IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2023-485-529
[2023] NZHC 2533

BETWEEN	R Applicant
AND	DISCOVERY NZ LIMITED Defendant

CIV-2023-485-530

BETWEEN	H Applicant
AND	DISCOVERY NZ LIMITED Defendant

Hearing:	5 September 2023
Counsel:	C F Finlayson KC and M E Hubble for the Applicants J W J Graham for the Defendant
Judgment:	8 September 2023
Reissued:	8 March 2024

JUDGMENT OF PALMER J

Counsel/Solicitors
C F Finlayson KC, Auckland
O'Regan Arndt Peters & Evans, Wellington
Chapman Tripp, Auckland

What happened?

Procedural history

[1] On the afternoon of Monday 7 August 2023, I heard an application for an interim injunction by Mr John Dew, former Cardinal and head of the Catholic Church in New Zealand. The application sought to restrain Discovery NZ Ltd (Discovery) from screening a news item on Three's Newshub at 6 pm that evening. The story concerned allegations that Cardinal Dew had engaged in serious criminal sexual misconduct at St Joseph's Orphanage (or Children's Home as it was later known) in the period 1 to 12 November 1977. I declined the application but issued an interim injunction preserving appeal rights.[1] Cardinal Dew appealed to the Court of Appeal and the hearing is scheduled for 14 September 2023.

[2] R and H were vowed religious Sisters, or nuns, with a strong connection to St Joseph's Orphanage (the Orphanage). They both sought to be joined as appellants in the Court of Appeal. That Court determined that it had no jurisdiction to act on the matter. It suggested that a proceeding could be commenced in the High Court to be urgently determined and then removed to the Court of Appeal.

[3] On 29 August 2023, R filed proceedings in the High Court against Discovery in defamation and an urgent application for interim orders similar to those sought by Cardinal Dew. On the same day, Sister Sue France applied to be made litigation guardian for H, now suffering from dementia, for the purpose of making a similar application. I granted the litigation guardian application on 31 August 2023. H's application for interim orders was filed on 1 September 2023. I heard the two applications for interim orders on 5 September 2023. I issued this decision on 8 September 2023. The Court of Appeal upheld this decision on 23 November 2023. The Supreme Court declined leave to appeal on 5 March 2024 and issued their decision, including to this Court, on 7 March 2024. I re-issue the decision, following the anonymisation used in the Court of Appeal judgment, on 8 March 2024.

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1 *Dew v Discovery NZ Ltd* [2023] NZHC 2105.

The allegations and story

[4] In May 2023, Mr Steve Carvell alleged he had suffered sexual and other abuse while he was at the Orphanage in 1977, including by Cardinal Dew. Mr Carvell also made allegations to the Royal Commission into Historical Abuse in State Care and in the Care of Faith-based Institutions of serious criminal sexual conduct by Cardinal Dew and others against him and his sister at the Orphanage. The Commission referred the complaint to the Police who are currently conducting an investigation.

[5] Discovery's evidence is that Mr Carvell alleges that, when he was seven years old, he and his sister were sexually abused while on a short stay at the Orphanage in November 1977. Relevantly, he alleges that he was woken up in the night on two occasions. One occasion involved a game which quickly turned sexual and involved H. The other involved the rape of his sister. Mr Carvell's sister cannot recall the alleged violation but does recall a game with a nun which was sexual in nature.

[6] Mr Michael Morrah is the Investigations Correspondent for Three's Newshub, which is owned by Discovery, and an award-winning journalist. His evidence is:

(a) He was notified of the complaint regarding the alleged abuse 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 by Mr Carvell 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 was required in the circumstances).

(c) Of the 10 witnesses interviewed, six could not recall H. But four of them remembered a H being at the Orphanage "in or around 1977".

One of them vividly recalled her being there in 1977 and said H was in the kitchen and gave her a cup of gravy, which was the first time she had ever tried gravy.

(d) There is nothing in the records that Discovery has seen that demonstrate that H did not visit St Joseph's when she was living in Palmerston North, perhaps during the weekends.

(e) This is not the first time there have been allegations of abuse against the Sisters of Mercy and priests at the Orphanage. In 2006, the Sisters of Mercy succeeded in defending legal proceedings concerning allegations of abuse there, in a period that included 1977, after a five-week hearing in the High Court.[2] The Court could not be satisfied that the alleged sexual abuse happened or who the perpetrators were. The Court found there was physical violence at the upper end of what was regarded as reasonable or normal, even at the time, but did not go beyond what would be seen as reasonable in an institutional environment.[3]

[7] Discovery has, through counsel, undertaken that H will not be named in the story but will be referred to as "a nun" or "one of the nuns" at St Joseph. That is because she cannot now personally respond meaningfully and Discovery has not been given access to the Sisters of Mercy's records. Mr Morrah has also decided not to include in the story other allegations by Mr Carvell that Discovery has not been able to verify.

The responses

[8] Cardinal Dew's evidence was that he had 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.

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2 *A v Roman Catholic Archdiocese of Wellington* [2007] 1 NZLR 536 (HC) [*A* (High Court)]; and *A v Roman Catholic Archdiocese of Wellington* [2008] NZCA 49, [2008] 3 NZLR 289 [*A* (Court of Appeal)].

3 *A* (High Court), above n 2, at [280] and [553].

[9] At the time of the 7 August 2023 hearing, Cardinal Dew's solicitor had obtained statements from R and another former nun about the routine at the convent and Orphanage which disputed aspects of the physical layout described in the complaint. Cardinal Dew's counsel submitted the statements established that the events described could not, and would not, have occurred without their knowledge and, accordingly, the allegations are demonstrably false. The statements also said that H was not resident in the community or on the staff at St Joseph's in 1977.

[10] R and H are now in their 70s or 80s. Each has a strong connection with the Sisters of Mercy. Each qualified as a primary teacher in their early years of religious life and have had a strong connection with the Orphanage in the mid-to-late 1970s. Unlike Cardinal Dew, neither applicant has occupied any prominent public position in connection with their faith or any direct personal connection with the Catholic Church's response to the Royal Commission. Each of the applicants has an unsullied reputation with regard to their treatment of children, other than the current allegations.

[11] R and two other sisters provided evidence in relation to H. In summary:

(a) One of the sisters says H lived at the convent which adjoined, but was not part of, the Orphanage. The Orphanage was run exclusively by the Sisters of Mercy, and H taught at the nearby primary school in Upper Hutt in 1976 and again in 1979-80.

(b) All three say that, in 1977, H was teaching in Palmerston North and did not return to St Joseph's until 1979. During the relevant period in November 1977, she would have been teaching her class and studying at Massey University.

(c) One sister says H was not ever responsible for the care of young children in the Orphanage or elsewhere. She had no responsibility for children she taught in Upper Hutt or Palmerston North outside school hours. Another sister, who was responsible for arranging relief teachers, cannot recall any time when H was absent so that cover had

to be organised for her at school. The Palmerston North school year ended in the first or second week of December.

(d) R says H never worked in the kitchen at the Orphanage.

[12] In regard to R, her evidence is that:

(a) She lived and worked at the Orphanage from 1977 to 1985 inclusive. She was one of the three Sisters of Mercy directly engaged in the care of children at the Orphanage in 1977. She was responsible for the boys' dormitory, in which sleeping quarters were separated by dividers. She ensured each boy was asleep every night and she slept in a bedroom at the end of the dormitory. She has no memory of Mr Carvell.

(b) She never initiated, participated in or facilitated abuse of any child under her care, nor has she ever witnessed any assault or physical interference with any child under her care.

(c) In the minds of many, R will be associated with allegations of any abuse of children in that place at that time.

The applications

[13] R and H seek relatively broad interim orders that Discovery "be restrained from publishing the allegations as set out in the statement of claim", which is the news story Discovery intended to broadcast on 7 August 2023 together with Discovery's supplementary undertaking not to name H. However, Mr Finlayson KC agreed that he could live with a narrower version of the injunction, enjoining publication of the story by the defendant in any form that enables the public to identify the date range and location of the alleged abuse, as well as the name of H.

Relevant law

[14] Counsel all agreed that the legal principles to be applied here were accurately stated in the 8 August 2023 judgment. I repeat them as they relate to interim

injunctions to support a defamation claim. The principles stated in that judgment in relation to breach of privacy and contempt of court are not raised by the applicants here and are not repeated.

[15] 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.[4] 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 Rights). In *New Zealand Mortgage Guarantee Co Ltd v Wellington*, the Court of Appeal quoted the "classic authority" of *Bonnard v Perryman*:[5]

> 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.

[16] In *Auckland Area Health Board v Television New Zealand Ltd*, Cooke P stated:[6]

> 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.

[17] 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.[7]

[18] In *Television New Zealand v Rogers* Tipping J (in the majority) noted that a responsible news media organisation which undertakes to prove the truth of a

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

5 *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.

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

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

defamatory statement is seldom, if ever, subject to prior restraint by interim injunction.[8]

[19] In the 8 August 2023 judgment, I stated:

> **Should an interim injunction be granted?**
>
> *Defamation*
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> [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.
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> [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.[9]
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> [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.[10] The Court explained each element as follows:
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> (a) Public interest is not confined to political matters and it is not necessary the plaintiff is a public figure.[11] The subject matter:[12]
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> > … 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.

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8 *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [66].
9 At [66].
10 *Durie v Gardiner* [2019] NZCA 278, [2018] 3 NZLR 131 at [58].
11 At [64].
12 At [65].

(b) The relevant circumstances in assessing whether the communication was responsible include:[13] 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:[14]

> … 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 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.

…

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.

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13 At [67].
14 At [68].

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 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.[15] Neither do I consider it would be in the overall interests of justice.

[20] Also relevant to the applications here is a line of authorities regarding when defamation of a group can constitute defamation of individuals. In 1991, in the Court of Appeal judgment in *Hyams v Peterson*, Cooke P stated:[16]

> Where there is an attack on a group and the plaintiff is not named, the question whether the material was published of and concerning the plaintiff turns on whether the words published would themselves reasonably lead people acquainted with the plaintiff to the conclusion that [the plaintiff] was a person referred to. If a defamatory statement made of a class or group is reasonably to be understood to refer to every member of it, each one has a cause of action.
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> …
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> To return to established principle, we accept Mr Stevenson's submission for Wellington Newspapers Ltd that it is not enough that on reading an attack on a group the mind of a person knowing of the plaintiff's membership of the group goes to [the plaintiff]. The question is whether there is anything in the article or the admissible surrounding circumstances to identify [the plaintiff] as the person or one of the persons referred to or aimed at in the article itself.
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> It is also plain that to say there are grounds for suspecting a person of fraud or other discreditable conduct is, although defamatory, often different from and less serious than an assertion of his guilty: … These judgments also recognise that for practical purposes there can be an imputation of suspicion so strong as to be indistinguishable from guilt; it must always be a question of fact how far the defamatory meaning goes.
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> Further, to be actionable as a libel a statement must itself be false and defamatory of the plaintiff; if it is itself innocent, it is not possible, by pleading innuendoes, to make the defendant responsible for defamatory statements by other persons which are not expressly or by

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15 New Zealand Bill of Rights Act 1990, s 5.

16 *Hyams v Peterson* [1991] 3 NZLR 648 (CA) at 654–655.

> implication approved, adopted or repeated in the statement by the defendant in respect of which the action is brought…

Submissions

[21] Mr Finlayson, for the applicants, submits that Discovery clearly intends to publish defamatory statements:

(a) H is personally named in Mr Carvell's allegations as actively sexually abusing him. Even though Discovery proposes not to name her, any broadcast will encourage others to republish the underlying allegations. She is one of a small group of persons whose connection with the convent is well known so she would likely be implicated as having been involved in, or at least colluding in, the alleged abuse. Discovery has recently been making enquiries of various persons about their memories of H, which will quickly link her name to the allegations if they are published.

(b) R must be implicated in the minds of anyone who knows that she was responsible for the care of boys in the Orphanage at night when Mr Carvell says he and his sister were abused there. Discovery has not responded to the applicants' evidence.

(c) The publication will defame a group — the Sisters of Mercy of St Joseph's Upper Hutt in the late 1970s, who ran the Orphanage — which includes both applicants. That would reasonably lead people acquainted with the applicants to the conclusion they were the ones referred to.

[22] Mr Finlayson submits that, notwithstanding the difficulties, and even taking into account Tipping J's observations in *Television New Zealand v Rogers*, the applicants have proved on the balance of probabilities that a defence of truth cannot succeed, on the basis of the evidence now before the Court, because:

(a) There is compelling evidence H did not reside in the convent or the Orphanage in November 1977. That seriously undermines the

credibility of the entire story. Mr Morrah's evidence is opaque and speculative. The allegation about a cup of gravy appears to be a case of mistaken identity because H did not work in the kitchen.

(b) The alleged abuse could not have happened without R being aware of what was going on. An adult would have to have entered the dormitory on two occasions, removed Mr Carvell, and returned him without detection. The same would have to be true of his sister, where the sister slept at the end of the girls' dormitory.[17] On the basis of R's evidence, the events cannot have occurred.

[23] Mr Finlayson submits the highly important distinction between the application considered in the 8 August 2023 judgment and these applications is that the applicants here are not Church leaders nor have they held any important offices within the Church. They have no direct connection with the issue of abuse in care and have no public profile. There is no public interest in their association with the story. It is hard to find more serious allegations and their publication could irrevocably tarnish the applicants' reputations. There is no urgency to publication. Discovery's evidence is opaque and the sisters' evidence is compelling. H's inability to speak for herself only increases the potential for harm to her reputation. The Sisters of Mercy have no public notoriety. Discovery has not responded to the evidence filed by the applicants. Even if Discovery argues there remains a public interest dimension to the allegations as a whole, there is now no basis on which they can undertake to prove the truth of the defamatory statements, so the proposed publication fails to meet the responsible communication requirement of the public interest defence.

[24] Mr Graham, for Discovery, submits these applications are weaker than that of Cardinal Dew:

(a) Only defamation is pleaded and that is problematic because there is no defamation of either R or H. At most, only a handful of sisters and some people in Upper Hutt would know of R's and H's connections with the Orphanage. The news story does not identify either as the

[17] *A* (High Court), above n 2, at [69].

"unnamed nun who engaged in abuse". It is not enough that the mind might wonder. The story provides no information to enable people to identify which of the 13 nuns present at the time were the unnamed nun. Nor does the story suggest R facilitated, witnessed, or failed to prevent sexual abuse of children, which usually occurs in secret. That is not a tenable meaning of a story that a nun was involved in abuse of a child in 1977 and would be struck out.

(b) If a responsible media organisation pleads a defence that is usually enough but is not necessarily the end of the matter. The defence of truth to H's claim is, at the very least, arguable. The evidence to disprove the defence is not materially different than in Cardinal Dew's application. The highest the applicants' evidence reaches is that H was in Palmerston North in 1977. But that, and the evidence of the routine and layout of the dormitory, fall short of proving the alleged abuse could not have happened. She could have travelled back to the Orphanage, such as on weekends. Mr Carvell's identification of H, and the recollections of four people that she was at the Orphanage in 1977, are grounds for concluding the story is true. The defamation claim will depend on an assessment of credibility among other things and can only be resolved at trial.

(c) The defence of public interest communication is extremely strong, reasonably arguable, and likely to succeed. The subject matter of the story, taken as a whole (child abuse by a leading figure in the New Zealand Catholic Church, other priests, and a nun of vulnerable children) is of public interest. The Royal Commission and the apology by the leading Catholic figure, reinforces that. The public interest is not limited to an individual of high personal standing but extends to the reporting of serious criminal conduct.[18] The Sisters of Mercy, and the Orphanage, have not escaped notoriety, though that is not necessary to establishing the public interest communication defence. The

[18] *Mutingwende v Petersen-Hodge* [2023] NZHC 488 at [53].

communication is responsible. Discovery sought to verify the allegations, sought comment from those identified as responsible, has adopted a balanced tone, and has chosen not to include information it cannot independently verify. The complainants are reliable. The allegations are of high public importance.

(d) The interim orders applied for cannot be salvaged by modifying their scope. The applications do not meet the very high threshold required and should be dismissed.

Should an interim injunction be granted?

[25] It is important to focus on the test to be applied as stated by the Court of Appeal in *Auckland Area Health Board v Television New Zealand Ltd*.[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.

Are defamatory statements likely to be published?

[26] The first issue is whether Discovery is likely to publish defamatory statements about the applicants. Discovery proposes not to name H. There is no suggestion it proposes to name R. If anyone else were to do so, for instance by publishing the underlying allegations, they might be liable in defamation. But Discovery would not be liable for others' statements which they do not adopt, approve or repeat. Such possibilities are speculative and are not the subject of these applications to prevent Discovery from broadcasting this story which involves only an unnamed nun.

[27] If Discovery's story is interpreted to involve a statement about a group, the relevant question, stated by the Court of Appeal in *Hyams v Peterson*, is whether that would reasonably lead people acquainted with each of the applicants to the conclusion that she was a person referred to.[20] On the basis of the evidence before me, I cannot conclude that the story would do so. The story will refer to "a nun" or "one of the nuns" at St Joseph's. There were 13 nuns there at the relevant time. Even those who

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19 *Auckland Area Health Board v Television New Zealand Ltd*, above n 6, at 407.
20 *Hyams v Peterson*, above n 16, at 654–655.

know R or H, and know of their connection to St Joseph's, could do no more than wonder whether either of them might have been the nun concerned. That is not enough to attract liability in defamation. There would not be sufficient information in the story, or the surrounding circumstances, to lead people acquainted with either R or H to conclude they were the person referred to. Indeed, H did not reside in the convent or work at the Orphanage in 1977. She lived and worked in Palmerston North. That further militates against her being identified as the person referred to.

[28] I do not consider that the evidence of Discovery's investigations to date, or its questions about H, change that situation. Mr Morrah's evidence is that he talked to 10 people who stayed at the Orphanage in 1977 about whether they remember H. He also asked questions of the Sisters of Mercy archivist team. There is no evidence about what questions were asked or what reasons were given for the questions. There is no indication the allegations were mentioned. There is no indication the people talked to would have understood that H was suspected of abuse rather than being ruled out or being sought as a witness.

[29] R is concerned that she will be implicated by the allegations in the mind of anyone who is aware she was responsible for the care of boys in the Orphanage at night. But there is no suggestion Discovery will name her. There is no evidence about what the story proposes to say about the circumstances of the alleged offending, and whether it would implicate whoever was responsible for the care of boys in the Orphanage at night. If Discovery were to say enough about the circumstances of the offending to give rise to an implied statement of the sort R is concerned about, a suit in defamation may be available to her. Given that Discovery is now fully on notice of that, it can accordingly be expected to be responsibly careful not to do so.

[30] In light of the nature of Discovery's story, according to the evidence currently before the Court, it is not clear to me that either applicant will be identified and therefore defamed and that any right at all is proposed to be infringed. That means there is no sufficiently clear and compelling reason to restrain publication of the story by Discovery. That is sufficient to dispose of the application. But, in case I am found to be wrong in that conclusion, I go on to consider Discovery's defences to any defamation of the applicants.

Have the applicants shown there is no reasonable possibility Discovery has a legal defence?

[31] If the allegations are defamatory, the applicants must show that there is no reasonable possibility that Discovery has a legal defence. I said in the 8 August 2023 judgment that "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".[21] That is so here, as the applicants concede.

[32] The applicants contend they have shown, on the balance of probabilities, that a defence of truth by Discovery cannot succeed regarding the allegations against H. But that is not the test. An interim injunction, that prevents publication of a news story by the media in advance, constitutes a serious interference with the right to freedom of expression. That is why Cooke P stated in *Auckland Area Health Board v Television New Zealand* that "[it] must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published".[22]

[33] The applicants' evidence is clear that H did not work or live in Upper Hutt in the first half of November 1977 but, rather, that she worked and studied in Palmerston North until the first or second week of December 1977. That suggests she was not involved in offending at night between 1 and 12 November 1977. Against that, Mr Carvell identifies H as directly involved in the alleged offending against him. Discovery says four people remember H being at the Orphanage "in and around 1977". It is not clear exactly what that means — who those people are, exactly what they say they remember, and exactly when they say they remember H being at the Orphanage. One of the people Discovery talked to says H was in the kitchen handing out gravy. It is not clear whether that encompassed her working in the kitchen or not. The applicants' evidence is that she did not work in the kitchen.

[34] It may be correct that, on the balance of probabilities, the evidence currently before the Court indicates that H is unlikely to have been involved in the alleged offending. But I do not consider the evidence reaches the level of showing that there is no reasonable possibility of the defence of truth succeeding. It is a reasonable

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21 *Dew v Discovery NZ Ltd*, above n 1, at [20].

22 *Auckland Area Health Board v Television New Zealand Ltd*, above n 6, at 407.

possibility that H may have travelled down to Upper Hutt over a weekend. Evidence of her usual location in Palmerston North in the relevant period is not evidence that she was not in Upper Hutt in that period. It is difficult to prove a negative. But that is what the applicants must prove to surmount the legal threshold they face. I do not consider they have done so.

[35] I reach the same conclusion regarding the applicants' evidence about the physical layout of the dormitory and the likelihood that R would have heard any attempt to remove a boy from the dormitory. The evidence currently before the Court suggests, on the balance of probabilities, that the offending is unlikely to have occurred without her knowing about it. But the evidence about R's hearing, how heavily she slept, and whether she was there every night in the relevant period would need to be tested, and her credibility assessed. The evidence before the Court does not lead me to conclude Discovery has no reasonable possibility of proving a defence of truth, given the information it has assembled.

[36] Furthermore, I do not consider the applicants have shown it is a reasonable possibility that Discovery cannot prove a defence of public interest communication. It is true that the applicants do not have the same public profile or direct connection with the issue of abuse in care as Cardinal Dew. But that is not necessary to the defence. Discovery's story as a whole, of child abuse at the Orphanage, is of public interest. Its invites public attention and can be expected to be of substantial concern to the public.

[37] The allegations are indeed serious. But the reporting is responsible, as I found in relation to the application by Cardinal Dew. There is no particular urgency involved and the reliability of the source of the allegations is difficult to gauge. Newshub has incentives to ensure its tone is balanced and reasonable, as it says it will be, given the high-profile nature of the story, the usual role of journalistic ethics, and the threat of this litigation. In all the circumstances, I consider the applicants have not shown that the proposed story is not responsible.

[38] I may be wrong, but I understood Mr Finlayson to submit that if Discovery cannot prove truth as a defence, then it would not be responsible for Discovery to

publish the allegations for the purposes of the defence of public interest communication. If that is the submission, I do not consider it is well-founded. Public interest communication is a separate defence to defamation to the defence of truth. In a defamation trial, it is possible for a news media organisation not to be able to discharge the burden of proving that the defence of truth applies but to be able to prove its publication was nevertheless responsible and in the public interest. That distinction is at least as relevant to discharging the heavy burden of proving a defence is not a reasonable possibility, for the purposes of an interim injunction.

Balance of Convenience and overall interests of justice

[39] The same factor of the public interest again weighs heavily in the balance of convenience between the parties of issuing or not issuing the interim injunction. The situation of H, in not being able to defend herself due to her medical condition, requires consideration. But I have concluded that neither applicant will be defamed here and, if one were to be, they have not shown there is no reasonable possibility of Discovery proving its defences of truth or responsible public communication.

[40] As I stated in the 8 August 2023 judgment, the courts deal most cautiously and warily with applications for interim injunctions to prevent responsible media organisations from reporting stories in advance. If what is reported is, contrary to my conclusion above, defamatory and Discovery's defences do not prevail, then Discovery will be liable for significant damages. But the Courts should not issue an interim injunction restraining the freedom of expression of the news media in advance of a story being run when the story does not appear to defame the applicants and it has not been shown that a defence would fail.

[41] Overall, I do not consider that the Court stepping in now to prevent publication 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.

[42] Accordingly, I dismiss the applications. However, the applicants wish to appeal. To preserve the ability to appeal, I grant an interim injunction pending determination of an appeal.

Result

[43] The applications for interim injunctions are dismissed.

[44] Costs are awarded to the respondent on a category two basis.

[45] Interim injunctions restraining publication of the allegations and suppressing the name of each applicant, pending determination of their appeal, is granted as long as the appeal is filed in the Court of Appeal by **1 pm Tuesday 12 September 2023** and is prosecuted in the Court of Appeal without delay.

Palmer J