ORER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES. THE FILE IS NOT TO BE SEARCHED WITHOUT LEAVE OF A JUDGE OF THIS COURT.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF PARTIES AND PROHIBITING SEARCHING OF HIGH COURT FILE REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA683/2015
[2017] NZCA 94

BETWEEN	Z Appellant
AND	Z Respondent

Hearing:	22 February 2017
Court:	Asher, Simon France and Peters JJ
Counsel:	T Ellis for Appellant D H McLellan QC and J S Cooper for Respondent
Judgment:	29 March 2017 at 12.45 pm

JUDGMENT OF THE COURT

A The appeal is allowed. The orders made in the High Court are rescinded.

B Publication of the names or identifying particulars of the parties is prohibited.

C The file is not to be searched without leave of a Judge of this Court.

D The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements. Costs in the High Court are to be determined by the High Court.

REASONS OF THE COURT

(Given by Simon France J)

Introduction

[1] This appeal challenges the validity of gagging orders preventing the appellant from disseminating grievances he holds in relation to the management of what can be loosely termed the family business. The orders were made on an ex parte basis in March 2012, but not subject to a full hearing until June 2015. At that point Woodhouse J declined to rescind the orders, and Z appeals.[1]

[2] Suppression orders concerning the identity of the parties will be maintained. Accordingly it is convenient to allocate different labels to each of the participants.[2] The parties to the proceedings are brothers. We will call the brother who applied for and obtained the gagging order "A". The brother who is the subject of the order, and who now appeals, will be called "R". A third brother will be called "X".

Background

[3] A and R, later joined by X, undertook various business endeavours together. They were successful at what they did, and significant wealth was accumulated. The available wealth was used to support the wider family. In the latter part of the 1990s R's role declined, and A, together later with his son, assumed superintendence of the family's business affairs.

[4] Relations between A and R have declined, and are presently at a very low ebb. R considers that A has mismanaged the funds and has acted to benefit himself and his immediate family at the expense of R, X and the wider family. The genesis

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1 *Z v Z* [2015] NZHC 2674.

2 The parties will retain their original labels "Z" and "Z" for the purposes of the intituling.

for the present proceeding was a document (the letter) R created in early 2012 setting out these grievances. It is a very lengthy exposition of events that have occurred since around 1970. It is obviously written from R's perspective and makes allegations of mismanagement and improper dealings by A. Family events are also covered in some detail with A's wife being a particular focus of criticism for her alleged role in events.

[5] The letter was initially sent only to A, X and A's son. In it R makes various demands and says that if matters are not resolved in the way he wants, he will file court proceedings with all the consequent publicity. A short time later, R distributed the letter to the wider family. This action prompted A to file an application.

Orders and subsequent events

[6] A sought orders preventing R from spreading his allegations further. In support he filed an affidavit in which he denied R's claims and said they were causing distress to family members. A said he feared there would be wider distribution by R in order to get traction. A expressed particular concern about:

> Allegations relating to confidential business matters going back many years, including R's reckless and unfounded (I believe) allegations of fraud and deception … and other impropriety, and R's perceptions of what people such as my mother … did, and why, are deeply personal to our family and should not in my view be the subject of R's attempt to gain publicity for the apparent purpose of improving his negotiating position.

[7] The application was not accompanied by any draft statement of claim, or any indication from A that he himself intended to bring proceedings in relation to R's allegations. However, A advised the Court that a mutual acquaintance had told him that R was going to file proceedings in a matter of days.

[8] The following orders were made:[3]

> (a) Restraining the respondent, until further order of this Court, from publishing, distributing or causing to be published or distributed, copies of any court proceedings, in draft or final form, which have been or are intended to be filed in court, relating to the respondent's dispute with members of the …

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3 *Z v Z* HC Auckland CIV-2012-404-1520, 22 March 2012 at [3] (emphasis added).

family ("the dispute"), *or any documents or other information, written or oral, touching on the subject matter of that dispute* and in particular the documents referred to in paragraph 8 of the affidavit of [A] sworn in support.

(b) In the event that the respondent issues court proceedings relating to the dispute, that the Court's file not be searched by any person until further order of the Court.

(c) That the parties to those proceedings, if issued, and the parties to this proceeding be identified only by the initials "Z v Z".

(d) That the Court file relating to this application not be searched and that the documents referred to in paragraph 8 of the affidavit of [A] be and remain sealed and not be accessed by anyone other than the Judge hearing this application.

(e) Reserving costs and the rights of the parties to apply for further or other orders.

[9] R almost immediately filed an application to rescind the orders. He stated proceedings were imminent. Timetabling directions for hearing the rescission application were made. That never took place. Instead the application to rescind was abandoned by consent. This was done without prejudice to R's ability to make the same application in the future. By consent, the interim orders were to remain in force.

[10] As it happens two and a half years elapsed before R renewed his application for rescission of the orders. In that intervening period neither party had advanced matters. Woodhouse J considered that this inaction on the part of R only served to reinforce the correctness of the interim orders. If there was any substance to R's allegations, it was reasonable to infer proceedings would have been filed.

[11] R appeals, with a particular focus on order (a) which is submitted to be overly broad, and to have impeded his ability to investigate his claims and bring proceedings.

Decision

[12] We begin by referring to the orders made and particularly the references therein concerning searching the court file. In relation to both the orders and some

of the discussion in the judgment under appeal, including the authorities referred to, there has in our view been insufficient focus on the relevant jurisdiction. The High Court Rules concerning access to documents have a limited range. They govern access to documents filed in court and have nothing to do with restraint of publications or speech.[4] Here R had not, and still has not, filed anything, so the Rules were largely inapplicable.

[13] We accept that out of caution anticipatory orders restraining access to documents may be made in the expectation, as existed here, that proceedings were imminent. It may be appropriate, for example, to direct that anonymity will apply from the outset so as to preserve the ability of the parties to seek formal orders. However, in the present case the period of time between A's application for a gagging order, and whenever it was that R filed proceedings, is not in any way governed by the Rules concerning access to court documents. Instead the common law alone, itself heavily overlaid by freedom of expression concerns as recognised in s 14 of the New Zealand Bill of Rights Act 1990, governs the situation.

[14] As regards the common law, the position is largely settled. Although what is sought is an interim injunction, the usual rules are modified when the aim of the injunction is to prevent apprehended defamation. Recognising the importance of freedom of expression, a more restrictive rule is adopted.[5] The basic rule remains that set out in *Bonnard v Perryman*:[6]

> [T]he subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong … Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.

[15] That rule has been applied in New Zealand. In *Auckland Area Health Board v Television New Zealand Ltd*, this Court observed:[7]

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4 High Court Rules 2016, rr 3.5–3.16.

5 See generally the discussion in Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [16.6.02].

6 *Bonnard v Perryman* [1891] 2 Ch 269 (CA) at 284.

7 *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA) at 407.

> The board and Mr Nicholson seek to invoke the jurisdiction of the Court to restrain the publication of defamatory matter. That there is such a jurisdiction is well established. The principles have been stated by this Court in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 and *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2)* [1989] 3 NZLR 520. By reason of the principle of freedom of the media, which has been emphasised by this Court in those cases and others including *Attorney-General for the United Kingdom v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 180 (the *Spycatcher* case) and *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1, and which is reinforced by s 14 of the New Zealand Bill of Rights Act 1990 as to the right of freedom of expression, it is a jurisdiction exercised only for clear and compelling reasons. It must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published. In relation to a possible defence of justification, we put the matter in this way in the *New Zealand Mortgage* case at p 7:
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> > It is true, as Mr Upton says, that this Court has not yet had to consider whether the principle restricting interim injunctions in defamation cases applies in New Zealand. But we think that the ideas underlying it are equally applicable in this country. As Oliver J put it, when justification is to be relied on as a defence an injunction will not be granted except in cases where the statement is obviously untruthful and libellous.
> >
> > One way of showing that may be to show that there is no reasonable foundation for the defence. Whether or not that is so in any particular case cannot be answered by an abstract test; it must depend on the facts of the particular case so far as they are known to the Court when hearing the application.

[16] In *TV3 Network Services Ltd v Fahey*, Richardson P observed:[8]

> Any prior restraint of free expression requires passing a much higher threshold than the arguable case standard. In *Attorney-General v British Broadcasting Corporation* [1981] AC 303 at p 362 Lord Scarman said:
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> > [T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice.

[17] More recently, the Supreme Court, in a different but related context, reaffirmed that the standard for making non-publication or confidentiality orders was a high one:[9]

> We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers.

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8 *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA) at 132. See also the discussion in *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [152]–[154].

9 *Erceg v Erceg* [2016] NZSC 135 at [13] (footnotes omitted).

> The need to protect trade secrets or commercially sensitive information, the value of which would be significantly reduced or lost if publicised, are obvious examples of situations where such orders may be justified. However, the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.

[18] Applying these authorities, the Court here should first have determined if it was satisfied that R would assert the truth of the statements. If so, it was then incumbent on A to show that there was no reasonable possibility of that defence succeeding. We address each aspect in turn.

[19] We consider first the situation in 2012 when orders were first sought and determined on a without notice basis.[10] It was perhaps unclear at that point whether R would assert the truth of his allegations, although we consider the available evidence suggests he would. The length and density of R's letter makes it impossible to provide a meaningful summary, but that length and density itself makes a point. This was not some throw away allegation, or an opportunistic effort to extract money. Rather, R carefully traverses, in considerable detail, a family and business history covering more than 40 years. It is undoubtedly written from his perspective, but there is little if anything to suggest the views contained therein are not genuinely held, and would not be defended.

[20] As for the issue of the statements in the letter being "clearly untrue", there appeared to be from the letter, and still appears to be, a reality to the underlying business transactions being described. Whether R's interpretation of those transactions is correct is a different matter, but it appears they are largely events and

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[10] We suggest that caution in making these orders on a without notice basis is also desirable. In some cases it may be clear publication is imminent, such as when it is to be shown that day in a particular time slot on television. Immediate orders may then be needed. Here, however, the only potentially imminent publication was the filing of proceedings, a situation which does not seem to require without notice orders.

transactions that did in fact occur. This tells against any conclusion that the apprehended libel can, on the basis of the papers, be said to be clearly untrue. A's denial that his conduct was open to question, while a prerequisite to obtaining such an order, did not otherwise particularly advance matters. It was at best a counter-assertion of equal weight. For these reasons we do not consider that, at the time the orders were sought, A had discharged the onus on him to prove the statements were clearly untrue.

[21] Turning then to the 2015 hearing, whatever may have been the situation in 2012, it was beyond dispute in 2015 that R was asserting the truth of his claims. That being so, the need to establish the allegations could not be true was engaged. The fact that A had this onus was not clearly identified in the judgment, but Woodhouse J did nevertheless address the truth of R's claims. His Honour observed that the failure of R to file proceedings gave rise to "a reasonable inference that … if there was substance to [R's] allegations, which the respondent asserted there was, proceedings could have been issued long ago."[11]

[22] We do not consider relying on the failure on R's part to file proceedings was enough to discharge the onus on A. First, R's ability to file proceedings in the intervening period had undoubtedly been restricted by such a wide-reaching gagging order. The apparent width of these orders is illustrated by the fact that in 2015 it was necessary to vary them to make it plain R could at least speak to a lawyer about his claims. He could not, however, speak to family members or to anyone who might have been involved in the transactions. Amongst the parties, R was already at a relatively significant informational disadvantage, and that disadvantage was exacerbated by orders of this width. The inhibiting impacts of the orders alone show that drawing an inference of untruth from the failure to file proceedings was unjustified. However, we further note that R did provide information about personal matters that contributed to the delay. Finally, it can be observed that the proceedings are likely to have a considerable degree of complexity, a factor that would also contribute to delay.

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[11] *Z v Z*, above n 1, at [25].

[23] The failure to file proceedings was the only material change in 2015 from when the orders were originally made in 2012. For the reasons given, that failure to file is not a basis on which to conclude that R's allegations are clearly untrue, or that he would have no defence to a defamation action. Accordingly the test from *Bonnard v Perryman* was not met.

[24] In the alternative Mr McLellan QC submitted there is an exception to *Bonnard v Perryman* that applies when the apprehended publication will occur in furtherance of blackmail. He relied on *Holley v Smyth* as authority.[12] That case involved an allegation of fraudulent misrepresentation against officers of a well-known merchant bank. Mr Smyth advised the persons involved that if he was not reimbursed £200,000, an attached press release containing the allegations would be issued. When the subject of a gagging order arose, Mr Smyth indicated he intended to justify his allegations, but an order preventing publication was nevertheless made. The matter was appealed.

[25] The Court of Appeal split on whether the motive for threatened publication was relevant. On this point Staughton LJ and Sir Christopher Slade considered it was, and recognised an exception where the actions of the publisher would constitute blackmail.[13] However, Sir Christopher Slade then joined with Auld LJ in rejecting on the facts the claim of blackmail.[14] Auld LJ had also rejected motive as being relevant at all.[15] The gagging order was quashed.

[26] Because of the view we take of the facts, it is unnecessary to explore the scope of this exception in New Zealand. The elements of blackmail relevant to this case that would need to be established are:[16]

(a) a threat by R made with intent to cause the recipient to act in accordance with R's will;

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12 *Holley v Smyth* [1998] QB 726 (CA).
13 At 734 and 748.
14 At 747.
15 At 745.
16 Crimes Act 1961, s 237.

(b) the threat is either to make an accusation (fraud) or disclose something about a person (family matters); and

(c) the making of the threat is not a reasonable and proper means to effect R's purpose.

[27] If what R said constitutes a threat (as opposed to just being the provision of full information or a warning), it is only a threat to file formal proceedings if the matter is not settled within the family. Mr Ellis identified numerous passages where the consistent theme is a statement that R will file court proceedings if he has to. When publicity is referred to, it is always in the context that the family name and affairs will be exposed by virtue of court processes. Nothing more is threatened. We do not consider that to be a situation to which the crime of blackmail is aimed; if technically caught, R's threat to file proceedings at which the matter can be properly adjudicated is a reasonable means to effect his purpose.

[28] Unlike the respondent, and the judgment under appeal, we see in the letter no threat of dissemination beyond the family, other than the dissemination involved in filing proceedings. The Judge had cited the following passage from R's communication as evidence of a threat of wider publicity:[17]

> However, I cannot take any more. I can assure you that, if I do not receive an appropriate response from you, I will make sure that my side of the story is told to everyone. It's your decision. Either this is quietly resolved, or it will become a public debate, whereby you can tell your side of the story (which you have already been doing for years, with me refusing to respond), and I'll tell my side of the story.

[29] This statement was written prior to disclosure to the wider family. It must be read in the context of the whole document wherein there are these numerous references to filing proceedings and the fact that "everyone will have their chance to tell their side of the story in affidavits and official communication". This overall tenor of the document suggests that "everyone" in the cited passage means either the wider family, or the world at large, but as a consequence of the court's processes. Nowhere is it suggested R intended to publish the document further outside those contexts.

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[17] *Z v Z*, above n 1, at [8].

[30] Woodhouse J was critical of the distribution to the wider family, considering it to be unjustified. However, that conclusion ignores R's perception of the matter which is that it is a family matter that affects everyone. The money, as R sees it, was for everyone's benefit within the family, and the actions of A and his wife – again, as R sees it – have been inimical to that and to family harmony. We agree that there is material in the letter about family matters that is unlikely to be relevant to court proceedings. But it is a discourse about the family and has been distributed only to them. There is nothing in this wider family distribution to support an inference of bad faith or likely further distribution.

[31] We do not therefore accept that it has been shown there is a reasonable possibility that R's conduct constitutes blackmail. What he has done, in its essence, is similar to many demand letters that are written, where the "threat" is solely to take legal proceedings enforcing the demand if what is believed to be a legitimate demand is not met. Pointing out the consequences if that happens, as a means of encouraging settlement, does not make the conduct blackmail.

[32] If blackmail was rejected by this Court, Mr McLellan proffered, as further alternative bases for the orders, an inherent jurisdiction to protect confidential information or to protect privacy. He accepted, however, that if unsuccessful with the blackmail proposition, these alternatives provided a less compelling basis for the orders. We consider that to be manifestly so, and accordingly do not dwell on the proposition.

[33] Concerning privacy, we refer to the *Erceg* passage previously cited,[18] and observe the disclosure of personal matters, however unwanted, is not an unfamiliar feature of both the media and court proceedings open to the public. Prior restraint to prevent a breach of privacy was discussed in *Hosking v Runting* where Gault P and Blanchard J observed:[19]

> [158] The general position, then, is that usually an injunction to restrain publication in the face of an alleged interference with privacy will only be available where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate

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18 *Erceg*, above n 9, at [13].
19 *Hosking*, above n 8.

> public concern in the information. In most cases, damages will be considered an adequate remedy.

And Tipping J added:

> [258] I see the remedy for invasion of privacy as being primarily an award of damages. Prior restraint by injunction, such as is sought in the present case, will be possible but should, in my view, be confined to cases which are both severe in likely effect and clear in likely outcome. Freedom of expression values will ordinarily prevail at the interlocutory stage.

[34] We were not pointed to any aspects of the document that might meet this test, and further observe that had such topics been included, a balancing of the competing values would limit any gagging order to such topics. We do not need to address this further now we have concluded there is no intention on the part of R to publish other than by way of court proceedings.

[35] In relation to confidential business information we again note no attempt has been made to identify what aspects of the document involve such information. Some of the business material that is referred to will clearly be in the public domain and a blanket prohibition is not supportable.

Conclusion and other orders

[36] The appeal is allowed and the orders made on 22 March 2012 are rescinded. The italicised part of order (a) – see [8] above – was a gagging order unrelated to access to court documents. The circumstances did not come within the narrow parameters when such an order can be made.

[37] We nevertheless consider it appropriate to maintain suppression orders in relation to this proceeding. The information on the file is presently unconnected to any matter with which a court is otherwise seized. There is no interest in the detail of R's document being known, and this judgment sufficiently meets open justice concerns.

[38] The fact that suppression will be maintained in this file is not to be seen as a comment on, or as influencing, whether suppression should attach to any proceedings that are commenced. That will need to be the subject of a properly

argued application. In the interim, however, the orders will allow an application for suppression orders to be made if proceedings are eventually filed.

[39] The names and any identifying particulars of the parties in this proceeding are accordingly suppressed. Further, the file is not to be searched without leave of a Judge of this Court, or of the High Court in relation to its file.

[40] The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements. Costs in the High Court are to be determined by the High Court.

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