ORDER PROHIBITING PUBLICATION OF THIS JUDGMENT UNTIL 2.00 PM ON 7 MARCH 2024.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 136/2023
[2024] NZSC 21

BETWEEN	JOHN ATCHERLEY DEW Applicant
AND	DISCOVERY NZ LIMITED Respondent

Court: Glazebrook, Kós and Miller JJ

Counsel: P A McKnight and A J Romanos for Applicant
D M Salmon KC, J W J Graham and T F Cleary for Respondent

Judgment: 5 March 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

C We make an order prohibiting publication of this judgment until 2.00 pm on 7 March 2024.

REASONS

[1] The applicant seeks leave to appeal a judgment of the Court of Appeal declining to restrain publication of a programme accusing him and others of sexual abuse in November 1977, when he was a priest associated with the St Joseph's Orphanage in Upper Hutt.[1] The respondent is a media organisation. The programme, which is intended to be broadcast on TV3 and other media platforms associated with

[1] *Dew v Discovery NZ Ltd* [2023] NZCA 589 (Cooper P, French and Goddard JJ).

the respondent, recounts allegations by the alleged victims, Steven and Linda Carvell. They are siblings who were aged seven and eight in 1977. They have chosen to make their claims public.

[2] The applicant says that the abuse did not happen, and he says that independent evidence shows it could not possibly have happened at that time and place, and in the manner alleged.

[3] The applicant sought to restrain publication on three alternative grounds:

(a) In the exercise of the courts' statutory jurisdiction to suppress publication of certain matters in connection with criminal proceedings.[2] No such proceeding had been commenced, but the police were investigating the allegations;

(b) In the exercise of the High Court's inherent jurisdiction to restrain a publication which would interfere with the administration of justice by undermining the applicant's fair trial rights and the right to seek name suppression should the police commence a criminal proceeding; and

(c) By way of prior restraint of the defamatory publication.

[4] As the High Court had done before it,[3] the Court of Appeal declined to restrain publication on any of these grounds, and also on a fourth ground (breach of privacy) that is no longer pursued.

[5] The second ground is also not now pursued in this Court because the police have advised that they have concluded their investigation and no charges are to be laid.

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2 Criminal Procedure Act 2011, s 205. The District Court granted the complainants' application under s 203(3)(b) permitting publication of their names, addresses and occupations, but also made an order under s 205 suppressing publication (for fair trial reasons) of what the Court itself had recounted about their allegations: *Re Carvell* DC Wellington CRI-2023-085-1778, 2 August 2023 (Judge Davidson).

3 *Dew v Discovery NZ Ltd* [2023] NZHC 2105 (Palmer J).

Our assessment

[6] The proposed appeal is brought from an interlocutory order made in a defamation proceeding brought by the applicant.[4] The application must cross the threshold in s 74(4) of the Senior Courts Act 2016, which provides that leave must not be granted unless it is necessary in the interests of justice to decide the proposed appeal before the proceeding is concluded.[5] If leave is denied, the applicant's name will be published, irrevocably, in connection with the allegations. But he may be vindicated at the trial of the proceeding in which the application was brought.

[7] The first of the applicant's two remaining grounds raises no question of general or public importance.[6] It is not seriously arguable that a court has jurisdiction under s 205 of the Criminal Procedure Act 2011 in circumstances where no charging document has been filed.[7]

[8] The other remaining ground raises a question about the standard applicable to applications for prior restraint of a defamatory publication. The existing rule is that a court will restrain publication of defamatory material only for clear and compelling reasons.[8] We are not persuaded that this is an appropriate case to revisit the rule. Further, the respondent has repeated before us its assurances made to the courts below that it will plead truth; alternatively, that the publication is protected by the defence of responsible communication on a matter of public interest.[9] These defences should be tested at trial. It is not presently possible to say they have no reasonable prospect of success.[10]

[9] The applicant has asked that the parties be given advance notice of our decision. We accept that course is appropriate. Publication of this judgment will be

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4 See Senior Courts Act 2016, s 65 definition of "interlocutory application".
5 *Currie v Clayton* [2015] NZSC 17 at [8]; and *Hamed v R [Leave]* [2011] NZSC 27, [2011] 3 NZLR 725 at [13].
6 Senior Courts Act, s 74(2)(a).
7 See Criminal Procedure Act, s 14(1).
8 See *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA) and the authorities cited there.
9 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.
10 See *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 (CA) at 7; and *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA) at 407.

embargoed for 48 hours following its delivery to allow the applicant to prepare for publication.

Result

[10] The application for leave to appeal is dismissed. The applicant must pay the respondent costs of $2,500.

[11] We make an order prohibiting publication of this judgment until 2.00 pm on 7 March 2024.

Solicitors:
Thomas Dewar Sziranyi Letts, Wellington for Applicant
Chapman Tripp, Auckland for Respondent