(1) NOTE ALL NON-PUBLICATION ORDERS MADE BY THE TRIBUNAL HAVE BEEN RESCINDED AND NO LONGER APPLY

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 30**

	Reference No. HRRT 040/2015
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**RACHEL MACGREGOR**
	PLAINTIFF
AND	**COLIN CRAIG**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms K Anderson, Member
Ms GJ Goodwin, Member

REPRESENTATION:
Mr HJP Wilson and Ms L Clark for plaintiff
Mr SJ Mills QC for defendant
Mr A Romanos for Mr JH Williams (watching brief)

DATE OF HEARING: **30 August 2016**

DATE OF DECISION: **7 September 2016**

DECISION OF TRIBUNAL GRANTING LIMITED EXTENSION OF CONFIDENTIALITY ORDERS[1]

INTRODUCTION

[1] The circumstances of this case are unique. The Tribunal is asked to make non-publication orders in relation to its final determination made on 2 March 2016 in order to

[1] [This decision is to be cited as: *MacGregor v Craig (Limited Extension of Confidentiality Orders)* [2016] NZHRRT 30. Non-publication orders made in the High Court by Katz J on 12 September 2016 in CIV-2015-404-1845 were on 30 September 2016 lifted with effect from 5:00pm on Monday 3 October 2016.]

protect Mr Craig's fair trial rights before a superior court, being the High Court. That High Court matter is the defamation proceedings brought by Mr Jordan Williams against Mr Craig in *Williams v Craig* HC Auckland CIV-2015-404-1845 (*Williams* proceeding).

[2] The *Williams* proceeding, set down for trial by jury for a period of three to five weeks commencing on Monday, 5 September 2016, is now in its third day.

[3] Ms MacGregor opposes the application, submitting that any risk to Mr Craig's right to a fair trial is a matter which can be managed, and should be managed in the High Court, by the trial judge. In the alternative it is submitted the most appropriate way to manage any risk is for the Tribunal's decision to be suppressed until such time as the jury has been sworn in.

[4] The Tribunal is of the view a decision whether Mr Craig's right to a fair trial is at risk is a decision best made in the High Court by the trial judge and that the interests of Mr Williams, Mr Craig, the other three defendants and of Ms MacGregor will be adequately protected by the Tribunal making an interim order not for the length of the High Court trial but until the trial judge can reach a view on the degree to which the fair trial rights of Mr Craig and the other parties justify the making of non-publication orders and the terms of those orders. The Tribunal itself is not in a position to make that assessment in a vacuum or to "manage" fair trial rights in the course of the inevitably fluctuating circumstances of a lengthy jury trial in a superior jurisdiction.

[5] We regret that the urgency with which this decision has been published has precluded opportunity for the preparation of a more detailed decision. Of necessity we have dealt only with the main points advanced by the parties.

BACKGROUND

[6] In *MacGregor v Craig* [2016] NZHRRT 6 (the Substantive Decision) the Tribunal on 2 March 2016 made a finding Mr Craig breached a 4 May 2015 settlement agreement in which Ms MacGregor was the other party. Mr Craig's counterclaim was dismissed. Significant remedies under the Human Rights Act 1993 were granted to Ms MacGregor. In addition interim non-publication orders were made prohibiting publication of the names of the parties and of any details which could lead to their identification. The form of any final orders (if any) was left to be determined at a hearing to be held at a later date.

[7] That further hearing took place on 16 May 2016. Ms MacGregor sought the lifting of all restrictions on publication while Mr Craig submitted the interim orders should be made final.

[8] In a decision given on 21 June 2016 the Tribunal rescinded all interim non-publication orders apart from the requirement that leave be obtained by any non-party to search the Tribunal file. This second decision, cited as *MacGregor v Craig (Rescission of Confidentiality Orders)* [2016] NZHRRT 23, will be referred to as the Rescission Decision.

[9] Mr Craig appealed the Rescission Decision but not the Substantive Decision. His appeal to the High Court was heard at Wellington on 27 July 2016 before Cull J. Central to his case on appeal was the submission the Tribunal had failed to give sufficient weight to the fact that the *Williams* defamation proceedings were set down for a trial by jury for a period of three to five weeks commencing on 5 September 2016 and (on his argument) there was a high likelihood publication of the Tribunal's Substantive Decision so close to the commencement of the trial would result in intense media interest which jurors (or potential jurors) could not escape, thereby prejudicing Mr Craig's right to a fair

trial. Mr Craig's further submission, as recorded by Cull J in her *Minute* of 29 July 2016 at [5], was that the trial judge (then Toogood J) in the *Williams* proceeding should have opportunity to consider the issue:

> (e) That as a result, the interests of the fair, impartial and efficient administration of justice outweigh the principle of open justice, and are not matters which should be determined without the opportunity for the Judge in the *Williams* proceeding to consider the issue.

[10] The *Minute* records two further submissions made by Mr Craig. The first reinforced his submission that the High Court trial judge should have an opportunity to consider the issue of publication of the Tribunal's decisions. The second emphasised that while at the December 2015 substantive hearing before the Tribunal Mr Craig was represented by experienced counsel, Mr Craig elected to represent himself at the 16 May 2016 rescission hearing:

> [7] Two further submissions were made for Mr Craig. The first was that Toogood J as the Trial Judge, in the forthcoming defamation proceeding in the *Williams* proceeding will be dealing with pre-trial issues, including admissibility of evidence, confidentiality and non-publication applications, in pre-trial hearings scheduled for the forthcoming week commencing 1 August 2016. It was more appropriate that Toogood J, who is seized of the pleadings and matters at issue in the defamation trial, should also deal with non-publication orders affecting the Tribunal's decisions in the context of the three week defamation trial.
>
> [8] The second matter was that Mr Craig was unrepresented by counsel before the Tribunal on 21 June 2016. Given that he was a lay litigant, Mr Mills submitted that the issues of fair trial and the Superior Court's rulings on suppression orders, were not addressed before the Tribunal.

[11] Cull J at [15] accordingly identified two matters as having been raised in the High Court but which were not before the Tribunal. First, the fact that Toogood J was in the week commencing 1 August 2016 expected to hear pre-trial argument relating to the Tribunal's decision, the transcript of evidence and related orders, in the context of the 5 September defamation trial. Second, that as Mr Craig was unrepresented, the Tribunal had not heard submissions addressing the fair trial point:

> [15] There are two matters, which have been raised in this Court, but do not appear to have been before the Tribunal. They are:
>
> 1. The Trial Judge in Auckland, Toogood J, is scheduled in the week commencing 1 August 2016 to hear matters relating to the Tribunal's decision, transcript of evidence and related orders, in the context of the 5 September defamation trial.
>
> 2. Mr Craig was unrepresented and the submissions filed in this Court addressing the right to a fair hearing under s 27 of the New Zealand Bill of Rights Act, with the relevant authorities, have not been made to the Tribunal.

[12] In these circumstances Cull J at [17] and [18] declined to determine the appeal. Instead an order was made under s 123(7) of the Human Rights Act referring the matter to the Tribunal for further consideration:

> [18] It is for the Tribunal then to determine whether the matters raised by the parties need further hearing. The Tribunal can assess what effect that has on the Tribunal's discretion to reinstate or confirm its Rescission Decision.

[13] The interim stay directed by Cull J at [19] clearly envisaged argument over the non-publication orders would be resolved either by the Tribunal or by the High Court:

> [19] In the interim, I direct under s 123(9) of the Human Rights Act 1993 that the Rescission Decision is stayed. There is to be no public release or reporting of the hearing on 27 July 2016, or reporting of the Tribunal's substantive decision or the Rescission decision until further order of the Tribunal, **or of the High Court**. [Emphasis added]

[14] Responding to a subsequent enquiry by the Tribunal, counsel for Mr Craig by memorandum dated 2 August 2016 clarified that at the 1 August 2016 hearing before Toogood J no application had been made by any of the parties for non-publication or other confidentiality orders though the Judge was alerted to the s 123(7) referral order made by Cull J on 29 July 2016. He was also made aware that depending on the outcome of the referral to the Tribunal, there might be a need for the High Court trial judge to deal with issues.

[15] It is the Tribunal's present understanding that no non-publication or other confidentiality orders have been made in the *Williams* proceeding. Nor have they been made in relation to the other three proceedings in which Mr Craig is involved as listed in his counsel's memorandum of 2 August 2016:

- *Craig v Social Media Consultants & Williams* – for hearing 6 December 2016
- *Craig v Stringer* – for hearing on 6 March 2017 (by jury)
- *Craig v Slater* – for hearing on 7 May 2017 (by jury).

Update regarding the *Williams* proceeding

[16] At the hearing on 30 August 2016 Mr Mills QC for Mr Craig provided the following information regarding the High Court trial in the *Williams* proceeding:

> **[16.1]** The case remained set down for a trial by jury for a period of between three and five weeks commencing on Monday 5 September 2016.
>
> **[16.2]** Toogood J was no longer the trial judge owing to the fact that a criminal trial in Rotorua over which he is presently presiding will not end before the *Williams* proceeding commences.
>
> **[16.3]** The new trial judge for the *Williams* proceeding is Katz J. She has had no prior involvement in the proceedings.
>
> **[16.4]** On Sunday 28 August 2016 (one week before the trial date) Mr Mills was advised by Mr PA McKnight (counsel for Mr Williams) that Mr Williams would be seeking a ruling from the trial judge that the Tribunal's Substantive Decision be included in the common bundle. If it was not so included Mr Williams considered it possible the trial would have to be adjourned.
>
> **[16.5]** Ms MacGregor will be called by Mr Williams as a witness at the trial. Only an unsigned copy of her brief of evidence had been filed and admissibility issues had yet to be determined.
>
> **[16.6]** If the trial was to be adjourned the next hearing date was potentially May 2017.
>
> **[16.7]** The question of the inclusion of the Substantive Decision in the common bundle (along with other pre-trial issues) was to be argued before Toogood J on the afternoon of 30 August 2016 at Rotorua.

[17] Mr Mills told the Tribunal that should the Substantive Decision ultimately be included in the common bundle (and therefore made available to the jury) the application by Mr Craig to the Tribunal for non-publication orders would have become overtaken by events and it would be difficult to see how the orders could then be justified. Likewise, if the trial was put off to May 2017 or some other distant date it was doubtful whether Mr Craig could advance an arguable case in support of the making of non-publication orders.

[18] The Tribunal has since been advised that following a hearing at Rotorua on 30 August 2016 Toogood J determined the decisions of the Tribunal should not form part of the common bundle though it was accepted the substance of the Tribunal's decisions could be put to Mr Craig in cross-examination for response without attributing any conclusions on those matters to the Tribunal.

[19] As mentioned, the trial did in fact commence in the High Court at Auckland on Monday 5 September 2016 before Katz J and a jury.

THE SUBMISSIONS

The submissions for Mr Craig

[20] The essential point now made by Mr Craig is that because the Tribunal's Substantive Decision is strongly critical of Mr Craig and makes a number of findings adverse to his credibility, publication of the decision on the eve of or in the course of the defamation proceedings will seriously prejudice Mr Craig's right to a fair trial.

[21] The interests of the fair, impartial and efficient administration of justice outweigh the principle of open justice and are not matters which should be determined without the opportunity for the High Court trial judge in the *Williams* proceeding to consider the issue.

[22] Mr Craig does not seek permanent suppression of the substantive decision. He seeks only a temporary extension of the Tribunal's interim suppression orders to the end of the High Court trial.

[23] It was submitted the central issue in the s 123(7) rehearing was whether publication of the Substantive Decision was likely to prejudice Mr Craig's fair trial rights in the defamation proceedings and whether the Tribunal had sufficiently considered those rights in ordering the public release of the Substantive Decision.

[24] Mr Mills helpfully took the Tribunal through parts of the statement of defence filed by Mr Craig in the *Williams* proceeding and explained the relationship of some of the Tribunal's findings to the pleaded defence of qualified privilege for reply to an attack, an explanation which Mr Craig himself had not given at the 16 May 2016 hearing. Mr Mills regretted the issues of law and fact relevant to the fair trial issue had not been sufficiently brought to the attention of the Tribunal at that hearing but submitted that in reaching its new decision the Tribunal must necessarily engage with the case as now presented by the parties supplemented as it was by the further evidence filed by both Mr Craig and Ms MacGregor.

[25] As to the submission by Ms MacGregor that the non-publication order should expire once the High Court jury was sworn, Mr Mills argued this would place undue pressure on the trial judge, particularly bearing in mind recent developments which have resulted in Katz J being assigned to the case with little or no opportunity for preparation.

The submissions for Ms MacGregor

[26] Ms MacGregor did not dispute Mr Craig's right, in civil proceedings, to a fair trial but submitted (inter alia):

> **[26.1]** The ensuring of that right is best managed in the context of the trial itself.
>
> **[26.2]** Mr Craig's right had to be balanced against Ms MacGregor's right to freedom of expression and in particular her freedom to respond to media

enquiries by referring to the findings made (in her favour) by the Tribunal in its Substantive Decision.

[26.3] Mr Craig had not established a real risk of prejudice to a fair trial. A jury could be expected to distinguish between the Tribunal's findings relating to Mr Craig's failure to comply with his confidentiality undertakings to Ms MacGregor on the one hand and on the other the issues the jury will be charged to decide relating to Mr Williams' action against Mr Craig and, in turn, Mr Craig's response to those action.

[26.4] The jury, like any other jury, will receive instructions from the Bench about their role and the basis on which they must consider the evidence before them.

[26.5] The cases relied on by Mr Craig to support his case universally involved suppression orders in circumstances where the trial court itself had not yet had opportunity to hear all the evidence and to make a final decision. By way of contrast, the situation in the present case was very different. The Tribunal has heard all the evidence and delivered its Substantive Decision as long ago as 2 March 2016.

[26.6] Mr Craig's brief of evidence filed in the High Court continues to repeat claims rejected by the Tribunal, claims which paint him in the most positive light notwithstanding the Tribunal's adverse findings. Those assertions are unlikely to be corrected in the High Court. Taken as a whole, the narrative presented by Mr Craig in his High Court statement gives a misleading and incorrect characterisation of events which, on Ms MacGregor's submission, reflects adversely and unfairly on the actions and reputation of Ms MacGregor.

[26.7] Ms MacGregor, as the plaintiff in the Tribunal's proceeding, is entitled to the benefit of the publication of a decision entirely in her favour. She is further entitled to the benefit of publication in circumstances, as apply here, where Mr Craig intends to repeat large parts of the information already tested before the Tribunal.

[26.8] There are other means of protecting fair trial rights. In particular it is the responsibility of the High Court trial judge to manage the trial with that right in mind. The responsibility is that of the trial judge, a responsibility which the Tribunal can safely hand over once the jury is sworn in. Such timing would avoid the pre-trial "taint" relied on by Mr Craig but also provide Ms MacGregor with the protection owed to her and afforded by the Rescission Decision.

[27] It was also submitted for Ms MacGregor that the fair trial issue had already been determined by the Tribunal in its Rescission Decision but it was accepted the Tribunal, on the s 123(7) reconsideration, was required to take into account the fresh evidence now filed by both parties and the submissions as now framed, particularly the submissions for Mr Craig.

THE LEGAL ISSUES

The right to a fair trial

[28] As New Zealand is a party to the International Covenant on Civil and Political Rights, 1966 (ICCPR) a convenient starting point for a discussion of the right to a fair trial is Article 14 of the Covenant. In this Article the right to a fair trial is explicitly acknowledged as a right applying equally to both criminal and civil proceedings. As stated by the Human Rights Committee in its *General Comment No. 32 (Article 14: Right*

to equality before courts and tribunals and to a fair trial) (2007) at para [2], the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights. Article 14(1) relevantly provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law …

[29] In the opinion of the Human Rights Committee (and given the role and expertise of the Committee it is an opinion deserving of respect), the concept of a "suit at law" encompasses (inter alia) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law. See *General Comment No. 32* at para [16].

[30] Applying that interpretation to the facts of the case there can be no doubt the *Williams* proceeding is a "suit at law".

[31] However, while the right to a fair trial in the criminal context has been expressly domesticated into New Zealand law by s 25 of the New Zealand Bill of Rights Act 1990, there is no direct civil law analogue. While s 27(1) of the Bill of Rights recognises a right to the observance of the principles of natural justice by a court or tribunal, there is no explicit reference to a right to a fair trial:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[32] However, this provision is not restricted to a specific class of natural justice rights, nor is it restricted by Article 14(1) of the ICCPR. See *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [21] and Butler & Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) (Butler & Butler) at [25.2.4]. In addition, in interpreting the Bill of Rights a generous interpretation designed to give to individuals the full measure of the rights is required: *Combined Beneficiaries Union Inc v Auckland City COGS Committee* at [31].

[33] Nevertheless, on the specific question whether s 27(1) confers, in the civil context, a right to a fair trial, the only decision cited by the parties was *Anderson v Hawke* [2016] NZHC 607 where Heath J at [9] made passing reference to the connection between s 27(1) of the Bill of Rights and fair trial rights in the civil context:

> [9] The importance of those two policy considerations can be gleaned from rights affirmed by the New Zealand Bill of Rights Act 1990. Section 11 guarantees the right to refuse to undergo any medical treatment. Section 27 reflects a right "to the observance of the principles of natural justice" by any judicial authority. That is an endorsement of fair trial rights, in a civil context.

[34] In the present case counsel for Ms MacGregor did not challenge Mr Craig's assertion of a right to a fair trial in the context of the *Williams* proceedings. Because the

parties are in agreement on the point we are content to proceed on the assumption the right exists in New Zealand domestic law either at common law or under s 27 of the Bill of Rights. As stated by Elias CJ in *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [18], a principal responsibility of the courts in securing the proper administration of justice is protection of the right to a fair trial.

The test for when the right to a fair trial is at risk

[35] In the criminal context suppression orders can be made under ss 200(2)(d) and 205(2)(b) of the Criminal Procedure Act 2011 where there is "a real risk of prejudice to a fair trial". There is no equivalent provision in the civil context.

[36] In *Siemer* Elias CJ at [20] spoke of "a real risk that the course of justice would be impeded or prejudiced". The context of the statement makes it plain the test was not directed at the Criminal Procedure Act nor confined to criminal proceedings:

> Since the New Zealand Bill of Rights Act must be observed by the judiciary, a suppression order (whether under a statutory provision or under the inherent power of the court, where the inherent power is not excluded by statute) may lawfully be made by a court for fair trial purposes only where publication would create a real risk that the course of justice would be impeded or prejudiced. Rights to fair trial and freedom of expression are important requirements of law against which the legality of non-publication orders fall to be assessed.
>
> [Footnote citations omitted]

[37] The majority decision at [158] proposes the same formulation of "a real risk of prejudice to a fair trial right". Once again the context makes it clear the statement was not contextually confined to criminal proceedings.

[38] Because the parties were not in dispute over the formulation of the test, we are content to adopt it without further discussion. There is in any event no logical reason why the criminal and civil tests should be different. The right to a fair trial in both contexts is essential to the administration of justice generally and to the integrity of both courts and tribunals.

Reconciling rights

[39] Mr Craig relies on the right to a fair trial while Ms MacGregor relies on the right to freedom of expression. In addition sight must not be lost of the fact there is also the principle of open justice addressed by the Tribunal in some detail in the Rescission Decision at [27] to [30]. While we do not intend repeating what is said there the importance of the principle must not be underestimated in the present context.

[40] In their submissions counsel referred to these rights as being in competition. However, as noted by the Chief Justice in *Siemer* at [19], the right to a fair trial is not a relative right which must be balanced against other rights and interests recognised by law. Where a fair trial is at risk owing to publicity, the deferral of publication is justified:

> [19] The right to fair trial is not qualified in the International Covenant on Civil and Political Rights. It is an absolute right, not a relative right which must be balanced against other rights and interests recognised by law. Where fair trial is risked through pre-trial processes being publicised, there may be justification for deferring publication and restricting freedom of speech, at least for the pre-trial period.
>
> [Footnote citations omitted]

[41] See to similar effect Butler & Butler at [13.10.6]. Although the authors there address suppression orders in the context of criminal trials, the statement of principle has equal application in the context of civil trials:

> The Court of Appeal continues to see a fair trial as not only being the fundamental right of the individual but as permeating the very fabric of a free and democratic society. Although the right to a fair trial is a stand-alone right of the individual, its status comes from the importance of the proper administration of justice. If the jury has been influenced by media reports pre-trial, not only are the defendant's fair trial rights potentially infringed, but the ability of the court to "*do* justice" is inhibited. For this reason the courts, at times, continue to insist that the right to a fair trial must prevail over the principles of free speech.

[42] In *R v Burns (Travis)* [2002] 1 NZLR 387 (CA) the Court helpfully identified some of the factors to be taken into account when considering whether to grant or revoke a suppression order including the principle of open justice. While the particular context was trial for a criminal offence, the factors are in our opinion nevertheless of assistance where suppression orders arise in the civil context:

> [11] The comments in *R v Liddell* and the *Gisborne Herald* case clarify the nature of the balancing exercise to be undertaken when considering whether to grant or revoke a suppression order. The public's right to receive information, the principle of open justice, the type of information in question, its public importance and interest, its likely circulation, methods of diluting its effect on the minds of potential jurors, the presumption of innocence, and other issues are all to be balanced against its prejudicial effect. But once this exercise has been completed and it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of freedom of expression and open justice must then be departed from; not balanced against. There is no room in a civilised society to conclude that, "on balance", an accused should be compelled to face an unfair trial.

[43] It is well recognised a suppression order can be made consistently with the Bill of Rights where that represents the appropriate resolution of the tension between freedom of expression (which includes open justice) and fair trial rights. See the majority decision in *Siemer* at [158] and [159]:

> [158] A suppression order can be made consistently with the New Zealand Bill of Rights Act where that represents the appropriate resolution of the tension between freedom of expression and fair trial rights. New Zealand courts have recognised that the right of freedom of expression supports contemporaneous discussion of events in the criminal justice process and must be taken into account along with the right of an accused person to a fair and public hearing by an independent court. Both values must be given serious consideration and, so far as possible, fair trial rights and freedom of expression should each be accommodated. But, where publication of certain information would give rise to a real risk of prejudice to a fair trial right, freedom of expression may be temporarily limited by a suppression order in order to avoid that risk. In our view, this approach properly recognises the special importance of fair trial rights.
>
> [159] An interim ban, pending trial, on the publication of material which gives rise to a real risk of prejudice to a fair trial, is a reasonable limit on the s 14 right of freedom of expression. As a limit imposed by an order of court made under the common law, it is prescribed by law in terms of s 5. As well, the protection of fair trial rights is a sufficiently important objective to warrant a temporary limitation on freedom of expression. The requirement, before a suppression order can properly be made, that publication of the material would create a real risk of prejudice to a fair trial, ensures that suppression orders are only made where that is rationally connected to the objective of protecting fair trial rights. Fair trial rights are important and, where there is a real risk that they will be negated, a pre-emptive but temporary publication ban is a reasonable and proportionate limit on freedom of expression, to avoid that risk. The scope of such a suppression order (for example, the material suppressed or the duration of the order) should be defined in such a way that ensures freedom of expression is limited only to the extent reasonably necessary to preserve fair trial rights.
>
> [Footnote citations omitted]

Who is to decide whether the right to a fair trial is at risk

[44] Logic would dictate that the decision-maker best equipped to determine whether the fair trial rights of a particular litigant are at risk (and the steps necessary to address that risk) is the decision-maker who is possessed of:

[44.1] Knowledge of the facts and circumstances in which the risk has arisen (or may arise); and who has

[44.2] The widest array of powers to address that risk.

[45] As to the issue of powers, unlike the High Court, the Tribunal is not a court of general jurisdiction, nor is it possessed of "all judicial jurisdiction which may be necessary to administer the laws of New Zealand" (Judicature Act 1908, s 16). It is an inferior tribunal of limited statutory jurisdiction. It has no inherent jurisdiction though inherent powers may exist. See generally *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 (CA) at [16]; *Transport Accident Commission v Wellington District Court* [2008] NZAR 595 at [16] (Dobson J) and *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 at 701 (Wylie J).

[46] There can be no doubt the adjectival jurisdiction and powers of the High Court which enable it to give effect to its substantive jurisdiction far exceed such inherent powers as the Tribunal may possess. A brief summary of the inherent jurisdiction of the High Court was provided in *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [16]:

> [16] The adjectival jurisdiction and powers of the High Court, which enable it to give effect to its substantive jurisdiction, are part of the general jurisdiction recognised by s 16 of the Judicature Act. They were derived from the practice of the superior Courts in England as at 1860, based on their inherent jurisdiction. Except to the extent modified by statute and rules, the Court continues to have inherent jurisdiction and powers to determine its own procedure. The inherent jurisdiction is not ousted by the adoption of rules, but is regulated by the rules, so far as they extend. To the extent that the rules do not cover a situation, the inherent jurisdiction supplies the deficiency. The inherent jurisdiction is:
>
> > "… the authority of the judiciary to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."
>
> [Footnote citations omitted]

[47] This passage was cited with approval by the majority in *Siemer* at [114], the majority stating at [114]:

> The courts' inherent powers include all, but only, such powers as are necessary to enable a court to act effectively and uphold the administration of justice within its jurisdiction. Their scope extends to preventing abuse of the courts' processes and protecting the fair trial rights of an accused. The inherent powers of a court do not, however, extend to furthering the general public interest beyond that concerned with the due administration of justice. Examples of the inherent powers which are necessary to enable a court to act effectively within its jurisdiction include powers to dismiss or stay proceedings, to control barristers and solicitors and to issue orders to preserve evidence. [Footnote citations omitted]

Useful reference can also be made to [173](d) and [174] of the majority decision.

[48] In the present case not only is the High Court possessed of an inherent jurisdiction and powers which far exceed those of the Tribunal, the High Court is also the court before which the trial is taking place. The trial judge is in fact the person with knowledge of the facts and best placed to monitor the requirements of a fair trial (to all parties) as dictated by the ebb and flow of the evidence, admissibility rulings, events both inside the hearing room and without and so on. The Tribunal, not having any engagement in or presence at the High Court trial can do no more than hazard a guess as to what might happen in the unknown future course of the trial and to then fashion a remedy which may (or may not) address the particular event. The Tribunal's remedy may be either too broad or too narrow or simply inappropriate, if not harmful. If too broad the Tribunal's

order will offend the twin rules that first, suppression orders are made only where there is a rational connection to the objective of protecting fair trial rights and second, that freedom of expression may be temporarily limited by a suppression order only to the degree necessary to avoid the risk of prejudice to a fair trial. Only the trial judge is in a position to monitor and to assess whether any suppression order can be made consistently with the Bill of Rights and whether the order sought represents the appropriate resolution of the tension between freedom of expression, open justice and fair trial rights. As stated in *Siemer* at [158] so far as possible, those rights should each be accommodated. How that accommodation is to be shaped to fit the particular circumstances of the case is an assessment best made by the trial judge.

[49] The Tribunal must avoid over-reach. Otherwise it will be in a position not dissimilar to that of the "third parties" spoken of by the majority in *Siemer* at [173] who might "get it wrong":

> [173] These mechanisms, however, are by no means fail-safe and to date the New Zealand view has been that they do not adequately protect fair trial rights and the administration of justice. We consider that this view is well-founded:
>
> (a) A system which leaves publication decisions (particularly the assessment whether a publication will prejudice fair trial rights) entirely to third parties (who may be neither dispassionate nor fully informed) creates a risk that those third parties will get it wrong, resulting in prejudice to fair trial rights which cannot be remedied, after the fact, by prosecution for contempt of court.

APPLICATION OF THE LAW TO THE FACTS

[50] Given the defamation trial is to take place not before the Tribunal but before the High Court and given the High Court has powers to ensure a fair trial which go well beyond the powers possessed by the Tribunal, and further given the trial judge will be able to monitor all Bill of Rights issues, we have reached the conclusion the making of any decision and the management of that decision should be left to the High Court. It would be wrong in principle for the Tribunal to continue its non-publication orders to the end of the trial. The Tribunal simply does not know what will happen during the course of an intense three to five week period and what the requirements of a fair trial will be.

[51] All the Tribunal can say on the information presently to hand is that the rescission by the Tribunal of its non-publication order at the same time as the commencement of the *Williams* proceeding will create a real risk of media exposure and of prejudice to a fair trial, albeit a temporary risk. However, once the trial commences the trial judge will be best placed to determine, day by day, event by event, what in the particular circumstances the requirements of a fair trial turn out to be. For example, if the Tribunal's Substantive Decision is admitted in evidence, the case for non-publication orders relating to that decision could well fall away. Similarly, if for any reason the trial is postponed into the future, the case for non-publication may well weaken to a substantial degree.

[52] In our view the Tribunal has a responsibility to ensure:

> **[52.1]** Any decision it makes on the present application does not pre-empt any conclusion which the trial judge may come to; and that
>
> **[52.2]** A decision on the present application must be made in a manner which allows the orderly transfer of the decision-making responsibility from the Tribunal to the High Court.

[53] This end will be achieved by continuing the non-publication orders up to 5pm on Monday 12 September 2016, being the commencement of the second week of the trial. By then the trial judge will be in a position to determine whether a non-publication order should be made by the High Court and if so, its terms and duration.

[54] We believe this is consistent with the submission made by Mr Craig's counsel to Toogood J (and to the Tribunal) that the trial judge have opportunity to consider the issue and consistent also with the indication given by Cull J that the High Court determine whether the Tribunal's decisions be published.

ORDERS

[55] The Tribunal orders:

> **[55.1]** The order made by the Tribunal at para [149.2] of the decision given on 2 March 2016 continues to operate.
>
> **[55.2]** All restrictions on the publication of the Tribunal decision delivered on 2 March 2016 are, with effect from 5pm on Monday 12 September 2016, rescinded as are all restrictions on the publication of all other decisions of the Tribunal or Chairperson given prior to 2 March 2016 or after 2 March 2016.
>
> **[55.3]** There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and defendant are to be notified of any request to search the file and given an opportunity to be heard on that application.

COSTS

[56] While costs in respect of the substantive decision have been resolved, costs in relation to the hearings on 16 May 2016 and 30 August 2016 remain in dispute.

[57] As is apparent from the *Minute* issued by Cull J, Mr Craig's failure to argue his fair trial rights before the Tribunal led to his appeal to the High Court. At the reconsideration hearing before the Tribunal the Rescission Decision was not challenged by Mr Craig except to the extent it was submitted no or no sufficient consideration had been given to the fair trial issue, an issue which Mr Craig had not raised at the 16 May 2016 hearing, at least not to any degree which could be discerned by the Tribunal. Such was tacitly conceded by Mr Mills.

[58] In the result Mr Craig's own conduct has led to the Tribunal having to conduct two hearings instead of one. Mr Craig's election to represent himself at the 16 May 2016 hearing was a deliberate one and not one arising from necessity. He advised the Tribunal he had made an informed decision not to be legally represented even though his solicitors (Chapman Tripp) continued to represent him in respect of other litigation.

[59] At the reconsideration hearing Mr Craig's position was very different to the one advanced at the 16 May 2016 hearing. Whereas at that hearing he argued the interim non-publication orders should be made permanent, Mr Mills at the 30 August 2016 hearing made it clear such was no longer the case. Mr Craig now sought only a very limited extension for the duration of the trial which was to commence the following week.

[60] The fact that the Tribunal's interim orders have by this present decision been extended for the short period of one week is not in any sense a victory for Mr Craig. The order has been made simply to transfer the decision-making power to where it properly belongs. The Tribunal is more than surprised that Mr Craig has at no time made

application to the High Court for non-publication orders even though the making of such application has been foreshadowed on more than one occasion and there has been ample opportunity for such application to be made.

[61] By way of emphasis we repeat that the only reason the Tribunal has extended the interim non-publication orders for a brief period is because of the proximity of our decision to the commencement of the *Williams* proceeding.

[62] In our view Ms MacGregor has been compelled, quite unnecessarily, to appear twice before the Tribunal to argue much the same point. She has in fact secured the rescission of the interim orders made by the Tribunal, orders which Mr Craig now acknowledges cannot survive beyond the conclusion of the present High Court trial.

[63] In relation to the 16 May 2016 hearing Ms MacGregor seeks actual costs of $27,587 (plus GST) and in relation to the 30 August 2016 hearing seeks $7,863 (plus GST), totalling $35,450 (plus GST).

[64] In *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 it was held the Tribunal correctly regards s 105 of the Human Rights Act 1993 as reflecting the different nature of its jurisdiction from that of ordinary civil courts and to be cautious about applying the conventional civil costs regime to its jurisdiction.

[65] In the present case Ms MacGregor succeeded (comprehensively) in establishing Mr Craig breached his obligations under the confidentiality agreement and under the Human Rights Act itself. She has also succeeded in persuading the Tribunal the interim confidentiality orders should be rescinded. All Mr Craig has managed to do is to postpone such rescission until a judge of the High Court, in the context of very different litigation, determines whether confidentiality orders of some kind are required.

[66] In these circumstances we are of the view Ms MacGregor should not be substantially out of pocket after vindicating not only her rights under the agreement and the Act, but also her opposition to the continuation of the interim non-publication orders.

[67] We award Ms MacGregor 70% of the costs sought by her in relation to the hearings of 16 May 2016 and 30 August 2016. That amount is $24,815 to which GST is to be added.

.....	.....	.....
Mr RPG Haines QC	**Ms K Anderson**	**Ms GJ Goodwin**
Chairperson	**Member**	**Member**