IN THE DISTRICT COURT
AT MANUKAU

CRI-2015-092-014000
[2016] NZDC 6997

NEW ZEALAND POLICE
v
CAMERON JOHN SLATER

CRI-2015-092-014001
[2016] NZDC 6997

NEW ZEALAND POLICE
v
BENJAMIN STEPHEN RACHINGER

Hearing:	20 April 2016
Appearances:	Mr Slater in Person Mr Rachinger in Person Mr Kayes for the New Zealand Police Ms Wilson for Mediaworks TV Ltd, NZME.Publications Ltd, Fairfax New Zealand Ltd and Television New Zealand Ltd
Judgment:	5 May 2016

RESERVED DECISION OF JUDGE R McILRAITH

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[1] Mr Slater is charged with counselling and/or attempting to procure Mr Rachinger to access the computer system of "The Standard" website to obtain property or a benefit, namely computer files (ss 249(2)(a) and 311, Crimes Act

1961). Mr Rachinger is charged with obtaining property by deception, namely $1,000 from Mr Slater, (s 240(1)(a) and 241(b), Crimes Act 1961).

[2] Before Mr Slater and Mr Rachinger first appeared on these charges, the police sought suppression for them both. The police anticipated that the proceedings would likely attract media interest and were keen to ensure that fair trial rights were preserved and that the defendants had sufficient time to obtain representation, so they could address suppression issues if they so chose.

[3] Mr Slater and Mr Rachinger initially appeared before this Court on 17 December 2015. Interim suppression was granted in relation to Mr Slater. Mr Rachinger did not seek suppression. On the application of the police, however, the Court nevertheless ordered interim suppression of Mr Slater's name and details in relation to Mr Rachinger's proceeding (Mr Slater being the complainant).

[4] At the conclusion of his first appearance, Mr Slater's proceeding was adjourned to 20 January 2016 for the police to consider diversion. Mr Slater was interviewed by police and found to be eligible for diversion. His next appearance was adjourned until 15 April. His case has since been further adjourned, with a return date of 6 May. By that stage, it is anticipated that he will have completed the diversion programme agreed to with him. If so, the charge against him will be dismissed (ss 147 and 148, Criminal Procedure Act 2011) and Mr Slater will be deemed to be acquitted.

[5] Mr Rachinger had his second appearance on 20 January 2016. While his proceeding was adjourned for him to reflect on whether he wished to consider diversion, he subsequently advised that he did not wish to do so and entered a not guilty plea when he appeared on 2 March. The police sought continued suppression of Mr Slater's name and details, as complainant. This Court adjourned the application for ongoing or permanent suppression until 20 April.

[6] Accordingly, before me is an application from Mr Slater pursuant to s 200 of The Criminal Procedure Act 2011 for ongoing and permanent suppression in relation

to his own charge and also in relation to him as the complainant in the charge against Mr Rachinger.

Application

[7] Mr Slater filed initial written submissions in advance of this application being heard. A final version of those submissions was then filed on 19 April. Accompanying those submissions were affidavits from Mr Slater's wife, Juana Mary Atkins and his son, Cadell Cameron Slater. While Mr Slater did not file an affidavit, it can be observed that his submissions contained a great deal of evidence. As a self-represented person, however, no issue was taken with that approach.

[8] Prior to the hearing of the application on 20 April, it was briefly considered by this Court on 15 April in the context of applications by the media for release of a copy of Mr Slater's submissions (the initial version), so as to enable the media to respond to those submissions when seeking to have the current suppression orders reconsidered in the course of the current application. The Court ordered that the media should have access to Mr Slater's submissions and the reasons and the terms are set out in a minute of 15 April.

[9] At the same time, the Court declined an application for in-Court media coverage of the hearing on 20 April. The Court adjourned an application for inspection of the Court files in relation to both proceedings for consideration on 20 April.

[10] In its minute, the Court noted that the media entities had applied to review the interim suppression orders in place, with that application to be heard on 20 April. It was, however, common ground before me that irrespective of who had made an application, the matter was appropriately treated as an application by Mr Slater pursuant to s 200 for ongoing and permanent suppression.

Opposition

[11] In opposition to ongoing and permanent suppression, Mediaworks TV Ltd, NZME.Publications Ltd, Fairfax New Zealand Ltd and Television New Zealand Ltd filed written submissions on 19 April and were represented in Court by Ms Wilson.

[12] Mr Rachinger, consistent with his earlier approach, also opposed Mr Slater's application. He filed written submissions, dated 3 April. He appeared in person to address those submissions.

[13] Mr Prentice, the proprietor of the blog "The Standard", was present in Court and represented by Mr Presland. Mr Prentice, who considers himself the victim of Mr Slater's offending, opposed ongoing or permanent suppression. Mr Presland sought to make submissions on his behalf.

[14] Finally, the New Zealand Police filed a written memorandum, dated 16 March. Mr Kayes represented the police and spoke to this memorandum. The position of the police is that it is neutral on suppression and abides the decision of the Court.

Legal Framework

[15] The ability for this Court to make an ongoing or permanent suppression order concerning a defendant is governed by s 200 of the Criminal Procedure Act 2011. It is this section upon which Mr Slater's application relies. It relevantly states:

> **200 Court may suppress identity of defendant**
>
> (1) 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.
>
> (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).

(6) When determining whether to make an order or further order under subsection (1) that is to have effect permanently, a court must take into account any views of a victim of the offence conveyed in accordance with section 28 of the Victims' Rights Act 2002.

[16] The approach to an application such as this is well-established. The Court of Appeal has identified in both *Fagan v Serious Fraud Office*[1] and *Robertson v Police*[2] that s 200 requires a two-stage analysis. The first, known as the jurisdiction stage, requires a court to consider whether it is satisfied that one of the threshold grounds listed in s 200(2) has been established. That is to say, whether publication would be likely to lead to one of the outcomes listed in sub-section (2). The Court of Appeal has stressed that the listed outcomes are pre-requisites to a court having jurisdiction to grant suppression. It is only if one of the threshold grounds has been established, that the court is to go on to the second stage. That second stage is the discretion stage. At that stage, the court must weigh the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the views of the victim and the public interest in knowing the character of the offender. The interests of open justice fall for consideration at that second stage.

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[1] *Fagan v Serious Fraud Office* [2013] NZCA 367
[2] *Robertson v Police* [2015] NZCA 7

[17] In *Robertson*, the Court of Appeal described the wording and scheme of s 200(2) as being clear and beyond argument. In elaborating on the section, the Court of Appeal observed:[3]

> "The wording of the section itself also reinforces the presumption, using the language "only if" as well as expressions such as "extreme" and "undue". The intention is clear, publication is the norm. Suppression orders are only to be made in restricted circumstances and the threshold is high. The onus is on the applicant to satisfy the Judge that suppression should be ordered".

[18] And further:[4]

> "That said, we agree with Mr Lithgow that the presumption of open justice is not directly relevant to the first stage of the s 200 analysis. While the presumption underlies the fact of the existence of a threshold requirement in the section, it will only be pertinent for Judges to consider the presumption in the exercise of the second stage discretion. As outlined above, the first stage is an absolute threshold requirement; it does not involve a balancing exercise".

The issue – extreme hardship?

[19] As argument proceeded before me, there was common ground that the issue in Mr Slater's application for ongoing and permanent suppression is whether he has satisfied me that publication would be likely to cause extreme hardship to him or any person connected with him (s 200(2)(a)). Only if he has done so, ought I to proceed to the second stage of the analysis.

[20] Mr Slater addressed his written submissions. There were a number of bases on which he submitted that publication would be likely to cause extreme hardship to both himself and his family. Those included:

(a) An orchestrated campaign to vilify Mr Slater, set up by Mr Rachinger in the wake of *Dirty Politics*, is ongoing and designed to cause extreme hardship to Mr Slater and his family.

(b) A central theme that Mr Rachinger had worked with the police as well as a number of media entities during the lead up to the events involved in these proceedings and that Mr Rachinger had set out to

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[3] *at 44*
[4] *at 46*

deceive Mr Slater and trap him into offending. At paragraph 11 of his submissions, Mr Slater asserted:

> "After the events of *Dirty Politics* and the continuation of media persecution of myself and my family, I want my life to return to normal and feel that I have been a fool who has made mistakes for which I am taking responsibility but also believe that I have become inveigled in a sort of sick game between the police, Mr Rachinger and media who each, in their own ways, are working to continue the ongoing attacks on me and my family".

(c) An allegation that there have already been a number of breaches of the interim name suppression orders in place (he has made a formal complaint).

(d) His anticipation that by completing diversion by the time of the return date on 6 May, he will be deemed to have been acquitted.

(e) His reliance on the intent of that scheme as a basis for ongoing and permanent suppression, as publication and the hardship it would cause would be inconsistent with that intent.

(f) The effect of publication on his son, Cadell. In an affidavit, Cadell deposes that he will be at risk of further abuse, having left employment as a result of earlier verbal abuse and harassment. He states that he cannot easily hide who he is, given his name. He noted that his father had received death threats and that his sister had received on-line threats of gang rape. He and his sister have taken these threats seriously. He is fearful that more threats will be made against both his father and his sister should publication occur.

(g) The effect of publication on his wife, Juana Mary Atkins. In her affidavit she anticipated publication impacting herself and her minor daughter in that it would again bring the media to their home, causing great distress to herself and children. She also noted death threats made against her husband previously and the threats against their daughter. She stated that, in her view, the media interest in this matter is not purely professional and that a number of journalists have personal vendettas against her husband, such that the media coverage, should there be publication, would not be fair or balanced but intended to do as much professional and financial damage to Mr Slater as possible. She expresses concern that their family income could be severely damaged in the event of publication and that she considered this to be Mr Rachinger's intention. She states her view that Mr Rachinger's objective is to destroy Mr Slater's website and business. She also noted that she has suffered from depression in the

recent past and that the thought of once again being thrust into the media limelight has made her feel physically ill. She anticipates that publication could cause her to have another depressive episode, putting strain on her marriage and negatively impacting her ability to care for her family and teach her daughter, who is currently home-schooled.

(h) The effect that he considers publication would have on his business. He advised verbally that his intention is to seek investors in relation to his business and to change its focus. He considers that his ability to take these steps will be severely affected by publication.

(i) References to death threats and clandestine visits to his property, which have occurred in the past. He anticipates the potential for further such threats.

(j) That he had suffered from depression and had been quite public about that. He is concerned that publication may have an adverse affect on his health.

[21] Mr Slater summarised his position succinctly. There ought to be ongoing and permanent suppression orders in place, both in relation to his proceeding and that of Mr Rachinger, in which he is the complainant. This is because of the extreme hardship that he considers he and his family will be exposed to in the event of publication. His essential point is that he believes he has become inveigled in what he describes as "a sort of sick game" between the police, Mr Rachinger and the media, who each, in their own ways, are working to continue ongoing attacks upon him and his family. Mr Slater told me that while he accepted that he worked in politics and was a political commentator and must, therefore, "take some of the slings and arrows associated with that", it is his family that he is most concerned about. Importantly, he went on to submit that if it were not for the effect on his family, he would not be opposing the lifting of suppression. He recognised the irony of his position, given that he has previously written strongly against suppression orders. The current experience had identified to him, he said, the issues that arise when the media "come for you".

Opposition Submissions

[22] Ms Wilson presented submissions on behalf of the media entities. After traversing the legal framework, she focussed her submissions on the very high level of hardship that must be established before the threshold of "extreme hardship" is met. She referred me to *Lewis v Wilson & Horton Ltd*[5] in which the Court of Appeal noted that although the circumstances personal to the person appearing before the court, his family and those who work for and with him, and the impact on financial and professional interests, are relevant:

> "It is usual for distress, embarrassment and adverse personal and financial consequences to attend criminal proceedings. Some damage out of the ordinary and disproportionate to the public interest and open justice in the particular case is required to displace the presumption in favour of reporting".[6]

[23] In response to Mr Slater's submission that he anticipated he would shortly be completing a diversion programme and, therefore, deemed to be acquitted, such that ongoing and permanent suppression was appropriate, Ms Wilson referred to *RM v New Zealand Police.*[7] In that case, the High Court recognised:

> "One of the purposes of s 200 was to raise the bar and enact a more stringent test for obtaining name suppression. This is apparent from s 200(2)(a) where, so far as the offender is concerned, even in the case of acquittal, publication of the name must cause extreme hardship".[8]

[24] Further, she referred to the High Court's statement that extreme hardship was obviously a high test and:

> "Obviously, too, the threshold is higher for all offenders, well-known or not, than it was before the legislation came into force. Courts must evaluate carefully the effect of publication on an offender's name. The principle of open justice in criminal courts and the need for media scrutiny must, in terms of previous Court of Appeal authorities, be given appropriate weight and is the starting point. Publication of any offender's name will cause hardship to the offender and his or her family. Publication will excite curiosity, criticism, social ostracism and embarrassment. But a suppression order can be made legitimately only if the damaging effects on the offender cause hardship which is extreme".[9]

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[5] *Lewis v Wilson & Horton Ltd [2000] 3 NZLR*
[6] at 42
[7] *RM v New Zealand Police* [2012] NZHC 2080
[8] at [15]
[9] at [43]

[25] Ms Wilson correctly submitted that in accordance with s 200(3), the fact that Mr Slater is well-known does not constitute extreme hardship. Ms Wilson referred to case law that supported that proposition.

[26] Ms Wilson observed that most of the bases upon which Mr Slater founded his submission that he and his family were likely to suffer extreme hardship in the event of publication, related not to the current proceedings but rather to the history of Mr Slater's involvement in the Dirty Politics matter and its aftermath. In addition, Ms Wilson noted that any increase or upsurge in media attention, or what he termed vilification, of Mr Slater and his family would largely be a natural consequence of Mr Slater's ongoing activities as a blogger and a natural consequence of his on-line presence and approach. She referred to the irony inherent in Mr Slater's application (a point he had himself noted). She made similar submissions in relation to any potential effect on his business.

[27] In relation to Mr Slater's assertion that he may suffer further ill health as the result of publication, Ms Wilson noted that while he had been on notice for some time of the hearing of this application, no evidence had been provided from any specialist medical provider in support of that submission.

[28] Ms Wilson also submitted that it was Mr Slater's own conduct and the apparent hypocrisy of his stance in relation to the current application that made this matter of particular interest to the public. Ms Wilson submitted that, to her knowledge, Mr Slater is the first person in New Zealand to be prosecuted under s 249(2)(a) of the Crimes Act 1961. This was of public interest. Further, the fact that he is undergoing diversion in relation to this charge is of public interest in and of itself.

[29] Ms Wilson submitted that the background to the charge against Mr Slater is already publicly known. I was referred to a number of media sites in which comment is made about the initial events that were to result in the charges being laid against Mr Slater and Mr Rachinger. None of these occurred after the interim name suppression orders were in place. Ms Wilson submitted that the fact that this

information is already in the public domain could be said to render futile any ongoing or permanent suppression.

[30] Finally, in summary, in relation to extreme hardship, Ms Wilson submitted that Mr Slater has not satisfied the Court that publication would be likely to cause extreme hardship to him or his family and, as such, in accordance with the two-stage analysis, that should be the end of the matter. While Ms Wilson made submissions regarding the second stage of a s 200 analysis, she encouraged me to conclude that no threshold ground has been established by Mr Slater such that it was not necessary for me to consider the second discretion stage of analysis.

Mr Rachinger

[31] Mr Rachinger provided written submissions and spoke to those. He observed that, in his view, these proceedings are of very high public interest. He also noted that Mr Slater is the first person to be charged with this offence in New Zealand and that because of the high public interest, he personally had declined diversion and explicitly declined to seek name suppression. He submitted that taking diversion is an admission of guilt by Mr Slater and that decisions regarding the continuing suppression do not impinge on Mr Slater's right to a fair trial, as he has already admitted guilt.

[32] Mr Rachinger wholly opposed suppression, noting that not revealing that justice has been done is to allow the perception that justice has not been done at all. Further, that suppressing the admission of guilt of Mr Slater's offence is contrary to the principles of open justice. He submitted that it would provide no deterrent to future criminals seeking the same things as Mr Slater.

Mr Prentice

[33] Mr Presland, representing Mr Prentice, submitted that Mr Prentice was the victim of the offending of Mr Slater. Mr Prentice is the operator of the blog site "The Standard". Mr Presland was instructed by Mr Prentice to make submissions pursuant to s 200(6). He submitted that this Court should take into account

Mr Prentice's views in accordance with s 28 of the Victims' Rights Act 2002. For present purposes, I am satisfied that Mr Prentice is, indeed, a victim as defined in s 4 of that Act. He was a person against whom an offence was committed in that it appears he was the owner of the computer and files involved.

[34] In any event, that status is somewhat academic. The submissions made by Mr Presland on behalf of Mr Prentice did not expand on those made by Ms Wilson. Mr Presland focussed on the requirement for extreme hardship under s 200(2)(a) and submitted that the most important principle was that of open justice. He submitted that it was only in exceptional circumstances that suppression should be allowed to continue.

The Police

[35] Mr Kayes advised that the police were neutral on suppression and abided the decision of the Court. In relation to the current status of Mr Slater's proceeding, Mr Kayes confirmed the police expectation that Mr Slater would shortly complete the diversion programme and, having done so, would be regarded as acquitted. He submitted that this was a factor to be taken into account but was not decisive. Mr Kayes noted that while the police had sought the interim suppression orders, that did not in any way indicate a view in relation to ongoing or permanent suppression.

Decision

[36] After considering all the submissions made by Mr Slater and those in opposition, I am not satisfied that publication would be likely to cause extreme hardship to Mr Slater or his family.

[37] The starting point is the principle of open justice in the criminal courts. The likely hardship of publication must be extreme to legitimately make an ongoing or permanent suppression order, as sought by Mr Slater. It must be more than that which might be considered the usual distress and embarrassment that being involved in proceedings in the criminal courts would usually attract. That is not so in this case. I accept that Mr Slater and his family may well suffer some hardship if

publication occurs. However, it will not, in my view, be extreme hardship as would be required to justify ongoing and permanent suppression.

[38] Mr Slater submitted that he has been a victim of actions by Mr Rachinger, the police and various players in the media and he has taken responsibility for his actions by entering the diversion programme. I accept that he is likely soon to complete the diversion programme and in that case will be acquitted of the charge against him. However, s 200 applies equally to persons charged with, convicted or acquitted of an offence. Consistent with Mr Kayes' submission, I do not consider these circumstances alter the nature of the two stage analysis required by s 200 which is well established in case law.

[39] Mr Slater submitted in detail in relation to the difficulties that he and his family faced as a consequence of Mr Hagar's book *Dirty Politics*. Mr Slater himself noted that he had been referred to as "the most hated man in New Zealand".

[40] Mr Slater was at pains to submit that he has taken steps to lower his public profile since those events. He nevertheless anticipates an "upswing" in further vilification following any publication in relation to this matter. He considers the "upswing" will constitute the extreme hardship caused to him and his family which justifies ongoing and permanent suppression. He also said that it was his concern for his family that motivated him to make the application.

[41] The fact that Mr Slater could be said to be well-known does not of itself mean that publication will result in extreme hardship.

[42] Further, Mr Wilson submitted that any hardship experienced by Mr Slater and his family in relation to *Dirty Politics* has already occurred and I accept that that hardship can not constitute the extreme hardship required to support continued and permanent suppression in this matter. Nevertheless, both his public profile and the historical experience of Mr Slater and his family are factors (among others) relevant to consideration of the extent of any hardship that Mr Slater or his family may experience in the future.

[43] However, I am not satisfied that any hardship that may occur following publication in relation to this matter would constitute extreme hardship, as that threshold requirement has been defined in case law. Neither am I satisfied that any hardship that may occur would relate directly to publication relevant to this matter as opposed to being the natural consequence of publicity that has already occurred in relation to it, Mr Slater's activities as a political commentator, including in relation to suppression applications such as this one, and the focus that his activities have brought upon him and his family.

[44] Given the conclusion that I have reached in relation to the threshold requirement under s 200(2)(a), it has not been necessary for me to consider the second stage of the s 200 analysis. If, contrary to the view I have reached, I had been satisfied that publication would be likely to cause extreme hardship to Mr Slater or his family, then in undertaking the weighing of the competing interests of Mr Slater and his family and that of the public in the context of the interests of open justice, I would not have been minded to exercise a discretion to grant Mr Slater's application. I do not consider that, in the circumstances of this application, the need for open justice would have been outweighed by any hardship that may be caused by publication to Mr Slater and his family.

[45] I am not without some sympathy for Mr Slater's position and that of his family. He has accepted his guilt and embarked upon a programme of diversion to address that. He has candidly acknowledged the mistakes that he has made and that he wishes to put those behind him and that he is concerned about the effect of publication on his family. I do not doubt the genuineness of that position. However, as Mr Slater has, himself, acknowledged, suppression is not the norm and I have concluded that it cannot be granted in these proceedings.

Interim Orders

[46] The interim orders for suppression granted on 17 December 2015 will lapse at 4.00 pm on Thursday, 10 May. As to the application for access to the Court file, that application is granted with respect to the contents of the file, with the exception of the affidavits of Juana Mary Atkins and Cadell Cameron Slater, filed in support of

Mr Slater's application and the submissions made in relation to this application. Finally, I suppress paragraphs 19(e) and (f) of this decision. Acknowledging Mr Slater's concern that it is the situation of his family that was the primary motivator for his application, it is appropriate that the personal matters referred to are not made public.

R McIlraith
District Court Judge