ORDER SUPPRESSING THE NAME OF THE APPLICANT AND PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL DETERMINATION OF ANY APPEAL THAT IS FILED BY 5 PM THURSDAY 10 AUGUST 2023.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-421
[2023] NZHC 2105

IN THE MATTER OF	Claims for defamation and invasion of privacy
BETWEEN	JOHN ATCHERLEY DEW Plaintiff
AND	DISCOVERY NZ LTD Defendant

Hearing: 7 August 2023

Counsel: P A McKnight for the Plaintiff
J W J Graham and T F Cleary for the Defendant

Judgment: 8 August 2023

JUDGMENT OF PALMER J

Counsel/Solicitors
P A McKnight, Barrister, Wellington
Thomas Dewar Sziranyi Letts, Lower Hutt
Chapman Tripp, Auckland

Summary

[1] On the afternoon of 7 August 2023, I heard argument on an urgent application for an interim injunction, restraining Discovery NZ Ltd (Discovery) from screening a news item on Three's Newshub at 6 pm that evening. The story concerns allegations that the applicant, the recently retired Cardinal John Dew, engaged in serious criminal sexual misconduct in 1977. I declined the application but issued an interim injunction to preserve the applicant's appeal rights as long as the appeal is filed within three working days of my decision yesterday and is prosecuted in the Court of Appeal without delay. This judgment explains the reasons for my decision.

[2] In summary, the applicant has not met the high legal threshold for an interim injunction. He has not shown there is no reasonable possibility that Discovery has a defence against defamation or that there is little legitimate public concern in the information to be released. The courts deal most cautiously and warily with injunctions to prevent responsible media organisations from reporting stories in advance. That is especially so where the story is of public interest, as this one is. The right to freedom of expression of the complainant to tell their story, of Newshub to report it, and of the public of New Zealand to receive the information, weighs heavily here. If what is reported is defamatory and the defences fail, Discovery will be liable for significant damages. But I do not consider that the Court stepping in now to prevent publication by issuing an interim injunction would be a reasonable limit on the right to freedom of expression that can be demonstrably justified in a free and democratic society. Neither do I consider it would be in the overall interests of justice.

What happened?

[3] The applicant was ordained as a priest in 1976 and was made a Cardinal in 2015. Until 5 May 2023, he was Archbishop of Wellington, the leader of the Catholic Church in New Zealand and a member of Te Rōpū Tautoko which coordinates engagement between the New Zealand Catholic Church and the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions. The day after the applicant retired on 5 May 2023, he received a letter notifying him of a complaint against him. The complaint, made by Mr Steve Carvell, alleges the applicant engaged in sexual misconduct against him in 1977. Mr Carvell also made

allegations to the Royal Commission of serious criminal sexual conduct by the applicant and others against him and his sister. The Commission referred the complaint to the Police.

[4] The applicant's evidence is that he has been devastated by the allegations which are entirely untrue and he trusts the Police to conclude investigations fully and fairly. The allegations are completely and strenuously denied.

[5] Mr Michael Morrah is the Investigations Correspondent for Three's Newshub, which is owned by Discovery. His evidence is:

(a) He was notified of a complaint regarding the applicant on 9 May 2023. He spoke to and interviewed Mr Carvell, his sister, and other witnesses. He spent almost two months full-time investigating and verifying information. Another senior journalist at Newshub spent around three weeks full time on the investigation. This included researching and talking to a clinical psychologist about memories, checking attendance and other records, speaking with 10 others who were at the venue at the time, and liaising with the Police.

(b) On Wednesday 2 August 2023, the District Court granted applications of Mr Carrell and his sister to waive their automatic right to name suppression under s 203 of the Criminal Procedure Act 2011 (if the Court's permission is required in the circumstances).

(c) On Thursday 3 August 2023, Mr Morrah attempted to call the applicant, sent him a text, and then sent him an email seeking his response to the allegations. There were further email exchanges with the applicant's lawyers. On Friday 4 August 2023, Mr Morrah advised that the story would run on the evening of Monday 7 August 2023.

[6] The applicant's solicitors sought some clarification from Mr Morrah and made urgent enquiries of people associated with the place of the allegations. That includes obtaining statements from two people about the routine at the venue of the allegations

and disputing aspects of the physical layout of the venue. The applicant's solicitors say the statements establish that the events described could not, and would not, have occurred without the knowledge of these two people and, accordingly, the allegations are demonstrably false. One of the two people says the events described are not remotely possible. The applicant's solicitors also identified evidence from two people suggesting that one of the other people allegedly involved in the offending was not at the venue at that time. Mr Morrah's investigations located four people who remembered that person being in or around the venue at the time.

[7] On 7 August 2023, the applicant filed proceedings against Discovery for defamation and invasion of privacy which seek an injunction restraining the publication of the allegations. The applicant also applies for an interim injunction restraining Discovery from publishing the allegations. I heard argument from the parties at 2.15 pm on 7 August 2023.

[8] At the end of the hearing, I declined the application but ordered an interim injunction to preserve the defendant's appeal rights, as long as the appeal is filed within three working days of my decision that day, and is prosecuted in the Court of Appeal without delay.

Relevant law of interim relief against the media

[9] The parties largely agree on the legal principles to be applied. The usual test for an interim injunction is that there is a serious question to be tried, the balance of convenience favours the injunction, and it is in the interests of justice to grant the injunction.[1]

[10] However, the test is higher than there being a serious question to be tried in relation to an interim injunction which interferes with the media's right to freedom of expression, protected under s 14 of the New Zealand Bill of Rights Act 1990 (Bill of

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1 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); and *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).

Rights). In *New Zealand Mortgage Guarantee Co Ltd v Wellington*, the Court of Appeal quoted the "classic authority" of *Bonnard v Perryman*:[2]

> Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.

[11] In *Auckland Area Health Board v Television New Zealand Ltd*, Cooke P stated:[3]

> By reason of the principle of freedom of media, which has been emphasised by this Court … and which is reinforced by s 14 of the New Zealand Bill of Rights Act 1990 as to the right of freedom of expression, [the jurisdiction to restrain the publication of defamatory matter] is exercised only for clear and compelling reasons. It must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published.

[12] In *Hosking v Runting*, Gault P and Blanchard J in the Court of Appeal noted that "exceptional, clear and compelling reasons are required before injunctive relief will be made available" in defamation cases.[4] They noted the arguments about calibrating the test for interim relief in privacy cases with that in defamation cases and concluded:

> [158] The general position, then, is that usually an injunction to restrain publication in the face of an alleged interference with privacy will only be available where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information. In most cases, damages will be considered an adequate remedy.

[13] Relying on that judgment, Elias CJ (in the minority) in *Television New Zealand v Rogers* noted that a claim for privacy differs from a claim for defamation in that the harm in privacy is in the disclosure whether or not the information disclosed is true.[5] She considered injunctive relief may well be appropriate in privacy claims and whether freedom of information considerations should prevail depends on the circumstances of the particular case. Tipping J (in the majority) noted that a responsible news media organisation which undertakes to prove the truth of a

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2 *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers* [1989] 1 NZLR 4 (CA) at 6 citing *Bonnard v Perryman* [1891] 2 Ch 269 at 284.

3 *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA) at 407.

4 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [152].

5 *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [38].

defamatory statement is seldom, if ever subject to prior restraint by interim injunction.[6] He considered the position is broadly analogous in relation to invasion of privacy.

[14] In *Driver v Radio New Zealand*, Clark J held that it is conceivable that some individuals have an expectation of privacy in the fact of their arrest.[7] She also held that whether there is a reasonable expectation of privacy is an intensely factual inquiry, in which the seriousness of the allegations, legitimate operational concerns, freedom of expression, media industry practice, and the stigma of criminal charges are relevant.[8] In *ZXC v Bloomberg LP*, the United Kingdom Supreme Court held that, as a legitimate starting point, a person under criminal investigation has a reasonable expectation of privacy in respect of information relating to the investigation.[9] That could be outweighed by the countervailing interest of a publisher's right to freedom of expression.[10]

[15] An additional set of considerations here relate to contempt and suppression orders in criminal cases. Section 7 of the Contempt of Court Act 2019 provides that a person commits an offence if they intentionally publish any information relevant to a criminal trial where there is a real risk that the publication could prejudice the right to a fair trial. In assessing that, s 8 requires the Court to consider: the likely effect of the publication as a whole; whether it is likely to be available to potential jurors; the medium of presentation of the publication, its accessibility, and durability; the content of the publication; and the character of the publication. There are also authorities recognising that the Court has inherent jurisdiction to protect fair trial rights before criminal proceedings have commenced. As Cooke P held for the Court of Appeal in *Television New Zealand Ltd v Solicitor-General*:[11]

> In our opinion the law of New Zealand must recognise that in cases where the commencement of criminal proceedings is highly likely the Court has inherent jurisdiction to prevent the risk of contempt of Court by granting an injunction. But the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial.

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6 At [66].
7 *Driver v Radio New Zealand Ltd* [2019] NZHC 3275, [2019] 3 NZLR 76 at [101].
8 At [100]–[114].
9 *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] 3 LRC 419 at [125] and [146].
10 At [76].
11 *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1 (CA) at 3.

[16] In applying that recently in *Teacher v Stuff Ltd*, Cooke J stated that "[a]ll the circumstances should be considered, including not only the likelihood of charges, but the potential harm arising from the proposed publication, and precisely what is sought to be suppressed".[12]

Submissions

[17] Mr McKnight, for the applicant, submits:

(a) The allegations against the applicant are unarguably defamatory and there is a clear intention to publish them. Extraordinarily, the allegations are not corroborated by any sworn affidavit of the complainant. Against the account of the complainant's allegations are categorical denials by the applicant supported by the corroborative statements of two independent people who were familiar with the venue. The more serious the allegation, the more persuasive the evidence must be to dismiss an application for an interim injunction. There is no corroborative evidence that the alleged actions occurred.

(b) There is no public interest or importance in publicising the allegations which would be a mere act of gossip and titillation. Discovery has been insufficiently diligent in verifying the allegations. There is no urgency to publicising them. The source of the allegations, one person's memories of events some 46 years ago, is not reliable. It seems to be the object of Discovery to tarnish the applicant's reputation. It is not settled whether a defence of responsible public interest communication is a proper basis on which to avoid an interim injunction. While the applicant's position in the Church may mean there is public importance in the allegations, he is retired.

(c) The applicant has a right to privacy in respect of the police investigation. It is an invasion of privacy to publish the information

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12 *Teacher v Stuff Ltd* [2019] NZHC 1170, [2019] NZAR 902 at [19].

here which is highly offensive to a reasonable person in the applicant's position.

(d) The rushed publication subverts the Contempt of Court Act, which would prevent Newshub from naming the applicant if he were arrested or charged for the alleged offences, as well as the ability of the Court to make suppression orders under the Criminal Procedure Act.

(e) The balance of convenience must favour the applicant. The defendant would be liable for well over $1 million in damages for one of the most serious defamations in New Zealand history.

(f) The defendant is relying on hearsay evidence which needs to be tested and the applicant would wish to file affidavits in reply. The applicant seeks an interim interim injunction and name suppression until there can be more extensive argument of the application for an interim injunction. If the application is not granted, the applicant will appeal and proposes to do so within seven working days and seeks an interim injunction and name suppression pending the outcome of the appeal.

[18] Mr Graham, for Discovery, submits:

(a) Restraint of the media from exercising its right to freedom of expression is an extraordinary remedy which is exceptionally and rarely granted. The threshold is not met here.

(b) The applicant has not established that Discovery cannot succeed in defending a defamation claim. Discovery has arguable defences of truth and responsible communication of a matter of public interest to any defamation action by the applicant. The allegations reported are true and the applicant has not demonstrated they are plainly false. The statements gathered by the applicant fall far short of establishing the allegations could not have occurred. The substance of the allegations is of the highest public interest as reinforced by the existence of the

Royal Commission and the importance of the safety of children in faith-based care. The reporting, based on two months of careful investigation with corroboration of crucial details, is responsible. Discovery is a responsible media organisation which does not publish gossip or titillation and nor does it publish recklessly. To suggest it does is disrespectful of the victims who are trying to have their stories told. Mischaracterising the purpose of Discovery is simple hyperbole and is not a responsible submission. Discovery's defences are highly likely to succeed if this matter goes to trial. So the interim injunction cannot be granted in relation to the defamation claim.

(c) The applicant's position is that the nearly all the allegations are false, which means private information is not being published. So he cannot meet the high threshold for a privacy claim of compelling evidence of most highly offensive publicising of private information. Even if the fact of a police investigation is a private fact, which Discovery disputes, it does not follow that publication of it would be considered highly offensive. Regardless of that, the applicant was the leader of the Catholic Church and made statements to the Royal Commission, including an apology on behalf of the Church. So he cannot meet the high threshold of there being little legitimate public concern in the information. There is a legitimate if not compelling public interest.

(d) The Contempt of Court Act does not apply as no charges have been laid. Reporting of investigations before charges are laid happens regularly. Even if the Act did apply, the reporting here would not prejudice fair trial rights because any trial is many months if not years away. *Teacher v Stuff Ltd* expresses a concern but does not establish a position.

(e) Further time to argue the application would serve no purpose. Further evidence cannot demonstrate that Discovery's defences could not succeed. The Court is as well-placed today as it will be in a couple of days to determine the application. There is no realistic prospect of the

applicant securing an interim injunction so granting an interim interim injunction until the application for the interim injunction can be heard would unjustifiably curtail Discovery's rights under s 14 of the Bill of Rights. If the application is declined, any appeal would have no prospect of success so no interim injunction pending appeal should be granted.

Should an interim injunction be granted?

Defamation

[19] I must assess whether there are exceptional, clear and compelling reasons to restrain publication of a defamatory matter contrary to the right to freedom of expression. The allegations are clearly defamatory statements and are likely to be published. Following *Auckland Area Health Board v Television New Zealand Ltd*, a key question is whether the applicant can show that there is no reasonable possibility that Discovery has a legal defence.

[20] It is difficult to assess the prospects of success of the defence of truth on the basis of the information before me. But, however difficult it is to prove that particular conduct did occur so long ago, it is even more difficult to prove that it did not occur. The information provided by the two people contacted by the applicant does not prove that, though it may help to do so when combined with other evidence. As is usual with these sorts of allegations, proving or disproving the allegations seems likely to depend primarily on assessment of the testimony of each of those involved, along with all of the other evidence produced at a trial. On the basis of the information before me, I cannot say there is no reasonable possibility the defence could not succeed. I bear in mind the observations of Tipping J in *Television New Zealand v Rogers* that a responsible news media organisation which undertakes to prove the truth of a defamatory statement is seldom, if ever, subject to prior restraint by interim injunction.[13]

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13 *Television New Zealand v Rogers*, above n 5, at [66].

[21] Even if the defence of truth cannot succeed, on the basis of the information before me at this early stage, the defence of responsible communication on a matter of public interest has a reasonable prospect of success. The elements of that defence were identified by the Court of Appeal in *Durie v Gardiner* to be: the subject of the publication was of public interest; and the communication was responsible.[14] The Court explained each element as follows:

(a) Public interest is not confined to political matters and it is not necessary the plaintiff is a public figure.[15] The subject matter:[16]

> … should be one inviting public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached.

(b) The relevant circumstances in assessing whether the communication was responsible include:[17] the seriousness of the allegation; the degree of public importance; the urgency of the matter; the reliability of any source, whether comment was sought and accurately reported; the tone of the publication; and the inclusion of defamatory statements that were not necessary to communicate on the matter of public interest. The factors must be applied:[18]

> … in a practical and flexible manner with regard to the practical realities and with some deference to the editorial judgment of the publisher, particularly in cases involving professional editors and journalists.

[22] The allegations here are a matter of public interest. As Mr McKnight conceded, the public role of the applicant as head of the Catholic Church in New Zealand until earlier this year supports that. So does his membership of Te Rōpū Tautoko, his provision of evidence to the Royal Commission, and his apology on behalf of the leaders of the Catholic Church to victims and survivors of abuse in March 2021. The very existence of the Royal Commission demonstrates the public

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14 *Durie v Gardiner* [2019] NZCA 278, [2018] 3 NZLR 131 at [58].
15 At [64].
16 At [65].
17 At [67].
18 At [68].

interest in historic abuse in the care of faith-based institutions. The allegations invite public attention and can be expected to be of substantial concern to the public. The applicant has not shown otherwise.

[23] On the basis of the information before me, the proposed communication is responsible. The allegations are serious but I accept Newshub is a responsible news media organisation and two of its senior reporter has gone to some lengths to verify them over two months. There is no particular urgency involved, as Mr McKnight submits. The reliability of the source of the allegations is difficult to gauge, as noted above, but additional corroboration has been sought. Comment has been sought from the applicant and there is no suggestion it will not be accurately reported. The tone of the publication is unknown as yet but Newshub has incentives to ensure it is balanced and reasonable, given the high profile nature of the story, the usual role of journalistic ethics, and the threat of this litigation. There is no evidence that Newshub's object is to tarnish the reputation of the applicant. In all the circumstances, the applicant has not shown that the proposed communication is not responsible.

Privacy

[24] The threshold for issuing an interim injunction for invasion of privacy is not as certain as that for defamation. But the current appellate authorities suggest that there is consistency between the two. The clearest statement is by the Court of Appeal in *Hosking v Runting* that there must usually be "compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information".[19]

[25] The allegations here are intended to be publicised. They are highly offensive if they are untrue but I have discussed above the difficulties inherent in proving that they are untrue. The applicant completely and strenuously denies almost all of the allegations, which suggests they are not his private information. The clearest information which he accepts is true, and which could be private is the fact that the police are investigating the allegations.

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19 *Hosking v Runting*, above n 4, at [158].

[26] A reasonable expectation of privacy relating to a police investigation may be a legitimate starting point, as the United Kingdom Supreme Court found in *ZXC v Bloomberg LP*.[20] As Clark J stated in *Driver v Radio New Zealand* in relation to being arrested, the expectation of privacy is an intensely factual inquiry. The range of relevant considerations she traversed bear some similarities to those relevant to the defence to defamation of responsible communication on a matter of public interest.

[27] In any case, as both *ZXC* and *Hosking* suggest, the right to freedom of expression in relation to information of legitimate public concern can effectively override a starting point of a reasonable expectation of privacy. I consider that is so here, for the same reasons traversed above in relation to the defence of responsible communication on a matter of public interest. There is public interest in the exercise of the right to freedom of expression about a matter of legitimate public concern.

[28] I conclude that the thresholds for issuing an interim injunction on the basis of both the defamation and privacy claims are not met.

Balance of convenience

[29] The same factor of the public interest weighs heavily in relation to the balance of convenience between the parties of issuing or not issuing the interim injunction. In my view, the interests of the right of the complainant, Newshub, and the public to freedom of expression about a matter of public interest outweigh the reputational interests of the applicant not to be exposed to adverse publicity.

[30] There is an additional factor to consider in relation to the balance of convenience. That is Mr McKnight's submission that publication would subvert the Contempt of Court Act and ability to make suppression orders if criminal charges are forthcoming. There is something to this. But I do not consider it is a sufficiently strong consideration to tip the balance of convenience in favour of an interim injunction.

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[20] But, as cited by counsel for Discovery, see N A Moreham "Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private" (2019) 11 Journal of Media Law 142; and N A Moreham "Privacy, defamation and *ZXC v Bloomberg*" (2022) 14 Journal of Media Law 226.

[31] Strictly speaking, s 7 of the Contempt of Court Act is not implicated, and the name suppression jurisdiction is not available, because there are no criminal charges. There may not ever be. But if charges are laid, the fact there was a police investigation will be obvious. The real question is whether the right to seek name suppression would be undermined. As to that, Mr McKnight could not identify potential grounds for name suppression of the applicant if criminal charges are laid. The test for name suppression for a defendant under s 200 of the Criminal Procedure Act is a high one, such as causing extreme hardship or creating a real risk of prejudice to a fair trial. That would then need to be weighed against the presumption in favour of open justice.

[32] The Court of Appeal's statement in *Television New Zealand Ltd v Solicitor-General* concerned a situation where commencement of criminal proceedings is "highly likely".[21] That is not the case here. Neither is it clear to me that the threshold for name suppression would necessarily be met. That would have to be assessed at the time, which may be years in the future. Publication now may affect that assessment. But it is not clear to me that the answer would be any different to what it would be anyway.

[33] In all the circumstances, I do not consider this uncertain potential future scenario outweighs the rights to freedom of expression now which the Court of Appeal in *Television New Zealand Ltd v Solicitor-General* said are not lightly to be interfered with.

Overall interests of justice

[34] The account of the legal principles set out above illustrates that the courts deal most cautiously and warily with applications for interim injunctions to prevent responsible media organisations from reporting stories in advance. That is especially so where the story is of public interest, as this one is. The right to freedom of expression of the complainant to tell their story, of Newshub to report it, and of the public of New Zealand to receive the information, weighs heavily here. If what is reported is defamatory and the defences fail, Discovery will be liable for significant damages. But I do not consider that the Court stepping in now to prevent publication

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21 *Television New Zealand Ltd v Solicitor-General*, above n 11, at 3.

by issuing an interim injunction would be a reasonable limit on the right to freedom of expression that can be demonstrably justified in a free and democratic society.[22] Neither do I consider it would be in the overall interests of justice.

Timing of injunction

[35] My assessment of the threshold, the balance of convenience and the overall interests of justice is not at all likely to change in light of reply evidence and more submissions. It rests on the inherent balance between the applicant's interests and the public interest. At the hearing, I declined the application.

[36] However, the applicant wishes to appeal. To preserve his ability to do so, I granted an interim injunction pending determination of an appeal, as long as the appeal is filed in the Court of Appeal within three working days of the date of my decision yesterday and is prosecuted in the Court of Appeal without delay.

Result

[37] At the end of the hearing on 7 August 2023:

(a) I declined the application for an interim injunction.

(b) I granted an interim injunction restraining publication of the allegations and suppressing the name of the applicant, pending determination of an appeal, as long as the appeal is filed in the Court of Appeal within three working days of the date of my decision, by **5 pm Thursday 10 August 2023**, and is prosecuted in the Court of Appeal without delay.

Palmer J

[22] New Zealand Bill of Rights Act 1990, s 5.