ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2020-404-0428
[2020] NZHC 2704

BETWEEN	THE DIRECTOR OF THE SERIOUS FRAUD OFFICE Prosecutor
AND	ABC and DEF Defendants

Date of hearing: 14 October 2020

Appearances: RKP Stewart for the appellants
J C L Dixon QC and R J Williams for the prosecutor
ABC in person
No appearance for DEF

Date of judgment: 14 October 2020

ORAL JUDGMENT OF JAGOSE J

Counsel/Solicitors:
RKP Stewart Barrister, Auckland
J C L Dixon QC, Auckland
Serious Fraud Office, Auckland

[1] NZME Publishing Limited, Radio New Zealand, Stuff Limited, and TVNZ Limited appeal against the 9 October 2020 decision of Judge P J Winter in the District Court at Waitakere, continuing the defendants' interim name suppression until their second appearance in the District Court at North Shore on 29 October 2020.[1]

[2] Name suppression derogates from the principle of open justice, that court proceedings are conducted in public, and the right to freedom of expression to publish their report.[2] A corollary of open justice is people involved in court proceedings will necessarily be identified:[3]

> [A] public trial is the best security for the pure, impartial and efficient administration of justice and the best means for winning public confidence in and respect for the system.

Background

[3] The Serious Fraud Office (the "SFO") alleges the defendants "conceived and conducted a scheme" under which, between September 2015 and February 2020, some $750,000 of donations intended for the NZ First Party was diverted to entities controlled by one or both defendants. The money is said to have been used for NZ First's benefit, but without disclosure to its secretary and therefore not disclosed on the party's electoral return. The defendants are charged with obtaining by deception.[4]

[4] In wake of this Court's refusal to prohibit the SFO's public statement such charges had been filed (but without identifying the defendants),[5] and in advance of his first scheduled appearance, the first-named defendant without notice sought interim name suppression. It was granted by Judge S J Maude in the District Court at North Shore on 25 September 2020, as necessarily extending to the second-named defendant.[6] (The second-named defendant determinedly did not, and does not, independently seek name suppression.) On same-day appeal to this Court, the order

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1 *Serious Fraud Office v ABC* [2020] NZDC 20552.
2 *McIntosh v Fisk* [2015] NZCA 247 at [1], citing *JXMX (A Child) v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96 at [5]–[12].
3 *Clark v Attorney-General (No 1)* [2005] NZAR 481 (CA) at [11], citing *Scott v Scott* [1913] AC 417 at 463.
4 Crimes Act 1961, ss 240(1)(a) and 241(a): maximum penalty 7 years' imprisonment.
5 *New Zealand First Party* v *The Director of the Serious Fraud Office* [2020] NZHC 2502.
6 *The Director of the Serious Fraud Office v ABC*, CRN 20044500393, 25 September 2020.

was quashed and substituted with an interim order forbidding publication of the first-named defendant's name, address or occupation, pending determination of his on-notice application for interim name suppression.[7]

[5] That application gave rise to the judgment now under appeal. Judge Winter applied a two-stage test under s 200 of the Criminal Procedure Act 2011: first to identify if any of s 200(2)'s thresholds was crossed; then to assess if name suppression should be ordered.[8] The Judge was satisfied extreme hardship would be caused to the first-named defendant in terms of his business commitments, and to people connected to him in terms of prospective loss of funds managed by them.[9] Interim name suppression pending a second appearance on 29 October 2020 was necessary to allow the first-named defendant's business connections and associates to be informed of the allegations so as to seek to avoid those consequences.[10]

[6] Before commencement of early voting in the 2020 general election (to be held on 17 October 2020), the SFO's public statement explained individuals associated with NZ First (but not a Minister, sitting member of Parliament ("MP"), or candidate in the upcoming election, or a member of their staff or a current member of the New Zealand First Party) had been charged with obtaining by deception. The Judge considered publication of the first-named defendant's name within that voting period "may unfairly unsettle those who already cast their vote as much as it informs those who have not", and the intensity of scrutiny now (in the run-up to the general election) unfairly may vilify him before potential jurors then. Again, interim name suppression until a second appearance reduced that risk, to be extended to the second-named defendant whose naming otherwise would lead to the first-named defendant's identification.[11]

[7] On appeal, Robert Stewart argues the evidence fell short of establishing extreme hardship, and any hardship comprehensively is outweighed by the public interest in voters being fully informed of serious matters relating to political parties.

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7 *The Director of the Serious Fraud Office v ABC*, CRI 2020-404-0403, 25 September 2020 (minute).
8 *Serious Fraud Office v ABC*, above n 1, at [46].
9 At [50]–[51].
10 At [55].
11 At [58]–[60].

Any fair trial concern should only follow establishment of a fair trial threshold, which was not established here, and could be met in any event by appropriate jury directions.

Approach on appeal

[8] Media reporting on the proceeding, and subject to a code of ethics and the complaints procedures of the Broadcasting Standards Authority or the Press Council, may appeal to this Court against the District Court's suppression order.[12] As such, they bear the onus of satisfying me I should differ from the District Court's decision. I only am justified in interfering with that decision if I consider the decision is wrong – in other words, the Judge erred.[13]

[9] I then am to come to my own assessment of the merits of the case afresh, without deference to the District Court (save for some caution in differing on witness credibility, if I have not had the advantage of observing witnesses).[14] I may rely on the Judge's reasons in reaching my own conclusions, but the weight I give those reasons is a matter for me.[15]

[10] To the extent the decision involved exercise of the Judge's discretion, I only may interfere with it if the appellant establishes the Judge acted on wrong principle, did not address relevant matters or took into account irrelevant matters, or was "plainly wrong".[16]

[11] I must determine the appeal by confirming, varying, or setting aside the decision appealed against, or making any other order I consider appropriate.[17]

The law

[12] The Criminal Procedure Act 2011 – in its general provisions, under a subpart to address "[p]ublic access and restrictions on reporting" – establishes:[18]

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12 Criminal Procedure Act 2011, s 283(2)(c).
13 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13].
14 At [13].
15 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].
16 *May v May* (1982) 1 NZFLR 165 (CA) at 170; and *Blackstone v Blackstone* [2008] NZCA 312, (2008) 19 PRNZ 40 at [24].
17 Criminal Procedure Act 2011, s 287.
18 *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777 at [13]–[15].

… proceedings are generally open to the public.[19] There is a power to clear the Court but that does not, in most cases, allow for the exclusion of the media.[20] …

The Court also has power to suppress names and other identifying particulars of the defendant, witnesses, victims and connected persons as well as evidence and submissions where the statutory thresholds are met.[21] Section 200(1) states that a Court "may make an order forbidding publication of the name, address or occupation of a person who is charged with, or convicted or acquitted of, an offence".[22]

[13] Section 200, with "a lengthy provenance",[23] relevantly continues:

200 Court may suppress identity of defendant

…

(2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—

(a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or

(b) cast suspicion on another person that may cause undue hardship to that person; or

(c) cause undue hardship to any victim of the offence; or

(d) create a real risk of prejudice to a fair trial; or

(e) endanger the safety of any person; or

(f) lead to the identification of another person whose name is suppressed by order or by law; or

(g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or

(h) prejudice the security or defence of New Zealand.

(3) The fact that a defendant is well known does not, of itself, mean that publication of his or her name will result in extreme hardship for the purposes of subsection (2)(a).

(4) Despite subsection (2), when a person who is charged with an offence first appears before the court the court may make an interim order under subsection (1) if that person advances an arguable case that one of the grounds in subsection (2) applies.

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19 Criminal Procedure Act 2011, s 196.

20 Sections 197 and 198.

21 Sections 200, 202 and 205. Section 206 deals with the Registrar's power to make and renew interim suppression orders.

22 Unless the context otherwise requires, "name" is defined to mean "the person's name and any particulars likely to lead to the person's identification": s 194.

23 *ASG v Hayne*, above n 18, at [29].

> (5) An interim order made in accordance with subsection (4) expires at the person's next court appearance, and may only be renewed if the court is satisfied that one of the grounds in subsection (2) applies.

"Likely", for the purposes of s 200(2), does not mean publication's more probable consequence, but only "the existence of an 'appreciable risk'".[24]

[14] Reasons must be given for suppression decisions.[25]A two-stage analysis is required:[26]

> At the first stage the court considers whether the consequences in s 200(2) would likely follow publication of the person's name. This is a threshold determination.
>
> At the second stage, if the threshold is crossed, the court considers whether an order should be made as a matter of discretion.

[15] The first stage:[27]

> … insists that the court determine on what principled basis suppression might be granted.[28] The legislation does not impose a burden of proof but the presumption will apply unless the applicant can point to something to displace it.[29]

It "must establish one of the prerequisites. This is a threshold test, not a balancing exercise".[30]

[16] The second stage must decide if "suppression [is] in the public interest".[31] Consistent emphasis is placed on "the importance of openness in the reporting of judicial proceedings and the right of the media to report on what happens in court fairly and accurately as 'surrogates of the public'".[32] At the second stage:[33]

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24 *Huang v Serious Fraud Office* [2017] NZCA 187 at [9], citing *R v W* [1998] 1 NZLR 35 (CA) at 39, interpreting ss 139 and 140 of the Criminal Justice Act 1985, and *Beacon Media Group Ltd v Waititi* [2014] NZHC 281 at [21]; *Wallis v Police* [2015] NZHC 2904 at [22].

25 Criminal Procedure Act 2011, s 207.

26 *Ratnam v R* [2020] NZCA 92 at [5]–[6].

27 *D (CA443/2015) v Police* [2015] NZCA 541 at [10].

28 *Robertson v Police* [2015] NZCA 7 at [43]–[46].

29 *R v Liddell* [1995] 1 NZLR 538 (CA) at 546; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [41]–[43].

30 *Sansom v R* [2018] NZCA 49 at [10], citing *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9]–[10] and *Robertson v Police*, above n 28, at [44]–[46].

31 At [10].

32 At [11], citing *R v Liddell*, above n 29, at 540, and *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

33 *D (CA443/2015) v Police*, above n 27, at [12], citing Lewis v Wilson & Horton Ltd, above n 29, at [43].

> … the court must balance relevant considerations in the exercise of discretion. The open justice principle must be considered at this stage, notwithstanding that the threshold has been crossed. That is so because the ultimate question remains whether open justice should yield. The balance must "clearly favour" suppression.

[17] Where, as here, the threshold quality is of 'extreme hardship', that means "'severe suffering or privation'. The adjective "extreme" adds to the meaning of hardship [or undue hardship] by requiring something significantly more again".[34] Assessing if hardship has the necessary quality:[35]

> … cannot take place in a vacuum. It is self-evidently contextual and in our view must entail a relative comparison between the contended hardship and the consequences normally associated with a defendant's name being published. It must be something beyond the ordinary associated consequences. …

It is "a comparative standard":[36]

> … [requiring] that the court compare the consequences of publication in the instant case with those that normally attend prosecution. Distress, embarrassment and adverse personal and financial consequences usually attend criminal proceedings, and something out of the ordinary is needed if the applicant is to get across the threshold.

Discussion

[18] Here the Judge considered it "implicit" in this Court's minute he was dealing with the name suppression application on a 'first appearance'.[37] The Judge thus was entitled to exercise his discretion if the first-named defendant advanced an arguable case the s 200(2) threshold was crossed.

[19] By 'arguable case' is meant only to exclude that "which did not have any apparent prospect of success", beyond which "the prospects of success, so far as ascertainable, are simply a factor in the overall balance".[38] Although that description arose in a very different context, of grounds for stay, the relevant considerations are comparable.

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34 *Sansom v R*, above n 30, at [15], citing *Robertson v Police*, above n 28, at [48].
35 *Robertson v Police*, above n 28, at [49].
36 *D (CA443/2015) v Police*, above n 27, at [11], citing *Lewis v Wilson & Horton Ltd*, above n 29, at [42]; *Robertson v Police*, above n 28, at [49].
37 *Serious Fraud Office v ABC*, above n 1, at [15].
38 *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (1995) 6 TCLR 682 (CA) at 687.

[20] At that low bar, deliberately set to allow a staged approach to interim name suppression,[39] there is at least a prospect the effect of publication may cause extreme hardship to the first-named defendant by reason of his business commitments and associations. Mr Stewart argues they only are speculative assertions, but that suffices to establish an arguable case; they nonetheless may constitute an appreciable risk of extreme hardship. That threshold is established here.

[21] Whether its appreciable risk has any greater substance may be doubtful. The particular examples of extreme hardship relied on may attend with publication of the first-named defendant's name in association with any serious criminal proceeding. Hardship – in the nature of adverse publicity, and its potential personal and financial consequences – may follow. Any appreciable risk of extreme hardship – "severe suffering or privation" – is not a given. But that is for substantive determination at the first-named defendant's second appearance, if interim name suppression is granted (and maintained) on first appearance. As to the availability of an arguable case for extreme hardship, I find the Judge here was not wrong.

[22] Turning then to exercise of the Judge's discretion, the Judge clearly addressed the correct criterion: if the balance of competing interests required open justice to yield.[40] In that balance, he weighed the first-named defendant's ability to address the charges with his business commitments and associations – essentially to seek to avoid the extreme hardship the Judge found otherwise was likely to accompany publication – against the public interest in and consequences of knowing the identity of those charged.[41] The Judge therefore acted on correct principle.

[23] Mr Stewart would have me take a different view on that balance by reason of New Zealand First's claim to "exoneration" in the SFO's explanations the charges were not brought against Ministers, MPs, candidates or their staff, or current members of NZ First. He notes this Court's observation:[42]

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39 *Standfast v R* [2019] NZCA 666 at [12].
40 *Serious Fraud Office v ABC*, above n 1, at [47]–[49].
41 At [55]–[58].
42 *New Zealand First Party v The Director of the Serous Fraud Office* [2020] NZHC 2502 at [2].

> [T]here is a significant public interest in the New Zealand voting public being informed during an election campaign about criminal charges of serious fraud against people or organisations related to political parties.

That view was reached, in the context of NZ First's application for interim orders as necessary to preserve its position,[43] to assess impact of the SFO's proposed public statement on NZ First's electoral prospects.[44] It is not the same balance for the Judge's assessment under s 200, which is if suppression clearly is favoured.

[24] Mr Stewart argues the Judge erred in consideration of voters whose votes already have been cast, and in contemplating fair trial considerations when such was not relied on for the threshold assessment. To err in the present discretionary context is meant the Judge had regard for irrelevant considerations or was 'plainly wrong'. Neither contended error qualifies: the Judge was considering the prospective asymmetry of information between voters, which is a relevant consideration on claims to open justice, as is the impact on defendants' fair trial prospects, whether or not attaining the threshold for determination of a name suppression application.

[25] There is no suggestion the Judge considered the balance to be a line-call. His reasons included the public's present knowledge of the nature of the alleged offending – which, as Mr Dixon notes, is limited – and voters' prospective unequal information as to the defendants' identity on the one hand, and the personal impacts on the first-named defendant on the other, all as clearly favouring interim name suppression. As an assessment in the exercise of the Judge's discretion, I am unable to identify any basis for my interference with it.

Result

[26] The appeal is dismissed.

—Jagose J

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43 At [22], referring to s 15 of the judicial review Procedure Act 2016.
44 At [27].