NOTE: ANY REPORT OF THE FAMILY COURT PROCEEDINGS AND THIS JUDGMENT MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA576/2021
[2024] NZCA 101

	BETWEEN	NEWSROOM NZ LIMITED Appellant
	AND	SOLICITOR-GENERAL Respondent

Hearing:	19 October 2023 (further material received 30 October 2023)
Court:	Cooper P, French and Miller JJ
Counsel:	T J Castle and B J R Keith for Appellant K Laurenson and I M C A McGlone for Respondent R K P Stewart for Media Freedom Committee as Intervener
Judgment:	10 April 2024 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal against the injunction issued by the High Court is allowed and the injunction is quashed.

B The appeal against the costs award made in the High Court is allowed and the respondent must pay the appellant's costs in the High Court calculated on a 2A basis, together with usual disbursements. Any disagreement as to amount may be determined by that Court.

C The respondent is ordered to pay the appellant costs for a complex appeal calculated on a band A basis together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by French J)

Table of Contents

Introduction

[1] In November 2020 Newsroom NZ Ltd (Newsroom) published a video documentary and associated online articles about Oranga Tamariki's practice of "reverse uplifts".[1] Under that practice, Māori tamariki in need of care who had been placed in what they and their Pākehā foster parents had been promised were "homes for life", were several years later removed from those homes and instead placed with wider whānau of their birth parents.

[2] The publications focused on Oranga Tamariki's implementation of its reverse uplift practice in a particular case. After viewing Newsroom's video, the then Minister

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[1] Although this judgment relates to and discusses Family Court proceedings, meaning Family Court Act 1980 suppression applies, there is nothing in the judgment that constitutes identifying information likely to lead to the identification of the children or related persons at issue. Therefore, the judgment and the material within it can be published without breaching Family Court Act suppression.

for Children described what he had seen as "absolutely heart breaking" and said he was "disturbed by what [he] saw". He also ordered an immediate halt to reverse uplifts.[2]

[3] Shortly before the children in question were removed from their care, the foster parents had made a complaint to the Ombudsman about the way they had been treated by Oranga Tamariki and the harm they said the Ministry had caused. The complaint — which included allegations of ethnic prejudice, bullying, misleading statements, and distortion of facts to fit an agenda — was substantially upheld.

[4] The Solicitor-General, however, considered Newsroom's publications breached s 11B(3) of the Family Court Act 1980 and amounted to contempt of court. Section 11B(3) prohibits a person from publishing a report of proceedings in the Family Court if the report contains identifying information relating to a young or vulnerable person, without the leave of that Court.[3] The Solicitor-General successfully applied for an injunction against Newsroom in the High Court the day following publication.[4] The video and associated online articles have been unavailable to the public ever since.

[5] Newsroom now appeals the High Court decision granting the injunction.[5] It also appeals a subsequent High Court costs order made against it for $13,349.28.[6] We were told that in addition Newsroom is facing a criminal prosecution over the publications.[7] The prosecution has been held in abeyance pending the outcome of this appeal.

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2 "Oranga Tamariki immediately suspends 'reverse uplifts'" (14 December 2020) Stuff <www.stuff.co.nz>.

3 The full text of s 11B of the Family Court Act 1980 is set out at [72].

4 *Solicitor-General v Newsroom NZ Ltd* [2020] NZHC 3150 [*Pickwick* judgment]. The High Court initially heard the application for the injunction on what is called a *Pickwick* basis meaning that although the application was made without notice, the Judge allowed Newsroom a limited opportunity to be heard. Following the *Pickwick* hearing, the Judge granted an interim injunction. Then, following a fully contested hearing, another interim injunction was issued.

5 *Solicitor-General v Newsroom NZ Ltd* [2020] NZHC 3441, [2020] NZFLR 784 [injunction judgment].

6 *Solicitor-General v Newsroom NZ Ltd* [2021] NZHC 1034 [costs judgment].

7 By virtue of s 11B(6) it is a criminal offence to contravene s 11B.

[6] On appeal, it is common ground that as a matter of principle, injunctive relief was available to the High Court either on the basis of an injunction to enforce a statutory provision or, on the basis adopted by the High Court, of contempt of court.[8] What is very much disputed however is whether the High Court was wrong to find Newsroom was in breach of s 11B(3) in the first place.

[7] The two key issues raised by the appeal are:

(a) Do the impugned publications constitute "a report of proceedings in the Family Court" within the meaning of s 11B?

(b) If so, are they reports that contain identifying information as defined by s 11C?

Factual background

[8] The Pākehā foster parents, whom we shall call Mr and Mrs F, were approved Ministry caregivers. They informed the Ministry they would be interested in having home for life placements. A child, whom we shall call "X", was duly placed with them on that basis.

[9] Approximately two and a half years later, Mr and Mrs F learnt that three Māori siblings (A, B and C) who had been taken into care were going to be split up because — despite conducting a search within the relevant whānau, hapū, and iwi for a permanent home — Oranga Tamariki said they could not find a Māori whānau either willing or able to take all of them. Mr and Mrs F knew the children because Mrs F worked at a preschool attended by two of them. Mr and Mrs F discussed the situation and decided they could not let the children be separated and so came forward to offer a permanent home for all three.

[10] The children had experienced significant trauma and been emotionally and psychologically abused by being exposed to repeated serious family violence. This

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8 Injunction judgment, above n 5, at [9]. It is unnecessary for us to express any concluded view as to which is the better approach.

included physical violence directed towards the children.[9] Oranga Tamariki's view was that a home for life was needed to meet the children's needs because of the abuse they had suffered before they were taken into care and the importance of not re-traumatising them with future changes. There was to be only the one move.

[11] The children were duly placed with Mr and Mrs F and told that this was their "forever home". Mr and Mrs F, who committed to caring for the children until they reached adulthood, had purchased a large house on a 10-acre block in the South Island with a variety of animals for the children to play with and look after.

[12] At the time the three children were placed with Mr and Mrs F, they were the subject of Family Court orders which had granted Oranga Tamariki final custody and guardianship of each child until they were 18 years old.[10] That remained the legal position throughout.

[13] Before making certain specified orders — including custody and guardianship orders — the Family Court is required under s 128 of the Oranga Tamariki Act 1989 to first obtain what is called a "plan" that has been prepared in accordance with ss 129 and 130. The Court directs who is to prepare the plan (in this case Oranga Tamariki) and may order a revised plan if it considers the plan submitted to be inadequate.[11] Then, on making the orders, the Court must set a date for a review of the plans.[12] The provisions relating to reviews include requirements about the convening of family group conferences and the provision of reports setting out the results of the review together with a revised plan.[13]

[14] The provision of plans, reviews and reports to the Court can be ongoing, as it was in this case. Essentially the plans serve to update the Court on how children are

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9 The Family Court decision granting final custody to Oranga Tamariki records there was "[c]ompelling evidence … about the extent to which three young children [had] been 'incredibly damaged'". Relevant Family Court decisions have not been cited in this judgment in order to protect the privacy of the tamariki and ensure the judgment and material contained within it does not breach Family Court Act suppression.

10 Oranga Tamariki Act 1989, ss 101 and 110.

11 Section 129.

12 Section 134.

13 Section 135.

doing while in the custody and guardianship of Oranga Tamariki. Thus, for example, the Family Court was advised of the permanent placement with Mr and Mrs F.

[15] Significantly for present purposes, when Mr and Mrs F agreed to take the three children, Oranga Tamariki promised it would assist them to provide for the children's cultural needs. A cultural assessment was to be undertaken and supports put in place. However, that never happened.

[16] Not long after the children had moved to Mr and Mrs F's home, Oranga Tamariki asked Mr and Mrs F if they would take a new-born baby (D) who was a full sibling of A, B and C and who had also been removed from the care of their birth mother. Mr and Mrs F agreed. Given that they now had five young children (the four siblings and X) in their permanent care, Mrs F resigned from her job and the couple purchased a large eight-seater vehicle. The Family Court made an order granting interim custody of D to Oranga Tamariki.

[17] For more than a year, Mr and Mrs F received high praise from Oranga Tamariki. In one communication to the Family Court, they were described as "providing a stable and loving environment that support[ed] education and provide[d] consistency".

[18] From Mr and Mrs F's perspective, everything changed however following the enactment of s 7AA of the Oranga Tamariki Act in July 2019,[14] and the allocation of different social workers to their case. As Mr and Mrs F put it, they went from being saints to sinners.

[19] Section 7AA was enacted in response to concerns about institutional racism and the disproportionate number of Māori children being taken into state care.[15] The section identifies the ways in which Oranga Tamariki must uphold the right of Māori tamariki to be connected to their culture and whakapapa.

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14 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, s 14.

15 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 2016 (224-1) (explanatory note) at 2–4, referring to Modernising Child, Youth and Family *Expert Panel Final Report: Investing in New Zealand's Children and their Families* (Ministry of Social Development, April 2016) at 7.

[20] Although the social workers initially assured Mr and Mrs F they had no intention of taking the children away from them, the couple's sense of unease steadily grew. Within a short period of time, the new social workers started to raise concerns about the couple's ability and capacity to parent the children and were having discussions with whānau and iwi in the North Island about long term placement there.

[21] The Family Court was never told by Oranga Tamariki that the Ministry had failed to honour its promises of cultural support, nor that Mr and Mrs F had themselves initiated inquiries about te Reo Māori classes for the children and had actively sought help. One of the social workers also falsely advised Mr and Mrs F that the Family Court had not accepted two of its plans because the Court did not consider the children's cultural needs were being met.

[22] Alarmed by the speed with which all this was happening, counsel for the children filed an urgent memorandum in the Family Court advising that she had learnt a decision had been made to remove the children to an iwi placement in the North Island. That prompted a Family Court judge to make a direction that the status quo was to be preserved pending further inquiry (the December direction). The Judge also directed that Oranga Tamariki was to file reports and plans for all four children, A, B, C and D, no later than four weeks prior to any proposed move.

[23] Another Judge subsequently made final custody and guardianship orders relating to D in favour of Oranga Tamariki. Up to that point, the orders relating to D had only been interim ones.

[24] This was followed two weeks later by a lawyer acting for Oranga Tamariki giving an undertaking to the Court that the children would not be removed without a new report and plan being made available for the Court's approval. The Judge noted that a hui discussing placement options was to be arranged. At that time, the lawyer for the children advised the Court "there were a lot of different stories as to what might be available in the North Island". The presiding Judge recorded surprise about a different placement option being considered so quickly after the last reports and in light of the length of time A, B and C had been involved with Oranga Tamariki.

[25] A month or so later, Oranga Tamariki filed submissions in the Court stating the Ministry had "reassessed the care arrangements for all four children in the context of emerging care and protection concerns". The alleged concerns about Mr and Mrs F were said to relate mostly to their alleged inability and lack of commitment to promote the children's cultural links with their whānau, heritage and cultural identity. It was claimed the children were being emotionally and psychologically harmed to the extent it would undermine their sense of self.

[26] The submissions went on to say that prospective whānau caregivers having now been identified, it was considered to be in the best interests of the children to place them there. Such a placement was said to be in accordance with the principles and purposes of the Oranga Tamariki Act, including s 7AA.

[27] Subsequently Oranga Tamariki filed updated plans for each of the four children. The updated plans repeated the allegations about Mr and Mrs F behaving in a manner that was culturally, emotionally and psychologically harmful leading to long-term negative outcomes. Allegations of physical abuse and racist attitudes were also made.

[28] Approximately two months later, Oranga Tamariki approved a relative of the children's biological mother and the relative's partner, as the new whānau caregivers for the four children.

[29] Following receipt of these plans, the Court held another judicial conference. Mr and Mrs F, as well as the new whānau caregivers, attended the conference by telephone. The Court directed that prior to the next Court date "everybody involved", including Mr and Mrs F, should file affidavits outlining their respective positions.

[30] This appears to be the first occasion that Mr and Mrs F had any direct contact with the Family Court.

[31] Mr F duly filed an affidavit. He strongly disputed the allegations made by the social workers and expressed concern the children would suffer irreparable separation trauma should they be moved. He also stated that he and his wife had contacted the

Ombudsman to look into the way Oranga Tamariki had conducted itself and treated them. He requested that all proceedings be halted and a full independent investigation be undertaken.

[32] The affidavit exhibited letters of strong support for Mr and Mrs F from family of the tamariki (including the grandmother of their birth mother) as well as members of the local community. One of the letter writers was a kaiako of the preschool attended by C and another was the principal of the school attended by A and B. The latter advised that 12 per cent of her students identified as Māori and that the school prided itself on being culturally responsive both in the way the curriculum was taught and its provision of specific programmes in which both A and B were actively involved. According to the principal, A had a strong sense of pride in being Māori. Other letters spoke of the significant improvement in the children's emotional wellbeing and behaviour since coming to live with Mr and Mrs F. The general thrust of the letters was that the children were happy and flourishing.

[33] The day after Mr F's affidavit was filed, Oranga Tamariki received a report from two senior social work practitioners who had undertaken an independent investigation into the allegations of physical and emotional abuse and neglect made against Mr and Mrs F. The report concluded in effect that the allegations were over-stated. Nothing Mr and Mrs F had done or not done was found to amount to physical abuse or emotional abuse and they had not neglected to meet the children's cultural needs.

[34] The Family Court was never advised of these findings. Further, despite the report, Oranga Tamariki did not withdraw the allegations but persisted with them. A subsequent affidavit sworn by a social worker continued to claim the children were suffering emotional, psychological and cultural harm, and if they remained with Mr and Mrs F their long-term outcomes would be poor. The children's tupuna were said to be "calling them home to their whenua their marae and their whakapapa, to the life they were born to live".

[35] For the purposes of another judicial conference, Oranga Tamariki filed submissions in the Family Court seeking:

(a) confirmation of its plan that the children be placed in the care of the approved whānau caregivers; and

(b) discharge of the December direction which was described in the submissions as "a condition of the s 101(1)(a) custody order/s, preventing the Ministry from removing the children from their current placement with Mr and Mrs [F]".

[36] The Court was told there was no challenge to Oranga Tamariki ultimately having the decision-making power over placement, but that if the Court felt able to discharge the December direction then this would facilitate Oranga Tamariki transitioning the children "forthwith".

[37] The Judge considering the matter was prepared to accede to those requests. However, in response to a concern raised by counsel for the children that the updated plan contemplated a move without a transition phase and provision for ongoing contact with Mr and Mrs F, the Judge also held that "the orders as sought" were to lie in Court pending the Court's further review of a transitional plan to be provided. The Judge also directed that Mr and Mrs F be asked whether they wanted to have an opportunity to be heard in relation to a psychological report obtained by Oranga Tamariki. Sensing there was nothing more they could do through the Court process to stop the children being removed, Mr and Mrs F chose not to engage.

[38] Oranga Tamariki duly provided the Court with a transitional plan and the orders were issued.

The Newsroom video

[39] The video, which is entitled "Oranga Tamariki: The new wave of trauma", runs for 35 minutes. It begins with a short clip of the actual reverse uplift in progress. It shows the visibly upset foster parents and a group of friends from the local community farewelling the children. The tamariki can be seen crying and being consoled while loaded into the car. Cut through this footage are short excerpts from interviews with experts who appear later in the documentary, as well as a voice over of the journalist.

[40] The second segment is earlier in time and shows the children playing outside at the foster parents' home. Inside, the foster mother is comforting one of the children who says she does not want to go. The foster father talks about how upset the situation has made them.

[41] This is followed by a brief explanation of the reasons for the original uplift, the fact no appropriate whānau carers or any other Māori whānau were identified, and the difficulties in finding the children a home for life together. This segment includes a blurry clip and the sound of children screaming and yelling.

[42] The footage moves to a computer-generated gallery wall filled with photos of the children with their faces blurred and an explanation of how they came to live with the foster parents is given.

[43] There is then a brief overview of events before the reverse uplift. On screen quotes from the social workers about the foster parents' lack of cultural competence and the harm they are doing the children are shown. It is explained how soon after the new social workers were assigned, the foster couple were found wanting and began to feel under siege, believing that Oranga Tamariki had a predetermined outcome that the children must be removed in order to fulfil its new-found cultural mandate.

[44] The video returns to further footage of the reverse uplift before showing an interview with Tā (Sir) Mark Solomon, former Kaiwhakahaere (Chair) of Ngāi Tahu. He says where possible Māori children should be placed with extended whānau but that the case at issue was a case with no consideration of the trauma and what it would do to the children. He opines that the children should not have been removed after two and a half years and questions why the children were placed there at all if the foster parents were culturally incompetent.

[45] The video continues with details of the complaint made to the Ombudsman, and an interview with retired senior social worker Vivienne Martini. She tells the journalist she has reviewed the files and considers they show the decision to remove the children had been made earlier than Oranga Tamariki acknowledged to the foster parents.

[46] An image of an Oranga Tamariki file note regarding the lack of a permanent whānau placement then follows as well as a discussion with the foster parents about how they changed their lives to take in the children. A report from a former social worker confirming the foster parents' requests for assistance with the children's cultural needs is also screened.

[47] This is followed by historic footage of the police controversially attempting to uplift a Māori baby from a maternity hospital and the ensuing protests. The introduction of s 7AA is explained. Ms Martini discusses s 7AA and opines that, instead of being transformational, it became transactional and children were treated as commodities.

[48] The documentary continues with an account from the foster parents about when "Oranga Tamariki's attitude" changed towards them. They say they started to be bombarded about bringing the children up in a culturally correct way. An Oranga Tamariki file note of a home visit is screened, recording both the nervousness of the foster parents and an assurance they were given that the social workers were not aware of any hidden agenda for removal.

[49] A voice over then explains that four days later another social worker told the foster couple a Family Court judge had ruled the children's cultural needs were not being met. The foster parents tell the journalist they simply did not fit the bill anymore and the children were always going to be removed.

[50] A recording of a meeting between the foster parents and Oranga Tamariki is then played. The social workers lecture the couple about how Oranga Tamariki has custody over the tamariki and that over the years the foster parents have been given too much power and the Ministry needs to take it back. A support person for the foster parents asks where the Ministry stands on knowingly causing attachment trauma. A staff member responds that "once you have a cultural connection … that will fill your wairua, that will sort it out".

[51] The next segment of the documentary deals, by way of voice over, with the steps taken over the next few months by Oranga Tamariki to identify a whānau replacement for the foster parents.

[52] The foster parents then discuss the details of the allegations of abuse and neglect made against them, the subsequent investigation that largely vindicated them, and the failure of Oranga Tamariki to withdraw the allegations in the Family Court.

[53] The next segment is an interview with Dr Nicola Atwool, an associate professor of social sciences and a leading expert in attachment trauma. She explains that the children's cultural connection should have been considered in the initial placement. In her assessment, what happened involved unconscious bias, a new social worker motivated by a simplistic belief that culture trumps everything, and that Oranga Tamariki's practice was driven by an ideological position in an attempt to self-correct, leaving children as collateral damage. Dr Atwool explains how children's survival depends on their emotional connection to adults and in order not to traumatise the children, they would have needed a far longer transition time than the total of 14 days contact with the new whānau caregivers.

[54] The final segment is of events after the removal of the tamariki. A clip of the foster parents video calling the children is played. Oranga Tamariki would only allow the foster parents to call them once a week under supervision, which the journalist states only occurs when people are considered unsafe. A picture of the children's belongings packed up is also shown. It is explained that these items, including Christmas presents, were meant to be shipped by Oranga Tamariki to the children's new home but that Oranga Tamariki, without reference to the foster parents, chose not to send all the items and instead found other uses for them.

[55] The documentary ends with the foster parents telling the journalist it feels like the children have died. They acknowledge that the children should have been with whānau to start with, but that is not what happened and Oranga Tamariki caused them to suffer again.

[56] As mentioned, the video documentary was accompanied by several online articles. These traverse some of the matters raised in the video but in less detail. They also include the Minister's reaction to the video. Because the video is the main publication and the articles essentially stand or fall with it, the focus of the hearing before us, and this judgment, is necessarily on the video.

[57] We now turn to address the background leading to the enactment of s 11B of the Family Court Act, which the video was found in the High Court to contravene.

The background to s 11B

[58] The Family Court was established in 1981.[16] For the next 24 years, it operated as a closed court. It was not open to the public and the media was not entitled to be present as of right. Further, in 1981, the Guardianship Act 1968 (which regulated matters concerning the custody, access, guardianship and wardship of children) was amended to prohibit publication of "any report of proceedings" under that Act without the leave of the Court.[17] The provision that created this ban on reporting was s 27A.

[59] The reach of s 27A was obviously heavily dependent on the meaning to be attributed to the phrase "report of proceedings". There was initially a conflict of authority in the High Court. One decision favoured a narrow interpretation limiting the prohibition to reporting on what took place in the courtroom.[18] Another decision held that reporting of "all matters in which the jurisdiction of a Court is invoked for adjudication or determination" under the Children and Young Persons Act 1974 was prohibited.[19] This meant "a proceeding encompassed all stages" and the prohibition extended to reporting on the fact proceedings had been commenced, were pending or had been completed.[20]

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16 Family Court Act 1980, ss 1 and 4.

17 Guardianship Amendment Act 1980, s 14. The prohibition excluded reports that were of a bona fide professional or technical nature, or that were intended for circulation among members of the legal or medical profession, officers of the Public Service, psychologists, advisers in the sphere of marriage counselling, or social welfare workers; Guardianship Act 1968, s 27A(4).

18 *Television New Zealand v DSW* [1990] NZFLR 150 (HC) at 157.

19 *Director-General of Social Welfare v Television New Zealand Ltd* (1989) 5 FRNZ 594 (HC) at 596.

20 *Director General of Social Welfare v Christchurch Press Company Ltd* HC Christchurch CP31/98, 29 May 1998 at 8–9.

[60] The broader interpretation was adopted in other High Court and Family Court decisions and was understood to represent the prevailing law.[21] According to media law expert Professor Burrows, the media's understanding of the caselaw was that reporters were effectively barred from referring to a Family Court case at all.[22]

[61] If there were any lingering doubts as to the scope of the prohibition, these were ultimately resolved in favour of a broad interpretation by the decision of this Court in *Television New Zealand Ltd v Solicitor-General*.[23] The Court held that the word "proceedings" was not synonymous with "hearings" and therefore s 27A's ban on reporting was not limited to reports of what went on in the courtroom.[24] The Court noted that the word "proceedings" in its ordinary meaning is generally understood to encompass all matters before a court from the initiation of a case, through all its phases to termination, and that s 27A was designed to ensure optimal privacy of Family Court matters relating to children.[25] It concluded:[26]

> In terms of substance, "proceedings" includes all papers filed in respect of a Family Court application or dispute, and all adjudications made by a Judge in respect of a case …

[62] It was also confirmed that temporally the prohibition on reporting did not lapse once a case was settled or completed.[27]

[63] Three further points arising from this decision should also be noted. The first is that the Court accepted the ban did not extend to reporting on the legal status of parties resultant upon the outcome of the proceeding. However, that was said to be only permissible if the report did not link the status with the hearing.[28]

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21 See for example: *Solicitor-General v Smith* [2004] 2 NZLR 540 at [62]; *Re the P Children (No 1)* (1992) 9 FRNZ 89 at 91; *Television New Zealand Ltd v W* (2000) 20 FRNZ 42 at [12]; and Ursula Cheer, John Caldwell and Jim Tully *The Family Court, Families and the Public Gaze* (Families Commission, Blue Skies Report No 16/07, April 2007) at [3.2.6.1].

22 John Burrows "Openness of proceedings in the Family Court" [2005] NZLJ 101.

23 *Television New Zealand Ltd v Solicitor-General* [2008] NZCA 519, [2009] NZFLR 390 [*Television New Zealand* (CA)].

24 At [54].

25 At [33], [50] and [72].

26 At [54].

27 At [54].

28 At [53] and [78].

[64] The second point is that because the Court considered identification of the parties, rather than the detail of the proceedings, was "the premise" of the prohibition in s 27A, there could, in its view, be no objection to an "abstracted" publication of the fact of a particular kind of case and its characteristic features.[29] It therefore viewed the High Court decision under appeal as having stated the test too widely when it said that "*any* public disclosure about a case that is, will be, or has been, before the Court" was prohibited.[30] To media interests however, the inability to use real examples was a significant limitation on its ability to critique important social issues arising in New Zealand's family law sphere.[31]

[65] The third point relates to the New Zealand Bill of Rights Act 1990 (BORA). The Court accepted that the ordinary meaning of the s 27A prohibition was a limit on the right of freedom of expression guaranteed by s 14 of BORA, restricting as it did the right to impart information and opinions in respect of Family Court proceedings under the Care of Children Act 2004.[32] However, in the Court's view, the limit could be demonstrably justified in a free and democratic society because it was a kind of confidentiality designed to protect the privacy and interests of vulnerable children.[33]

[66] Although s 27A was the provision that applied to the publications at issue in *Television New Zealand*, at the time the judgment was issued s 27A was no longer in force.[34] It had been repealed in 2005 as part of very significant changes aimed at opening up the Family Court to greater public scrutiny and increasing public understanding of its decisions.[35]

[67] The changes had come about as a result of widespread concern about the Family Court's perceived lack of transparency and adverse perceptions of the Court that were acknowledged to be undermining public confidence in it.[36] In a 2004 report,

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29 At [53] and [55].
30 At [53], referring to *Solicitor-General v Television New Zealand Ltd* [2008] NZFLR 209 (HC) at [55].
31 Burrows, above n 22, at 101.
32 *Television New Zealand* (CA), above n 23, at [61].
33 At [68] and [71]–[75].
34 Care of Children Act 2004, s 152.
35 Section 2 and Care of Children Bill 2004 (54-2) (select committee report) at 3–5.
36 See for example Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 307 [Delivering Justice for All]; and Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) at 213.

Delivering Justice For All, the Law Commission emphasised the importance of open justice and considered that in the case of family proceedings there were areas where the balance between openness and other competing interests needed to be recalibrated.[37] Its recommendations included the following:[38]

(a) Accredited news media representatives should be permitted to attend family proceedings.

(b) There should be no restrictions on the reporting of family proceedings (other than those involving children or domestic violence) unless the court orders otherwise.

(c) In cases involving children or domestic violence, media reporting of proceedings should be permitted, but details that would identify those involved in the proceedings must not be published unless the leave of the court is obtained.

[68] The report was endorsed by the then Principal Family Court Judge and was referenced by the Select Committee that at the time was considering draft legislation intended to replace the Guardianship Act.[39] The Select Committee report recommended changes along the same lines as the Law Commission, and these ultimately found expression in ss 137 and 139 of the Care of Children Act which came into force on 1 July 2005.[40]

[69] Section 137 allowed accredited media to attend Family Court proceedings[41] and most relevantly for present purposes, s 139 opened up the right to publish reports of proceedings involving children but prohibited the publication of identifying particulars. As this Court noted in *Television New Zealand*, s 139 of the Care of

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37 Delivering Justice for All, above n 36, at 307.
38 At 308.
39 Cheer, Caldwell and Tully, above n 21, at 18; and Care of Children Bill (select committee report), above n 35, at 4–5.
40 Care of Children Act, s 2.
41 Section 137(4)(d) preserves the power of the presiding judge to request media representatives to leave the courtroom during a hearing.

Children Act represented a significant liberalisation of the law in this area,[42] reversing a presumption against reporting in favour of a presumption allowing it.

[70] At the time it was enacted, the wording of s 139 was in the following terms:

> **139 Publication of reports of proceedings**
>
> (1) A person may publish a report of proceedings (other than criminal proceedings) under this Act if the report does not include any name or particulars likely to lead to the identification of any of the following:
>
> (a) a child who is the subject of the proceedings:
>
> (b) the parties to the proceedings:
>
> (c) a person who is related to, or associated with, a party to the proceedings, or who is, or may be, in any other way concerned in the matter to which the proceedings relate (for example, a support person for the party):
>
> (d) a witness in the proceedings or a person the Court agrees to hear under section 136.
>
> (2) A person may also publish a report of proceedings under this Act (other than criminal proceedings) with the leave of the Court that heard the proceedings.
>
> (3) The Court may grant leave under subsection (2) subject to conditions the Court determines.
>
> (4) A person may also publish a report of proceedings under this Act (other than criminal proceedings) in a publication that—
>
> (a) is genuinely of a professional or technical nature; and
>
> (b) is intended for circulation among members of the legal or medical professions, officers of the Public Service, psychologists, advisers in the sphere of relationship counselling, or social workers.
>
> …
>
> (7) No person may publish a report of proceedings under this Act (other than criminal proceedings) except as provided in subsection (1) or subsection (2) or subsection (4).
>
> (8) Every person who contravenes subsection (7) commits an offence against this Act and is liable on summary conviction,—
>
> (a) in the case of an individual, either to imprisonment for a term not exceeding 3 months, or to a fine not exceeding $2,000:

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42 *Television New Zealand* (CA), above n 23, at [39].

(b) in the case of a body corporate, to a fine not exceeding $10,000.

…

[71] Sections 137 and 139 of the Care of Children Act were the first steps in opening up the Family Court to greater public scrutiny. The second step was the adoption of a similar regime for all proceedings in the Family Court by way of an amendment to the Family Court Act in 2009.[43] That was in the form of s 11B, the provision that is at the heart of this appeal. At the time s 11B was enacted, s 139 of the Care of Children Act was also amended to make clear that it was s 11B that now governed reporting of proceedings under that Act as well.[44]

Do the publications constitute "a report of proceedings in the Family Court" within the meaning of s 11B?

[72] We turn now to address the first issue for determination in this appeal, namely whether the High Court was correct to find that the video amounts to a report of proceedings within the meaning of s 11B.[45] In order to do that and explain our reasoning, it is necessary to set out the full text of s 11B:

11B Publication of reports of proceedings

(1) Any person may publish a report of proceedings in the Family Court.

(2) Subsection (1) is subject to subsection (3).

(3) A person may not, without the leave of the court, publish a report of proceedings in the Family Court that includes identifying information where—

(a) a person under the age of 18 years—

(i) is the subject of the proceedings; or

(ii) is a party to the proceedings; or

(iii) is an applicant in the proceedings; or

(iv) is referred to in the proceedings; or

(b) a vulnerable person—

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43 Family Court Amendment Act 2008, s 7.
44 Care of Children Amendment Act 2008, s 17.
45 Injunction judgment, above n 5, at [30].

(i) is the subject of the proceedings; or

(ii) is a party to the proceedings; or

(iii) is an applicant in the proceedings.

(4) However, subsection (3) does not apply to—

(a) a report of proceedings in a publication that—

(i) is genuinely of a professional or technical nature (including a publication that is intended for circulation among members of the legal or medical professions, officers of the public service, psychologists, counsellors, mediators, or social workers); and

(ii) does not include the name of—

(A) any person under the age of 18 years who is the subject of the proceedings, or who is referred to in the proceedings:

(B) any vulnerable person who is the subject of the proceedings:

(C) any parties or applicants in the proceedings where subsubparagraph (A) or (B) applies:

(D) any school that a person who is the subject of proceedings under the Oranga Tamariki Act 1989 is or was attending, or any other particulars likely to lead to the identification of that school:

(b) a publication of statistical information relating to the proceedings.

(5) The court may grant leave under subsection (3) with or without conditions.

(6) Every person who contravenes this section commits an offence against this Act and is liable on conviction,—

(a) in the case of an individual, either to imprisonment for a term not exceeding 3 months, or to a fine not exceeding $2,000:

(b) in the case of a body corporate, to a fine not exceeding $10,000.

(7) Subsection (6) does not limit the power of a court to punish any contempt of court.

(8) This section is subject to any other enactment relating to the publication or regulation of the publication of reports or particulars of a Family Court proceeding.

The High Court decision

[73] The Judge, Cooke J, began his analysis by reference to what he described as the "wide" interpretation of "report of proceedings" in *Television New Zealand*, which he endorsed.[46] The Judge accepted that the video and articles were "very much focused" on the conduct of Oranga Tamariki and not the Family Court. However, he considered that in reality the ultimate decisions in the case were all made by the Family Court and that the video was clearly a report or account of proceedings.[47] The fact Newsroom's focus was on one of the parties did not alter that. In the Judge's assessment, the publications also went well beyond reporting on the consequential status of either the children or the foster parents.[48]

[74] In coming to those conclusions on this first issue, the Judge accepted Newsroom's submission that the interpretation exercise needed to be undertaken with the relevant provisions of BORA in mind, including the right to freedom of expression. However, in his view, the authorities showed that the legislative provisions in issue had inherently addressed the balance between freedom of expression on one hand and the rights of privacy of children on the other. Interpreting s 11B in accordance with its natural meaning and purpose did not involve an unjustified limitation on the right of freedom of expression.[49]

Arguments on appeal

Newsroom's submissions

[75] Counsel for Newsroom contended that neither of the key phrases in s 11B, "report of proceedings" and "any particulars likely to lead to the identification", has a simple natural meaning. In Mr Keith's submission, both are capable of being interpreted in ways that are more or less restrictive of the right of freedom of expression and the requirement of open justice. He acknowledged the importance of protecting the privacy of young people but submitted that could be achieved without unnecessarily impeding reporting matters of significant public interest and concern.

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46 At [18], citing *Television New Zealand* (CA), above n 23, at [54]–[55].
47 Injunction judgment, above n 5, at [26].
48 At [28].
49 At [29].

Both purposes were capable of being served by a measured rights-consistent interpretation and that should be preferred to the overly broad, and hence unduly restrictive, interpretation adopted by the Judge.

[76] In relation to the phrase "report of proceedings", a measured interpretation was said to look like an interpretation that limited the scope of s 11B to the content of Family Court proceedings. That was its purpose — to enable Family Court disputes involving children and young persons to be reported with the protection of anonymisation. It should not be construed more widely but must be tied to a matter that was being heard in the Family Court and determined by it.

[77] Both Mr Castle and Mr Keith characterised the publications in this case as a significant public interest story subjecting a state agency to scrutiny. They accepted the Family Court was in the background of the story but neither it nor its decisions were the story. The story was the work of Oranga Tamariki outside the Court process.

[78] Developing this central submission, counsel contended that none of the interactions between Orangi Tamariki and the foster parents took place anywhere near the Court. There was no complaint about the Family Court. None of what was reported on was done by the Family Court. And the foster parents were never (except for a fleeting period) parties to any Family Court proceedings. The story was the decisions, actions and omissions of Oranga Tamariki and Oranga Tamariki alone. In those circumstances, a report on the actions of Oranga Tamariki in discharging its statutory responsibilities cannot, it was argued, be a report of court proceedings and it was wrong for s 11B to be used to cover up the wrongdoing of a state agency.

[79] It was further submitted that the Judge had misunderstood the respective functions of the Family Court and Oranga Tamariki, attributing to the Family Court an involvement in the decision making that it simply did not have. That misunderstanding was said to have influenced the Judge's identification of aspects of the publications that he considered fell to be a report of proceedings. Correctly analysed, the conduct of Oranga Tamariki being reported on was independent of the Family Court.

[80] In advancing these submissions, counsel for Newsroom emphasised they were not overlooking the statutory functions of the Court in obtaining and reviewing plans. But those functions did not involve comprehensive control of such matters. While particular issues or disputes can be engaged with by the Court, the matters traversed in the plans were said to otherwise remain outside the Court's purview and decision making. According to Newsroom, the Family Court was never asked to make a determination on the plans. Thus the mere fact a misleading plan was on the Court file could not and should not turn a story about the misrepresentation into a report of a proceeding.

[81] Counsel also drew support from the fact that the Ombudsman's jurisdiction does not extend to the courts.[50] Yet, that was not seen as preventing his investigation into the complaints against Oranga Tamariki. The fact of his investigation and the substantive findings were said to confirm the scope to separate the Family Court proceedings, which are subject to s 11B, from the conduct of Oranga Tamariki which is outside it.

[82] Finally, Mr Keith pointed out that excluding this story from the ambit of s 11B did not mean the children's privacy interests would be left unprotected. There was a suite of other protective measures derived for example from Newsroom's membership of the Media Council, self-regulation, and privacy laws.[51]

The Solicitor-General's submissions

[83] The Solicitor-General argued, relying on *Television New Zealand*, that in substance the video was a report of Family Court proceedings despite its focus not being expressed as such. That was said to be the case because the publication chose to illustrate its points about Oranga Tamariki by reference to four real children who were the subject of a large number of Family Court decisions.

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50 Ombudsmen Act 1975, sch 1.

51 It was accepted that the publications in question were not subject to the oversight of the Broadcasting Standards Authority. We were however advised that this was likely to change as a result of proposed amendments to the Authority's empowering statute to confer jurisdiction over online publications.

[84] No objection was taken by the Solicitor-General to the parts of the video containing the interviews with the experts. However, in the Solicitor-General's submission, the publications otherwise traverse a range of matters in substance canvassed in the Family Court, including some matters that were the subject of substantive Family Court decisions.

[85] In so far as Newsroom was suggesting that a story that traversed matters before the Family Court could only be a report of proceedings if those matters related to something over which the Court was exercising control or a power of decision, the Solicitor-General contended that was wrong for two reasons.

[86] The first was that such a proposition was not the law, being contrary to *Television New Zealand*. This Court had made it clear in that decision that every document on the Court file is to be considered part of the proceeding and therefore a report about those documents was a report of the proceeding.[52] The various plans filed in the Family Court in this case were clearly in that category.

[87] The second objection was that even if the Newsroom proposition was correct as a matter of law, s 11B would still apply because the Family Court was in fact controlling the decision making in this case. The Solicitor-General acknowledged that the process was discursive, iterative and cooperative as the Oranga Tamariki Act contemplates.[53] But nevertheless, the Court was still substantively, actively managing and determining the decisions that Oranga Tamariki was taking. The core of the video was the removal of the children from the care of the foster parents. Yet that, according to the Solicitor-General, would not have been able to take place without the Family Court discharging the condition imposed by the December direction.

Analysis

[88] As will be readily apparent, the submissions made on behalf of Newsroom have force.

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52 *Television New Zealand* (CA), above n 23, at [54].
53 Oranga Tamariki Act, s 5.

[89] The story was unquestionably one of significant public interest, as evidenced by the impact it had on the Minister and the suspension of the practice of reverse uplifts. It is reasonable to assume that the suspension of Oranga Tamariki's practice would not have happened — or at least would not have happened so quickly — had it not been for the powerful impact of the video. It was powerful precisely because it depicted the real life effects of the reverse uplift policy and the associated raw emotion. Clearly too, the foster parents' concerns about the way they were treated by Oranga Tamariki were valid and worthy of ventilation. The right of freedom of expression must encompass not only the rights of the media but also the rights of the foster parents to tell their story and the right of the public to hear it.

[90] We also accept that the Judge appears to have overstated the role of the Family Court in certain aspects of the case. It is correct the children could not have been removed from their birth parents without a court order. However, once final custody and guardianship orders were made in favour of Oranga Tamariki, the primary power of decision making over their future essentially rested with Oranga Tamariki. The Court's role to a reasonably significant extent effectively became a monitoring/consultative one. In our view, it is therefore wrong to say the Family Court made *all* the ultimate decisions in this case.[54]

[91] The decision to place the tamariki with Mr and Mrs F was made by Oranga Tamariki. The Court had no say in that decision. It was simply informed of it. Nor did the Court have any say in the decision to make that placement a placement for life. It was not the Court that made any promises to Mr and Mrs F. Likewise, the decision to reverse the previous home for life policy was not a Family Court initiative or decision. The Family Court was not responsible for the adoption of the reverse uplift practice and it did not select the whānau caregivers.

[92] Most importantly of all, we agree that the removal of the children from their home for life placement occurred through the exercise of Oranga Tamariki's guardianship powers. In our view, it is technically wrong to characterise the December direction as a Court imposed condition on the custody orders. It is wrong too, to

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[54] Compare, injunction judgment, above n 5, at [26].

suggest that without the green light of the Family Court, the removal could never have happened. At its highest, the December direction was a procedural step creating a temporary pause pending provision of further information. It was simply a timing issue. Oranga Tamariki ultimately held the decision-making power over the placement. What the Court was seeking to control was the transition.

[93] All of this we accept.

[94] On the other hand, we also consider that if the *Television New Zealand* test of what amounts to "a report of proceedings" [55] remains good law then, regardless of Newsroom's genuine attempts to distance Oranga Tamariki from the Court, relatively little content in the publications would fall outside the scope of s 11B.

[95] As to what would be outside s 11B under *Television New Zealand*, we consider the fact of the children's status as foster children under the guardianship of Oranga Tamariki would fall outside the section, but not the reasons for making the custody and guardianship orders. Expert commentary on the general merits of the reverse uplift policy without specific references to this case would also not, under *Television New Zealand*, be a report of proceedings. So too in our view (which differs from the High Court)[56] would a report of the foster parents' account of how Oranga Tamariki misrepresented the views of the Family Court to them at a meeting.

[96] In contrast to the position of misrepresentations made at a meeting outside the courtroom, the misrepresentations to the Court itself in documents that were filed in Court and formed part of the Court record must be part of the proceedings under the *Television New Zealand* test. Likewise, so must the content of the various plans and reviews that were filed in Court.

[97] In short, relatively little content in the Newsroom publication falls outside the scope of a "report of proceedings" as interpreted by *Television New Zealand*. Editing or removing the content that does constitute a report of proceedings would effectively eviscerate the entire story.

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55 *Television New Zealand* (CA), above n 23, at [54] and [66].
56 See injunction judgment, above n 5, at [25].

[98] It follows that to succeed on this first issue, Newsroom needs to persuade us that the boundaries as delineated by *Television New Zealand* should be re-drawn and that it is possible to formulate an alternative interpretation of the phrase "report of proceedings" that is both principled and workable.

[99] The suggestions by Newsroom that s 11B should be limited to matters being heard and determined, or matters over which the Family Court has control, a substantive jurisdiction, or power of decision making, is in our view problematic. We consider that is especially so in the context of the Family Court's relatively open-textured jurisdiction and practices, as the present case vividly demonstrates.

[100] As indicated, we consider the High Court overstated the role of the Family Court. But equally we consider Newsroom understates it. After all, it was the Court which convened several judicial conferences about these children, where submissions were heard and which were followed by the issuing of Court orders. The orders issued included directions for revised or additional plans. The plans were filed with the Court for a reason, and in assessing their content and calling for revised or supplementary plans, the Court was surely, in a very real sense, making a determination on the plans. Significantly for present purposes, one of the orders made following a judicial conference included the ordering of a psychological report under s 178 of the Oranga Tamariki Act into the implications of removing the children from the care of Mr and Mrs F.

[101] Accordingly, in our view, while the Family Court may not have made all the ultimate decisions, it did make some substantive decisions and it also exercised a reasonably significant degree of oversight in accordance with its statutory functions. In that context, identifying matters over which the Court has control and those which it does not is therefore far from a straightforward exercise. It is likely to require reasonably detailed analysis and some fine distinctions, which for the purposes of the work of the media is impractical. Given too that a breach of s 11B constitutes a criminal offence, the boundaries need to be clear and certain.

[102] In our view, it is also an oversimplification to suggest, as Newsroom does, that a broad interpretation is the anthesis of a rights-consistent interpretation. There are, it

seems to us, benefits to the media if the *Television New Zealand* interpretation of "report of the proceedings" continues to be applied. When there was a prohibition on reporting, a broad interpretation of "proceedings" meant the ban had more reach. Logically, now that the ban has been replaced by a right, the converse must also apply. The scope of the new right, and the authorisation it confers to report, must generally be greater if there is a wide interpretation of "proceedings", than a narrow or limited one.

[103] That was certainly the view expressed in a 2007 research project funded by the Families Commission Blue Skies Fund investigating the effects of media reporting of Family Court cases following the enactment of s 139 and s 11B. It was noted for example that because material and documents brought before the Court are regarded in the caselaw as part of the proceedings, s 11B meant they now could be safely reported upon without any issues arising for example as to breach of confidence and the like.[57]

[104] In accordance with orthodox principles of statutory interpretation, Parliament may be taken to have known the established meaning attributed by the courts to the phrase "report of proceedings" in the context of the Family Court.[58] The fact Parliament continued with the identical expression in s 139 of the Care of Children Act and then s 11B of the Family Court Act is a strong indicator it intended the same meaning to prevail. Certainly, we have been unable to find any suggestion in any of the legislative materials leading to the enactment of s 139 or s 11B that reversing the presumption in favour of reporting was intended to carry with it a narrower or revised meaning for what amounted to a report of proceedings.

[105] Contrary to a submission made by counsel for Newsroom, we also consider the *Television New Zealand* interpretation is a meaning that accords with the normal and accepted usage of the word "proceedings". In that regard we agree with the comment

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57 Cheer, Caldwell and Tully, above n 21, at [3.2.6.1].

58 See for example *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [46]; *AFFCO New Zealand Ltd v Employment Court* [2017] NZCA 123, [2017] 3 NZLR 603 at [29]; and *Watherson v PGW Rural Capital Ltd* [2020] NZCA 329, [2020] NZCCLR 25 at [49].

made by Panckhurst J in a s 27A case, that it is "beyond question that the concept of a proceeding extends to the initiation of a case and throughout its various phases".[59]

[106] It is also not without some significance that in the final minute of the Family Court contained in the case on appeal, the presiding Judge concluded by making a direction that "the proceedings" were to be transferred to another court registry in the district of the children's new home.

[107] Drawing all these threads together, the normal and ordinary meaning of "report of proceedings", the legislative history and BORA considerations, we are driven to the conclusion that the interpretation adopted by this Court in *Television New Zealand* remains good law and provides a principled and workable standard. Accordingly, we agree with the Judge that, although it was never Newsroom's intention or purpose, as a matter of law the publications in question amount to a report of proceedings within the meaning of s 11B.

[108] Having reached that conclusion, it is necessary for us to address the second issue and determine whether the anonymisation steps undertaken by Newsroom mean that in any event there was no breach of s 11B.

Do the reports contain identifying information as defined by s 11C?

[109] As previously noted, the scheme of s 11B is that a report of any proceedings in the Family Court is not permitted without the leave of the Family Court if the report includes identifying information where a person under the age of 18 years is the subject of the proceedings or is referred to in proceedings.

[110] The four tamariki in this case were clearly both the subject of and referred to in the proceedings. It follows that because Newsroom never sought the leave of the Family Court, the critical question is whether the publications included "identifying information".

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59 *Director General of Social Welfare v Christchurch Press Company Ltd*, above n 20, at 9.

[111] The phrase "identifying information" is relevantly defined by s 11C in the following terms:

> … information relating to proceedings that includes any name or particulars likely to lead to the identification of any of the following persons:
>
> (a) a party to the proceedings:
>
> (b) an applicant in the proceedings:
>
> (c) a person who is the subject of the proceedings:
>
> (d) a person who is related to, or associated with, a person referred to in paragraphs (a) to (c) or who is, or may be, in any other way concerned in the matter to which the proceedings relate (for example, a support person for a party).
>
> (2) For the purposes of section 11B in relation to proceedings under the Oranga Tamariki Act 1989, **identifying information** also includes the name or particulars likely to lead to the identification of any school that a person the subject of the proceedings is or was attending.

[112] Unlike the publications at issue in *Television New Zealand*, Newsroom's publications do not name the foster parents nor the children nor their location, other than that it is in the South Island. The faces of the foster parents and the children are blurred and identifying particulars such as the name of the school on a lunch box and their faces in photos in the photo gallery shown on screen have been blurred. The children's new location in the North Island is also never disclosed.

The High Court decision

[113] The Judge held, following the decision of *R v W*,[60] that s 11C required the Court to determine whether there was an "appreciable risk" that someone watching the video and reading the publications would be able to identify the protected persons from the information provided.[61]

[114] Turning to the issue of whether there was identifying information in the present case, the Judge accepted that the measures Newsroom had taken would prevent the general public, who know nothing about the protected persons or the Family Court

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60 *R v W* [1998] 1 NZLR 35 (CA) at 40.

61 Injunction judgment, above n 5, at [34]–[37].

proceedings, from being able to identify the protected persons.[62] However, in his view, s 11B was not only concerned with identification to the public at large. On the contrary, in his assessment, the category of persons that the prohibition primarily targets is people who can work out identity from the information contained in the publication by piecing it together with information and knowledge they already possess. Such people, the Judge said, are likely to be people who are in the protected person's wider community and accordingly already have some association with them.[63]

[115] The Judge went on to find that because of the cumulative effect of a number of features, Newsroom's story included particulars likely to lead to the identification of the foster parents and the children and therefore involved prohibited disclosure of their Family Court matters.[64] The features relied upon by the Judge as amounting to identifying information for the purposes of s 11C were as follows:[65]

(a) The identification of the foster parents as an English couple in the South Island with an existing foster child and two adult children, who recently had care of four young Māori children and then lost care of them — a set of circumstances the Judge said was unusual.[66]

(b) The couple are reasonably distinctive people who have English accents. Their actual voices are heard and everything about the way they look is disclosed but for the blurring of facial features.

(c) The family home is pictured.

(d) The general appearance of the children, their likely relative ages and association with each other is disclosed.

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62 At [41].
63 At [41]–[42].
64 At [44].
65 At [44].
66 At [44(a)] the Judge refers to both four and three young Māori children. Although initially Mr and Mrs F only had care of three Māori tamariki, at the time of the removal they had care of four young Māori children, all of whom were uplifted.

(e) The dates for each of the steps involved in the developing situation for the children is disclosed.

(f) The social group surrounding the family at the time the children are removed is identified [Newsroom is prepared to blur their faces].

(g) The disclosure of the fact the foster mother taught at the preschool the children attended and left her career in childcare to take up mothering responsibilities.

(h) One of the community representatives shown close up is a teacher from the same preschool [Newsroom is prepared to blur her face].

(i) The foster child [X] that remains in the care of the foster parents is shown in her school uniform and although her face and the crest of the school on her jumper is blurred, the uniform will likely be recognisable.

(j) Information about the changes made by the foster parents in reliance on the promises of a "forever home" is given.

(k) The name of one of the children is visible on a flowerpot. [Newsroom did not mention this in its submissions but consistent with its approach to similar points we assume it would be prepared to rectify that]

(l) Details about the new whanau caregivers are provided, including their relationship to the birth parents and the fact they are located in the North Island.

Arguments on appeal

Newsroom's submissions

[116] Newsroom contends that the steps it took meant it did not run foul of s 11B(3). In its submission, in finding to the contrary, the Judge wrongly relied on case law from the criminal jurisdiction and his "working [it] out" test went too far. In Newsroom's submission, the "working [it] out" test invites speculation and strikes the wrong

balance between the competing interests of freedom of expression and the need to protect the privacy of vulnerable children. In counsel's submission, the prospect of identification needs to be analysed in a realistic way. Too exacting and risk-averse a standard will, it was submitted, have a chilling effect on investigative journalism.

[117] In support of its arguments counsel referred us to a 2020 decision of the England and Wales High Court Family Division where it was said that jigsaw identification can be too loosely asserted and the risks overstated.[67] And that, Mr Keith argued, was precisely what happened here. The "working [it] out" approach was taken too far.

The Solicitor-General's submissions

[118] The Solicitor-General did not dispute the importance of investigative journalism. However, counsel Ms Laurenson submitted that whatever the importance of the issues that Newsroom wanted to raise about Oranga Tamariki, the restrictions existed to protect the interests of vulnerable children and those safeguards should be upheld. Newsroom was free to publish a critique of Oranga Tamariki so long as it did not do so in a way that identified the children at the heart of the Family Court proceedings. Counsel emphasised that while s 11B had reversed the previous presumption on reporting, it still did not allow the media to identify children as a matter of course.

[119] The Solicitor-General further submitted that although the phrase "identifying information" is new to the Family Court Act, it is a concept familiar to general law in the context of suppression. Counsel contended that the statutory definition "likely to lead to the identification" involves more than assessing whether any stranger would be able to identify the children. It is sufficient if there is an appreciable risk of the children's wider community recognising them.

[120] Ms Laurenson characterised Newsroom's position as being that in order to contravene s 11B(3), a publication must do more than identify the children to those to whom they are already known and who have pre-existing knowledge that enables them

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[67] *A Local Authority v A Mother* [2020] EWHC 1162 (Fam), [2020] 2 FLR 652 at [18].

to work out who the children must be. In Ms Laurenson's submission, that cannot be right in the case of children with no public profile. She argued it is wrong that the people who are able to work out the identity of the children should then become privy to intensely private information from the Family Court proceedings, such as their violent home and subsequent foster care placements.

[121] As regards the application of BORA, Ms Laurenson submitted that even if there is some room to read down "identifying information", the alternative less rights-consistent meaning favoured by the Judge was correct because it is not an unjustified limit on the right of freedom of expression.[68] That was said to be especially so given the ability to seek leave from the Family Court to publish identifying information,[69] the well-established paramountcy principle in family law (the interests of the children are paramount)[70] and the United Nations Convention on the Rights of Children, to which New Zealand is a signatory.[71]

Intervener's submissions

[122] Newsroom's concerns about the chilling effect of an overly broad interpretation of the restrictions in s 11B were echoed by counsel for the Media Freedom Committee, Mr Stewart.

[123] Mr Stewart emphasised the value of investigative journalism which holds state agencies to account and the importance of the freedom to seek and impart information in the public interest. In his submission, too broad an interpretation of the restrictions in s 11B would however chill editorial appetite for investigative journalism.

[124] He took issue with the suggestion that concerns about the chilling effect were counter balanced or mitigated by the ability to seek leave from the Family Court to publish identifying particulars. Seeking leave from the Court would, in his submission, be a costly and time-consuming exercise and simply not practical given

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68 Injunction judgment, above n 5, at [29].

69 Family Court Act, s 11B(3) and (5).

70 Section 4A(1) of the Oranga Tamariki Act for example states that "[i]n all matters relating to the administration and application of th[e] Act … the well-being and best interests of the child or young person are the first and paramount consideration".

71 *Convention on the Rights of the Child* GA Res 44/25 (1989). Article 16 of the Convention specifically preserves the child's right to privacy.

the time and resource pressures faced by media. Similarly, the cost of dramatisations of events using professional actors — which had been suggested as an alternative to a video showing the actual people — was prohibitive and did not carry the same impact.

Analysis

[125] As will be apparent from the submissions, it was common ground that the primary purpose of the statutory prohibition on publishing identifying information is to protect the privacy interests of vulnerable children. There is a right to publish facts or information relating to a proceeding in the Family Court involving the children but not information that reveals or is likely to reveal their identity.

[126] While it is arguable that the word "likely" in the statutory phrase "likely to lead to the identification" may encompass a range of probabilities, we see no difficulty either as a matter of general principle or statutory interpretation in adopting the formulation of "an appreciable risk". It appears to us to strike the right balance between the competing interests and rights. A test requiring absolute certainty would obviously not accord with the statutory wording of "likely" and it would significantly undermine the privacy interests of vulnerable children at a time when, as the Solicitor-General points out, societal and legal concern for the protection of privacy, especially for children, has grown.[72] But equally, a test that any risk of identification is sufficient would in our view represent an unjustified limitation on the right of freedom of expression.

[127] We also agree with the Judge that under s 11C the anonymisation of the names of the protected persons does not automatically equate to absence of identifying information.[73] Had that been what Parliament intended there would have been no need for a statutory definition of identifying information which expressly refers to "any name *or* particulars".[74]

[128] We agree too that the test involves a causative element. The statutory proscription in s 11B(3) is publishing a report that includes identifying information,

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72 Cheer, Caldwell and Tully, above n 21, at [3.2.3].
73 Injunction judgment, above n 5, at [45].
74 Family Court Act, s 11C (emphasis added).

that is information that is likely to result in identification of the children. If the information capable of identifying the children is already known to the audience, then it must follow that publication of that information will not breach s 11B(3) because the reader or viewer has not learnt the information from the publication.

[129] However, where we disagree with the Judge is in the application of the appreciable risk test to the circumstances of this case.

[130] In particular, in our view, insufficient regard was given in the High Court to the combined effect of two facts. First, the size of the community where the foster parents lived. It is a very small rural community. The second is the visible daily lives of the four Māori tamariki. The decisions that had been made in proceedings affecting them were to a very significant extent in plain view as it were. They were self-evident. That can be starkly contrasted with the typical suppression scenario in criminal cases.

[131] We consider it is unrealistic to suggest that the detail of this case would not have been a major talking point in the very small community which clearly was strongly supportive of the foster parents' cause. In our assessment, the community would have been aware of the critical features of the publications, namely that these four Māori tamariki were not the biological children of the Pākehā Mr and Mrs F, that Mr and Mrs F were their foster parents (which meant the children were in state care, which in turn was likely to have only come about because of neglect or ill-treatment rendering them in need of care and protection), that Mrs F had left her job to take care of them on a permanent basis, the self-evident reason for the purchase of an eight seater vehicle, that the children had settled and were doing well then were removed for cultural reasons to the North Island to live with whānau, and that the removal had been implemented by Oranga Tamariki in distressing circumstances.

[132] As mentioned, the removal was actually witnessed by a number of locals who would undoubtedly have returned to their respective homes and families to relay in detail what had transpired. Those locals knew too, of course, that a national media organisation was involved and that they were being filmed for part of a documentary, something that would have made the situation even more of a talking point.

[133] In his decision, the Judge reasoned that a distinction needed to be drawn between local knowledge of the situation generally and a detailed report of the matters that were addressed before the Family Court.[75] However, we take issue with the characterisation of the Newsroom publications as a detailed report of the matters that were addressed before the Family Court. To put it another way, we consider it unlikely the local community would have learnt anything more from the publications than what they already knew.

[134] It was suggested to us on behalf of the Solicitor-General that while that might be true of residents in the rural community, Mr F worked in a nearby urban area and his workmates would recognise him on the video and may have visited the house. On our view, that not only involves a very small class of persons, but it is also simply too speculative.

[135] As for the children's North Island community, the Judge said that "[t]here may not be many Māori families in the North Island who have received four young children from the South Island" and there was therefore a real risk that the new community will now know the details of the Family Court case that led to the placement.[76] Given the prevalence of whāngai in Māoritanga we are not persuaded that the Judge's premise is necessarily well founded and that members of the new community would necessarily draw those inferences. The members of the new community would need to have been told much more by the tamariki and/or the whānau caregivers to be able to connect the dots, in which case it is again difficult to identify any additional potentially harmful information the publication will provide that is not already known.

[136] For these reasons, we conclude that although the publications amounted to a report of proceedings for the purposes of s 11B, they did not contain any identifying information of the protected (or connected) persons as defined in s 11C and therefore they did not breach s 11B(3).

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75 Injunction judgment, above n 5, at [46].
76 At [44(k)].

Additional matters

[137] Having reached these conclusions on the two key issues, it is unnecessary for us to consider a further issue raised by Newsroom, namely, whether the Judge should have acceded to its request to clarify the potentially offending aspects of its publications and identify possible remediation. The Judge's reasons for declining to engage in such a process were that "[a]n incremental process involving Newsroom and the Court presents difficulties" and that "[t]he Court should not be negotiated with."[77]

[138] The Judge's view is supported to some extent by the Law Commission in its report on open justice, where it was said that in cases where leave is sought from the Family Court to publish identifying information, the Court should not require a draft to be submitted for its approval as a condition of granting leave. The reason given by the Law Commission was that to do so would be contrary to open justice and the freedom of the press.[78]

[139] While we appreciate the Judge's approach may have proved frustrating for Newsroom, there are differing perspectives and we would prefer not to reach a concluded view one way or the other when it is not determinative of the case before us. Likewise for the request for us to formulate guidelines for media, akin to those issued by the England and Wales High Court Family Division for published judgments.[79] We agree that those guidelines are helpful for the purposes of writing judgments, but we simply do not have the requisite material before us to undertake such a task for media reports.

[140] All of that said, we do require of Newsroom that before publication, it again carefully reviews the video and the online articles and implements the changes it advised the High Court it would make, as well as the blurring of the name on the flowerpot. We also consider that the specific date on which the children were removed

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77 At [53].

78 Delivering Justice for All, above n 36, at 309.

79 Andrew McFarlane, President of the Family Division *Practice Guidance: Anonymisation and Avoidance of the Identification of Children and the Treatment of Explicit Descriptions of the Sexual Abuse of Children in Judgments Intended for the Public Arena* (England and Wales High Court Family Division, December 2018).

from the foster parents/arrived in the North Island should be excised, as should the specific date the fourth child was removed from their birth mother.

Outcome

[141] The appeal against the injunction issued by the High Court is allowed and the injunction is quashed.

[142] The appeal against the costs award made in the High Court is allowed and the respondent must pay the appellant's costs in the High Court calculated on a 2A basis, together with usual disbursements. Any disagreement as to amount may be determined by that Court.

[143] The respondent is ordered to pay the appellant costs for a standard appeal calculated on a band A basis together with usual disbursements. We certify for second counsel.

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