NOTE: ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. SEE [63] BELOW.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2020-485-715
[2020] NZHC 3441

IN THE MATTER OF	an application for orders restraining publication, and interim injunction
UNDER THE	Senior Courts Act 2016 and Family Court Act 1980
BETWEEN	SOLICITOR-GENERAL Plaintiff/Applicant
AND	NEWSROOM NZ LIMITED Defendant/Respondent

Hearing: 14 December 2020

Appearances: D J Perkins and K Laurenson for the Plaintiff/Applicant
T J Castle and B J R Keith for the Defendant/Respondent

Judgment: 18 December 2020

Reissued: 11 January 2021

JUDGMENT OF COOKE J

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[1] By application dated 27 November 2020 the Solicitor-General has applied for an interim injunction restraining Newsroom NZ Ltd (Newsroom) from publishing a video and associated articles. These publications relate to a decision to remove the care of certain children from one foster family to place them in the care of a different foster family. The Solicitor-General seeks such orders under the Court's inherent jurisdiction. She does so on the basis that the video and articles involve the infringement of s 11B(3) of the Family Court Act 1980 (the Act) as the publications amount to a report of proceedings before the Family Court concerning persons under the age of 18 years, and that the publications include information that identifies the children and other protected persons.

[2] The application was first heard by me by telephone on a without notice basis at 2.15 pm on the day it was filed. At that stage the video and articles had been posted by Newsroom. Counsel for Newsroom were able to attend the telephone conference at short notice. At that conference I granted the injunction on an interim basis.[1] I then timetabled the hearing for the on notice application. That application was heard by me on 14 December.

Background

[3] As I indicated when granting the injunction on a without notice basis I will set out the facts in a general way to avoid providing identifying information.

[4] Newsroom's proposed publications concern four children from the same birth family who had been placed in the foster care of a family in the South Island. The foster children are Māori, and the foster parents were Pākehā.

[5] Newsroom's publications indicate that when the children were placed with this family there was a promise given to the children that this would be their home for life. However after a period of more than two years a decision was made to relocate the children to the foster care of whānau relatives in the North Island. Although the stories

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1 *Solicitor-General v Newsroom NZ Ltd* [2020] NZHC 3150.

focus on the actions of Oranga Tamariki in this respect, the decision to move the children to the care of the relatives in the North Island was made by the Family Court in a judgment dated 22 September 2020.

[6] The "Newsroom Investigates" video, and the accompanying written articles and photographs focus on the significant emotional impact of this relocation. The Pākehā foster parents are interviewed, and describe the effects of the decision. The video shows the moment when Oranga Tamariki representatives arrive at the home to take the children, which is obviously distressing. The video also involves commentary on the situation from those having specialist knowledge in the area.

Statutory provisions

[7] Section 11B of the Act provides:

> **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—
>
> (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.

[8] Section 11C provides:

11C Meaning of identifying information

(1) For the purposes of section 11B, identifying information means 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.

Jurisdiction

[9] The application is advanced on the basis that the High Court has jurisdiction to grant an injunction to prevent conduct which is a contempt of court. There is no dispute that the Court has such jurisdiction. It is more commonly exercised in relation to potential prejudice to criminal proceedings, but it is not limited to that.[2]

[10] The Contempt of Court Act 2019 codifies the Court's ability to punish for contempt of court in certain circumstances. That Act does not seek to codify, or remove the inherent jurisdiction of the High Court to injunct potential contempts, however. In the present case s 11B(7) preserves the power of the Court to punish any contempt. The power of the Court to injunct a potential contempt can also be taken to have been preserved.[3]

[11] Mr Perkins for the Solicitor-General also referred to the power of the Court to restrain ongoing conduct that amounts to offending.[4] That potential jurisdiction could be said to be derived from the offence created by s 11B(6) of the Act. Whilst he did not press that point it seems to me that this is an unnecessary elaboration. The effect of s 11B(3) is to impose statutory prohibition on certain publication — in effect statutory suppression. Where suppression orders have been made in connection with proceedings before the Courts, including under statutory powers, or where there is

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2 *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1 (CA); and *Gisborne Herald Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA).

3 See *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 for an analysis of when statutory provisions are to be taken as having replaced the inherent jurisdiction.

4 *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL).

suppression that arises automatically under statutory provisions, the inherent jurisdiction to injunct any breach is engaged and it is unnecessary to rely on this alternative jurisdiction.

[12] In the same way I need not address whether there is a potential difference between conduct that would amount to an offence under s 11B(6), and conduct that would be a contempt of court. Such differences are not material for present purposes.

[13] In *Siemer v Solicitor-General* the Supreme Court held that Courts other than the High Court had the implied powers to make suppression orders in support of the proceedings before them.[5] The Family Court here has ongoing jurisdiction in relation to the care of these children. On that basis it is arguable that that Court has implied powers to make certain orders. But the power to injunct a potential contempt of court is more properly exercised by the High Court, which is where the Solicitor-General's proceedings have been advanced.

What are the issues?

[14] Although the submissions for the parties raised a number of questions, it seems to me that the application ultimately turns on two related questions:

(a) Whether Newsroom's publications involve "a report of proceedings in the Family Court" within the meaning of s 11B(3) of the Act.

(b) If so, whether that report includes "identifying information" as defined in s 11C of the Act.

[15] Moreover, whilst there are questions of law relevant to both of those questions, they are both ultimately questions of fact. Prior to granting the without notice interim injunction I received copies of the relevant published articles, and a webpage link to Newsroom's video which I was able to view before first hearing the application. For the purposes of the on notice application an amended version of the video has been provided by Newsroom which I have viewed, and the relevant articles have been

5 *Siemer v Solicitor-General*, above n 3, at [113]–[114], and [168]–[169].

formally placed before the Court as exhibits to an affidavit. The only other evidence before the Court comes in the form of formal exhibits to the affidavit, including the underlying Family Court judgments, and earlier correspondence between the Solicitor-General's office and Newsroom. I also asked for, and was provided with further relevant minutes and judgments from the Family Court file.

Are the publications a report of proceedings?

[16] The first question is whether the Newsroom publications involve a report of proceedings.

[17] Mr Castle and Mr Keith both argued for Newsroom that the publications were not a report of proceedings. They involved reports on the prior engagement between Oranga Tamariki and the foster parents, and then the administrative implementation of the Court decision rather than any reporting on the proceedings themselves.

[18] This requires an assessment of what Parliament meant by prohibiting a report of proceedings in s 11B(3). An almost identical issue was addressed by the Court of Appeal in *Television New Zealand Ltd v Solicitor-General* in relation to s 27A of the Guardianship Act 1968 (now repealed) which prohibited the publication of a report of proceedings under that Act except with the leave of the Court.[6] There the Court adopted a wide interpretation of the meaning of the prohibition. Robertson J held:[7]

> [54] It follows from this interpretation of the "ordinary" meaning of s 27A that particularised reports of proceedings — either in detail or in summary — may not be published without the leave of the Court. In this context, "proceedings" is not synonymous with "hearing". 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, but excludes the statuses of parties resultant upon those outcomes. Temporally, the s 27A prohibition does not lapse once a case is settled or completed.
>
> [55] However, there is no prohibition upon the publication of anonymised or abstract reports or information in a particular case. Publication of the fact of a particular *kind* of case and its characteristic features is not inconsistent with the purpose of s 27A because such "abstracted" publication would not identify the parties involved or other details that have the effect of identifying or exposing them. This would meet the public interest in knowing about what

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6 *Television New Zealand Ltd v Solicitor-General* [2008] NZCA 519, [2009] NZFLR 390.

7 For himself and O'Regan J. A similar approach was adopted by Baragwanath J.

> has happened in the courts without undermining the purpose of the section. For the purpose of s 27A, "report" need not entail detail or analysis, but it would entail particularisation that has the effect of exposing parties' and children's identities and their connection to guardianship proceedings.

[19] In my view a report on the issues that arose before they were placed before the Court still involves a report of the proceedings. It is the substance of the matters that were placed before the Court that is protected. That protection is not avoided by reporting what a party was contending before the required hearings took place.

[20] Mr Keith argued that the prohibition in s 11B(3) did not reach back to Oranga Tamariki's earlier engagement with the foster parents, even if those matters were subsequently put before the Court. I do not agree. Under the Oranga Tamariki Act 1989 Oranga Tamariki is given certain statutory functions and duties. But the relevant decisions concerning the care and custody of children are ultimately made by the Family Court. Before a Court can approve the placement of a child a formal plan directed under s 128 must be prepared and submitted to the Court by Oranga Tamariki. The Court then makes the decisions concerning custody, care and access as contemplated under the plans it has approved. So the removal of a child from their birth parents, their placement with foster parents, their removal from foster parents to give to the care of other foster parents and all relevant terms and conditions all ultimately turn on detailed plans prepared by Oranga Tamariki but approved by the Court, and then the subsequent Family Court orders to that effect. Reporting on those matters will involve reporting on matters that were put before the Court.

[21] It is not realistic to contend that publication of a report on Oranga Tamariki's placement of the children with the foster parents on the basis that it was to be a permanent placement, and that Oranga Tamariki then changed their mind and decided that the children would be in the care of another family, is not a report of the proceedings before the Family Court. That is because those decisions — the original placement of the children with the first foster family, and the subsequent change of the arrangements — were considered and determined by the Family Court. The issues assessed and determined by the Family Court involved the same issues that Oranga Tamariki addressed. It is not possible to report on the one without disclosing the other. They are inherently interrelated.

[22] Against that background I have little hesitation in finding that Newsroom's publications involve a report of the Family Court proceedings in this case. The publications record that Newsroom has obtained access to the Oranga Tamariki file, case notes and documents under the Official Information Act 1982. The stories then publish the following details arising from this information:

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j)

(k)

(l)

(m)

(n)

[23] The associated written articles also contain such information. The above steps can all be identified as matters assessed in the Family Court proceedings. The original

decision to remove the children from their birth parents is covered by a lengthy decision of Judge Walsh dated 18 September 2017.[8] When the further child was born the removal from the birth mother was again subject to a Family Court order of Judge Brown in May 2018. The subsequent terms and conditions of the placement, guardianship, custody and care were set out in plans submitted to and approved by the Family Court. The subsequent concerns about the cultural dimension of the care provided to them, and the cultural needs of the children, were then addressed by the Family Court. In total there are approximately 15 judgments or minutes of the Family Court Judges dealing with the position of these children which have now been made available to me.[9] The ultimate decision to re-place the children with the whānau that had been located was made by the Family Court on 22 September 2020.[10] At that last hearing the foster father appeared in person. Judge Lindsay records:

> [7] The criticism or concern of Oranga Tamariki and social workers has been that for the children that natural pathway cannot be offered by Mr and Mrs [A]. Today is bittersweet for the children who express deep affection for their caregivers, but that does not change the need for the pathway for these tamariki to whānau. In fact, although Mr [A] holds strong reservations about the children's distress or grief at leaving their care, for my part, Mr [A], I am confident that the children will be embraced by whānau. Whānau will place the korowai of unconditional love around them to ease the transition.
>
> [8] Mr [A] expressed concerns at today's hearing that social workers made a decision in late 2019 as to the children's future care but in such a way the door was closed to Mr and Mrs [A] to provide long-term care. Mr [A] submits that he and his wife now retrospectively face criticism by social workers as to the appropriateness of their care of the children. Mr [A] also submits the children's whānau placement is something of a smoke-screen to deflect from the real issues as perceived by him and his wife. Mr [A] rejects the basis of the whānau placement. Mr [A] tells me that the Ombudsmen is investigating a complaint levelled by Mr and Mrs [A] against [an] office of Oranga Tamariki. That quarrel is one which shall be heard in another jurisdiction.

[24] So the reporting on the assessments of Oranga Tamariki that had led to the children being removed from the foster parents, and given to the new foster parents, is reporting on the matters that were addressed in detail before the Family Court. That is the whole point of the provisions in the Oranga Tamariki Act requiring the Family Court to make these decisions.

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8 *Chief Executive Ministry of Vulnerable Children, Oranga Tamariki v [A]* [2017] NZFC 7429.

9 A much reduced number was originally provided by the Solicitor-General, but I directed at the hearing that additional key decisions be filed, and the further decisions were then provided.

10 *Chief Executive of Oranga Tamariki – Ministry for Children v [A]* [2020] NZFC 8275.

[25] In their supplementary submissions Mr Castle and Mr Keith argue that at least one of the references in the video which records what Oranga Tamariki had told the foster parents had been decided by the Family Court was wrong, and accordingly that this could not be regarded a report of the proceedings because of this inaccuracy. I do not accept this. An inaccurate report is still a report, and it is the substance of the private matters before the Court that is sought to be protected.

[26] It is certainly true that the video and related articles are very much focused on Oranga Tamariki, and criticisms of its decision-making. The Family Court is only referred to in passing. But the reality is that the ultimate decisions in this case were all made by the Family Court, and the conduct that is the subject matter of the stories was the subject matter of the proceedings. The stories reveal the issues that were alive in those proceedings, and then involve a criticism of the decisions that were ultimately made. It is clearly a report, or account of the proceedings notwithstanding that it focusses on Oranga Tamariki who was one of the parties to the proceedings.

[27] A related argument advanced by Newsroom is that it is permissible for there to be a report on the "status" of persons following Family Court decisions. That arises from the observation of the Court of Appeal in *Television New Zealand v Solicitor-General* that:[11]

> [53] … we consider that the publication of the parties' legal status, once a proceeding is terminated, is not prohibited by s 27A as long as the report does not link the status with the hearing. A parties' status is not part of a "proceeding", but a product of it.

[28] But in my view the publications here go well beyond simply reporting on the consequential status of the children. It does not simply report that a particular child is a foster child. Rather the publications report on the detailed information concerning the case of these children. I also note, but do not finally decide, Mr Perkins' argument that even describing a child as a foster child moves beyond simply reporting on their status, and inherently involves disclosure of a court proceeding. My preliminary view is that this seeks to extend s 11B(3) too far, and that simply reporting that a particular child is a foster child does not necessarily involve a report of proceedings. I recognise

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11 *Television New Zealand v Solicitor-General*, above n 6.

that it could in certain circumstances. But in the present case it is not necessary to decide that point, as the publications here goes well beyond a question of status. They involve a detailed account of the issues that were addressed in the Family Court proceedings.

[29] Mr Keith argued that the interpretation of s 11B(3) needed to be influenced by the New Zealand Bill of Rights Act 1990, and particularly the freedom of expression. He particularly emphasised the freedom of the former foster parents to express their views. In addition Mr Castle emphasised that it must be appropriate for the media to hold Oranga Tamariki to account, and address matters that may be of public concern. I fully accept that the interpretation of the Act needs to be undertaken with the relevant provisions of the New Zealand Bill of Rights Act in mind. But for the reasons assessed in the previous authorities which I address in greater detail below[12] it seems to me that the legislative provisions inherently address the balance between the freedom of expression on the one hand, and the rights of privacy — particularly of children and vulnerable persons — on the other. The limitations on the rights of freedom of expression are demonstrably justified. Interpreting the legislation in accordance with its natural meaning, and in accordance with its purpose, does not involve an unjustified limitation on rights of freedom of expression.

[30] For the above reasons I conclude that the video report, and associated articles, involve a report of proceedings for the purposes of s 11B(3).

Particulars leading to identification

[31] Section 11B(3) prevents the publication of a report of the proceedings that includes "identifying information" in the specified circumstances. Section 11C defines "identifying information" as information "that includes any name or particulars likely to lead to the identification" of certain listed persons.

[32] As a first point it should be noted that the list of protected persons in s 11C(1) is not limited to the children or vulnerable persons referred to in s 11B(3) that cause the protection to be engaged. It is a comprehensive list of persons potentially

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12 At [34]–[37] and [47]–[49] below.

associated with the proceedings. It includes, for example, the South Island foster parents. On the face of the provision it would also include the Chief Executive of Oranga Tamariki who was a party to the proceedings before the Family Court. Whether prohibiting a publication that simply identifies Oranga Tamariki is justified is an interesting question which does not need to be resolved in the present case given my findings below.

[33] There are two material questions. First what the correct test for determining whether particulars are likely to lead to identification is, and secondly whether there was such identification in the present case.

The test

[34] Mr Perkins argued that only an appreciable risk of identification is required before the prohibition is engaged. In support of that approach he referred to the decision of the Court of Appeal in *R v W* which concerned an almost identical prohibition against publication in certain criminal cases involving alleged sexual offending under the now repealed s 139 of the Criminal Justice Act 1985 (a topic now addressed in ss 200–202 of the Criminal Procedure Act 2011). There Richardson P held:[13]

> … there is no question of balancing the public interest in the open reporting of Court proceedings against the prospect or risk of harm to the victim. The exclusive focus of s 139 is on the welfare of the victim. It is the risk to the victim that is protected by the prohibition. The statute assumes that any identification of an under-16 victim is an unacceptable risk to the welfare of the victim. The statutory purpose is to avoid the risk of harm by barring publication. It must be enough to attract s 139 that there is an appreciable risk that publication of the material could lead to the identification of the victim. In that context, qualifying adjectives such as "real", "appreciable", "substantial" and "serious" are not used to set higher or different thresholds, but rather to bring out that the risk or possibility must not be fanciful and cannot be discounted.

[35] That test was applied in *H v R* where the Court of Appeal held:[14]

> Applying the *R v W* test to this evidence we are driven to the conclusion that there is an appreciable risk that publication of Mr H's name could lead to the

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13 *R v W* [1998] 1 NZLR 35 (CA) at [40].
14 *H v R* [2012] NZCA 514 at [17].

> identification of the complaints. This risk is not fanciful and it is not one that we can responsibly discount.

[36] For his part Mr Keith emphasised ss 11B(3) and 11C involve matters of evaluation, and that the rights under the Bill of Rights were important. He said that there must be a realistic likelihood of identification arising from the publication. Hypothetical or vague concerns were not caught by the prohibition. Rigour was needed in the evaluation.

[37] I do not see Mr Keith's submission as being inconsistent with that advanced by Mr Perkins. A straightforward approach to ss 11B(3) and 11C involves the Court asking whether the particulars included in the publication are likely to lead to the identification of the specified persons. A finding that identification is likely engages the prohibition. I accept, however, that the Court of Appeal has referred to this in terms of appreciable risk, and that this is the standard I am bound to apply. In the present case, however, nothing turns on the precise verbal formulation of the test.

[38] Messrs Castle and Keith emphasised that there has been a significant change to the legislative protections in the Family Court, and that with the insertions of ss 11A–11D in 2008 the presumptions formerly in s 27A of the Guardianship Act 1968 had been reversed, with s 11B(1) now allowing the publication of a report of proceedings in the Family Court.[15] It is true that greater openness of Family Court proceedings were contemplated with these changes.[16] At the same time, however, it was recognised that there were situations where the prohibition on publication was still justified. That was specified in s 11B(3) as arising with proceedings concerning those under 18 years of age, and vulnerable persons. With respect to that category of proceeding, the protections that formerly existed in a more broad-ranging way were retained. For that reason, whilst this legislative change was significant, it does not assist Newsroom. There is no doubt that we are dealing with a category of proceeding where the protections exist.

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15 By the Family Courts Amendment Act 2008, s 7. See a discussion of the related reforms in *Television New Zealand v Solicitor-General*, above n 6, at [36]–[39].

16 See Family Courts Matters Bill 2008 (143–2) (select committee report).

Was there identifying information in the present case?

[39] The next question is whether the video and associated articles include identifying information.

[40] Section 11C provides that publishing a person's name involves publishing identifying information. It then prohibits disclosing "particulars" that are likely to lead to identification. The word "particulars" seems to me to contemplate detailed information. So if information is conveyed in the publication that will likely lead to the identification of the protected persons, then this will be "identifying information" for the purpose of this section.

[41] In the without notice judgment I sought to address what seemed to me to be an important question — namely who the audience is that may identify the protected persons that the sections are directed to.[17] Perhaps obviously the audience is those that do not already know of the matters arising in the proceedings concerning the protected persons. The ultimate question appears to me to focus on whether the publication will result in people being able to identify the protected persons, including because of information already known to them. Can they piece together information already known to them and the information contained in the publication to identify the people involved in the Family Court proceedings? The relevant audience can include the general public. But except in special cases the general public will not likely have existing information about participants in a Family Court proceeding. So the addition of information contained in a publication may not lead to identification. The persons most likely to be able to work out identity are those that already have some information about the protected persons in question.

[42] In my view this is the category of person that the prohibition is most concerned about — people who can work out identity as a result of the publication because of information they already have. They are likely to be people who already have some association with the protected persons. As I said in my earlier judgment, it is those people who are likely to be in the protected persons' wider community, and have some

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17 *Solicitor-General v Newsroom NZ Ltd*, above n 1, at [20]–[24].

association with them. And those are the people who are most important when it comes to the privacy protection contemplated by s 11B(3).

[43] It is also important to recognise that the protection is directed to the combination of disclosing information about the proceeding before the Court, and the identity of the protected persons. A report about the proceeding may be published, provided that identifying information is not included. What is prohibited is the disclosure of information from the Family Court proceeding in a way that is also likely to disclose the identity of the protected persons.

[44] I have little hesitation in finding that Newsroom's publications include particulars likely to lead to the identification of the South Island foster parents, and the children, and that it accordingly involves prohibited disclosure of their Family Court matters. This is because of the following features:

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j)

(k)

[45] These details also need to be assessed cumulatively. During the course of the argument I suggested that a simpler example of disclosing identifying information might be a case where the names of the family members were not disclosed, but where there was a photograph of the house in which they lived. Subject to the possibility of such a house being indistinguishable from other housing, that seems to me to be a classic situation of identifying information. Here the Newsroom story not only shows the house and the detailed home environment of this family, but other extensive information is provided that makes it beyond argument that identification arises. It is quite obvious that the publications include identifying information.

[46] Messrs Castle and Keith argued that it did not matter if identification arose for those who already knew about the fostering situation with this family. I do not accept that submission. It may well be that many in the immediate community know about the situation in a general sense, including potentially from discussions with the foster parents. But it is one thing to have some level of knowledge arising from such discussions. It is quite another to publish a detailed report of the matters that were addressed before the Family Court. This is what the section prohibits when identification is involved. Some people may have some information to a varying degrees, but that does not mean the publication prohibition contemplated by this section does not arise.

Limits on freedom of expression

[47] It is important to consider the freedom of expression when considering these issues. But as already indicated there is an inherent limit on that freedom in s 11B(2), and the section applies to the type of expression involved here.

[48] As I indicated in the without notice judgment, the very essence of the story Newsroom is seeking to present discloses the identity of this family. To convey the

emotional impact of the decision to move the children to a different foster family, Newsroom has outlined their circumstances so that the viewer can understand them and then empathise with the situation. It may be very difficult for this style of story to be published without identifying information being disclosed. Removing that information involves removing the matters that contribute to the story's emotional impact. Mr Perkins suggested that it might be possible to include a dramatisation of the events so that it became a story about a hypothetical family. The balance of the video showing the views of experts in this general area could then take place, with those experts commenting on the hypothetical situation rather than the decisions in this particular case. I agree that that type of approach may well be necessary given the impact of s 11B(3). If so the injunction involves significant interference with the freedom of expression by not only Newsroom, but by other individuals presented in its publications, including the South Island foster parents. But that limit on the freedom of expression is inherent in the terms of s 11B(3).

[49] Section 11B(3) contemplates the leave of the Court being granted to publish what would otherwise be prohibited. That can be said to be an important qualification upon the limit on the freedom of expression. It is arguable that the present circumstances might involve a case where the grant of leave could be considered. It might be able to be argued that a Family Court could give leave to allow the South Island foster parents, and accordingly the children's former home, to be identified. The children had been moved to a new family in a new location such that the harm arising from invasion to privacy is not now so apparent. And it could be argued that there is a public interest in the decisions of the Court associated with Oranga Tamariki policies being subject to public scrutiny. It seems to me that this is an avenue where competing questions concerning freedom of expression might be considered. In advancing that possibility I should not be taken to be endorsing it in this case, however, as a significant invasion of the children's privacy may still be involved. But it is significant that the ability to apply for leave existed under s 11B(3), and was not taken up by Newsroom.

[50] Mr Castle argued that the change in circumstances for the children meant that it was no longer relevant for the former foster family in the South Island to be identified. The children have a new life with a new family in a different place. He

argued that the new foster parents and their community were not revealed by the publication. I recognise that the children's new community is now more important, but there is no substance to the argument that the protection associated with the former foster parents' family and community is now not relevant. The sections of the Act unambiguously provide that disclosing identifying information about that family, and thereby the children, is prohibited.

Offers made by Newsroom

[51] In advancing Newsroom's position Mr Castle emphasised that Newsroom had had no intention of identifying the children and other protected persons, that it had made substantial changes to the video to attempt to address the concerns, and that there had been a lack of engagement by the Solicitor-General in terms of her indicating what was necessary.

[52] I accept that Newsroom has made changes to the video. These changes have been made incrementally as these proceedings have been pursued. Initially there were scenes of the children's school which were removed. That was obviously necessary given the terms of s 11C(2). Additional blurring was then added in — for example the name of one of the children appeared on a plastic container and this was blurred out, a school crest on a uniform was also blurred out, and license plate numbers were similarly concealed. Further offers have now been made in submissions. But these changes do not address the overriding cumulative effect of the factors set out in paragraph [22] above. This is not a situation where adjustments of that kind necessarily solve the problem. The publication appears to be more fundamentally inconsistent with the limitation imposed by s 11B(3).

[53] I also record that at the hearing Mr Castle passed up a document with further proposed changes that could be made to the video, together with an indication that a revised video could be made available to the Court. Mr Perkins objected to that course, pointing out that this would now be the fourth version that Newsroom had put forward. I declined Mr Castle's application for leave to proceed in that way. An incremental process involving Newsroom and the Court presents difficulties. The Court should

not be negotiated with. In any event for the reasons I have already outlined it seems to me that the problems with the proposed publications are more profound.

[54] I also do not accept the criticisms advanced by Newsroom that there has been a lack of engagement by the Solicitor-General. The evidence before the Court suggests that the Solicitor-General had concerns about Newsroom's stories concerning Oranga Tamariki uplifts. She wrote to the co-editors raising those concerns. That included an offer to meet to discuss with her what steps might be taken so that Newsroom could ensure future reporting did not breach the Act by her letter of 2 December 2019. So the evidence before me does not suggest any lack of engagement on her behalf.

[55] Newsroom is a well-respected, and accredited media organisation that can be expected to act responsibly. But its publications here involve what appear to be a clear infringement of the requirements of s 11B(3), at least for the purposes of my assessment for this injunction application. For that reason, I cannot totally accept Mr Castle's submission that Newsroom as acted as a responsible media organisation who has followed a principled approach. I have been provided with no evidence of the steps Newsroom took, or the processes or advice it obtained. On the face of it, it has engaged in an infringing publication after being earlier warned by the Solicitor-General that its uplift stories were breaching the requirements. There may well be additional circumstances to consider, but as I say I cannot fully accept Mr Castle's submission.

Relief

[56] The Solicitor-General's application seeks orders by way of an interim injunction. Those orders cover not only the video which has been the main focus of my analysis above, but the related articles and photographs that are posted on Newsroom's website.

[57] Mr Castle submitted that such wholesale injunctive relief was not appropriate. But in my view it is because of the extent of the disclosure made in the video. It is also appropriate to include the articles and photographs because they are inherently interrelated to the video, and also by themselves involve the publication of identifying

information. There is no need to address each article individually in the circumstances, and neither was there any argument to that effect.[18]

[58] Accordingly for the reasons set out, the orders sought paragraphs 1.1–1.3 of the application of 27 November 2020 are granted. They are to be in place until further order of the Court.

[59] The Solicitor-General also sought an injunction restraining Newsroom "from publishing any further publications likely to lead to the identification of the children subject to the orders made …" in the Family Court proceedings. I do not think that such an order is appropriate. Injunctions of this kind should be directed to particular publications. This further order would effectively repeat the requirements of s 11B(3). That obligation already exists, and now that Newsroom is aware that any publications of the same kind are not permitted I do not think it is necessary for the Court to add to the prohibition in s 11B(3) by way of court order. Newsroom is a reputable and respected accredited media organisation and can be expected to proceed appropriately from here.

[60] I reserve leave to both parties to apply in relation to the terms of the orders, or any supplementary or consequential orders.

[61] When I set the hearing down it was explicitly a hearing of the on notice application for an interim injunction. The parties have since filed statements of claim and defence, and in some respects their arguments appeared to be focus on whether a final injunction should be granted. At this stage the orders I make are limited to orders by way of an interim injunction. It will be for Newsroom to indicate whether it wishes to have the matter argued substantively. A telephone conference should be scheduled in the new year so that the position can be clarified.

[62] The question of costs is also reserved, and may be addressed by memoranda.

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[18] Mr Keith did argue that a single photograph of the mother from one of the articles was not identifying. It is true her face was not shown, but her general appearance was, and it seems to me she would have been identifiable by those who knew her, especially given the information in the article.

[63] Finally this judgment itself is subject to s 11B(3) of the Act and may not be published. That prohibition will not prevent publication of the judgment with paragraphs (a)–(n) of paragraph [22], and paragraphs (a)–(k) of paragraph [44] redacted. Section 11B(4)(a) allows the publication of the unredacted judgment in the circumstances there set out, however.

Cooke J

Solicitors:
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