IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA358/2018
[2019] NZCA 438

BETWEEN	ADAM RAPHAEL GREENBAUM Appellant
AND	SOUTHERN CROSS HOSPITALS LIMITED Respondent

Hearing:	27 November 2018
Court:	Williams, Peters and Gendall JJ
Counsel:	J Long and J K Grimmer for Appellant A S Ross QC and L C Bercovitch for Respondent
Judgment:	18 September 2019 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent's costs for a standard appeal on a band A basis with usual disbursements.

REASONS

PETERS AND GENDALL JJ

(Given by Peters J)

Introduction

[1] The appellant, Mr Greenbaum, appeals against a decision of Toogood J in which the Judge dismissed his application for non-party discovery from the respondent, Southern Cross Hospitals Ltd (Southern Cross).[1]

[2] Mr Greenbaum is a United Kingdom trained plastic surgeon. He and his family immigrated to New Zealand in 2009 and in 2010 he accepted a position with the Waikato District Health Board (WDHB). Differences developed between Mr Greenbaum and WDHB later that year, culminating in an agreement in December 2010 that Mr Greenbaum would resign from WDHB, which he did in early 2011 after obtaining vocational registration from the Medical Council of New Zealand (MCNZ). More detail about the background is set out below.

[3] In 2011 and 2012, Mr Greenbaum applied to be "credentialled" to use the facilities of four private hospitals in the Waikato region, including one operated by Southern Cross. Each hospital declined to grant credentials to Mr Greenbaum.

[4] Mr Greenbaum commenced this proceeding against WDHB and Dr Tom Watson (the defendants) in 2017. Dr Watson was the Chief Medical Advisor at WDHB at the time Mr Greenbaum sought credentials. The essence of Mr Greenbaum's proceeding is that the private hospitals declined Mr Greenbaum credentials because the defendants interfered, unlawfully, in the credentialling process. The defendants deny the allegations.

[5] Mr Greenbaum's application for third party discovery, that is, the one Toogood J declined, was against Southern Cross and another of the private hospitals, Braemar Hospital Ltd (Braemar), seeking two categories of documents. The first category was "comparative material" to enable Mr Greenbaum to compare the manner

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[1] *Greenbaum v Waikato District Health Board* [2018] NZHC 1273 [High Court judgment]; and High Court Rules 2016, r 8.21.

in which the two hospitals determined his application for credentials with those made by third parties. Toogood J declined this application and there is no appeal against that aspect of the decision.

[6] Secondly, Mr Greenbaum sought what was referred to as "evaluative material" concerning or referring to him. Braemar has no such documents but Southern Cross does. As we understand it, the documents comprise notes of discussions between Southern Cross personnel and Dr Watson and/or WDHB personnel, whether doctors, nurses or administrators, for whom Mr Greenbaum contends WDHB would be vicariously liable. Southern Cross sought and received the information in confidence, having given an assurance of confidentiality based on a "waiver" in its standard form application for credentials, which Mr Greenbaum signed:

> I authorise Southern Cross Hospitals to make enquiries and obtain information from other sources when necessary for decisions on my credentialled status or scope of practice. I consent to these persons and institutions providing any such information required by Southern Cross Hospitals. I also understand and agree that this material may be provided in confidence as evaluative material and might not be disclosed to me.

[7] Southern Cross opposed, and opposes, discovery of the documents on the ground that they contain confidential information. Section 69(2) of the Evidence Act 2006 (the Act) provides that a Judge may direct that confidential communications or information not be disclosed if the public interest in disclosure in the proceeding is outweighed by a competing public interest.

[8] Toogood J was satisfied that there was such a competing public interest, this being in preserving the confidentiality of the documents, and that this interest outweighed the public interest in Mr Greenbaum having access to the documents. Hence his direction to Southern Cross not to disclose them. The issue on appeal is whether the Judge's decision that the public interest in maintaining confidentiality outweighed the public interest in disclosure was correct.

[9] There is one other preliminary point to mention which is that Mr Greenbaum already has Southern Cross's notes of two conversations with Dr Watson, although whether the notes are a complete or accurate record of what was discussed is a different matter. One of the notes reports on a discussion between a Mr Holmes, Dr Watson

and another party whose name has been redacted. The other appears to be typed notes of a discussion with Dr Watson. Counsel for Dr Watson supplied the notes to Mr Greenbaum's counsel in the course of discovery, so the appeal is concerned with documents recording, or purporting to record, conversations or discussions between Southern Cross and other WDHB personnel.

Background

[10] The following background is from Toogood J's decision:

> [6] Dr Greenbaum is a London-based plastic surgeon and a New Zealand citizen who was fully accredited in the United Kingdom and Europe. Dr Greenbaum was in consultant practice and on the specialist register in the UK before his wife, children and he emigrated to New Zealand in 2009. In New Zealand, Dr Greenbaum accepted a position of employment with the WDHB and obtained a provisional registration from the [MCNZ]. He was employed by the WDHB from 11 January 2010 to 23 February 2011.
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> [7] A dispute evolved between Dr Greenbaum and the WDHB over whether he had been offered a permanent position with the WDHB at the outset of his employment. The matter was resolved following mediation. A term of the settlement reached was that Dr Greenbaum would remain employed for a further fixed period of time, or until he obtained vocational registration.
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> [8] Dr Greenbaum required vocational registration because he was not New Zealand qualified. Obtaining the qualification would enable him to commence practice as a private plastic surgeon in New Zealand.
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> [9] On 23 February 2011, Dr Greenbaum obtained vocational registration despite alleged opposition from WDHB personnel and Dr Watson in 2010. It is alleged they failed or refused to countersign mandatory supervision reports from Dr Greenbaum's supervisor; attempted to force a change of supervisor for Dr Greenbaum; and made direct contact with MCNZ, suggesting a number of times there were competency concerns with Dr Greenbaum and that there was data to substantiate these concerns. When the MCNZ requested that Dr Watson provide formal notification and the relevant data, no such substantiating evidence was provided to it. The defendants deny that they took steps to prevent or impede Dr Greenbaum's vocational registration.
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> [10] Upon obtaining vocational registration, Dr Greenbaum left the WDHB and sought credentialling from four private hospitals, including Southern Cross and Braemar. It is alleged the WDHB and Dr Watson knew that Dr Greenbaum intended to apply for credentialling at private hospitals in Hamilton. Dr Greenbaum's application for credentials was declined by each of the private hospitals.

Credentialling process

[11] Credentialling is the process by which a hospital verifies the "qualifications, experience, professional standing and other relevant professional attributes of medical specialists, for the purpose of forming a view about a practitioner's competence, performance and professional suitability" to provide services from and with the benefit of the hospital's facilities.[2] These facilities include not only the hospital and associated hard infrastructure, but also staff, such as nurses and administrators.

[12] Although we do not know the form the credentialling process takes at every private hospital, we expect it is similar to that Southern Cross employs. Evidence as to that process is contained in an affidavit from Dr Tony Baird, the chairman of Southern Cross's National Clinical Medical Committee (NCMC), sworn in opposition to Mr Greenbaum's application for third party discovery. The NCMC oversees Southern Cross's credentialling process. Further affidavit evidence was given by Professor Ron Paterson and Professor Des Gorman and we refer to this below. However, it is convenient to discuss Dr Baird's evidence now.

[13] Those credentialled at a private hospital are self-employed and responsible for their patients' care. This is a significant point of difference from a public hospital, where specialists are employed.

[14] An applicant for credentials at Southern Cross submits a comprehensive, standard form application. Amongst other things, the applicant is required to provide details of his or her education, training, prior employment, experience, scope of practice, the names of referees from whom Southern Cross might seek information, and the waiver referred to in [6] above.

[15] In his affidavit, Dr Baird refers to differences between the operational environments of public and private hospitals. In the former, on Dr Baird's (contested) evidence, a surgeon enjoys collegial support, with junior doctors on hand "24/7", and there are regular meetings of specialties to review practices and outcomes. Dr Baird's evidence is that these systems, all of which ultimately go to patient safety, are not

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2 High Court judgment, above n 1, at [31].

present in the private hospital environment. As a result, a private hospital must satisfy itself not only of an applicant's clinical competence, but requires information as to other matters that contribute to patient safety and outcomes, and the general smooth functioning of the hospital, such as the applicant's personality, character, collegiality and ability to practise under pressure.

[16] Dr Baird's evidence, again contested, is that Southern Cross requires "honest" information about these matters from others who have worked with an applicant, and the ability to guarantee confidentiality is critical to obtaining the information. Dr Baird expects Southern Cross to be denied the information if it cannot be sure of keeping it confidential, in which case Southern Cross will end up relying on formal records and references provided by the applicant's supporters. Dr Baird also states that Southern Cross has an interest in granting credentials to practitioners. It does not use the information it receives capriciously or unreasonably.

[17] As to Mr Greenbaum's application, Dr Baird states that, on the basis of the waiver, Southern Cross guaranteed confidentiality in return for information about Mr Greenbaum. Southern Cross has informed those affected that Mr Greenbaum is seeking the documents. The majority are firmly opposed to disclosure and have said they would not have supplied the information had they known it might be disclosed. Dr Baird expects it will quickly become known in the medical community if Mr Greenbaum succeeds in his application, and Southern Cross will be unable to promise confidentiality in the future.

[18] Mr Baird also states that Southern Cross was on enquiry at the time Mr Greenbaum applied for credentials as it knew of his employment dispute with WDHB. Also, several of the local Southern Cross committee members practised at Waikato Hospital and were aware of difficulties that Mr Greenbaum was said to be having with others.

Privacy Act 1993

[19] Having been declined credentials, Mr Greenbaum sought from Southern Cross all "personal" information it held about him, as that term is defined in the Privacy Act 1993. An individual is entitled to such information subject to, amongst other

things, s 29 of that Act which permits the withholding of evaluative material supplied in confidence.[3] In May 2013, the Privacy Commissioner upheld Southern Cross's objection to providing the information on that ground. The Commissioner was also satisfied disclosure would breach legal professional privilege, an argument not advanced before us.

Commerce Commission

[20] In or about 2014, Mr Greenbaum complained to the Commerce Commission that he was being excluded from performing plastic surgery in Waikato as a result of anti-competitive arrangements in the region. Having made enquiries, the Commerce Commission took the complaint no further. However, in its letter informing Southern Cross of its decision, the Commission stated:

> 14. It is beyond doubt that the private hospitals obtained information about Dr Greenbaum from a range of sources as part of each hospital's credentialling process, including from the WDHB, and Doctors Tom Watson and Winston McEwan. It also appears beyond doubt that the picture painted of Dr Greenbaum by the WDHB was not a favourable one and gave the private hospitals concern.

Proceeding

[21] Mr Greenbaum's claim is for the tort of interference by unlawful means, for which he seeks an enquiry into losses, compensation for lost income, and general and exemplary damages. To succeed, Mr Greenbaum will have to prove that WDHB and Dr Watson interfered in his applications for credentials; that their interference was unlawful vis-à-vis the private hospitals concerned; that the interference was intended to and did cause him harm; and that he suffered loss.[4]

[22] Subject to the outcome of this appeal, the interference Mr Greenbaum alleges (all of which is denied) includes:

> (a) "spreading misinformation and disinformation" about him, his competency and character;

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3 Privacy Act 1993, s 29(1)(b).

4 See *Diver v Loktronic Industries Ltd* [2012] NZCA 131, [2012] 2 NZLR 388 at [30], adopting *OBG v Allen* [2007] UKHL 21, [2008] 1 AC 1.

(b) giving negative and untrue responses to enquiries of them, to the effect that Mr Greenbaum was not "credible or competent, or otherwise was a troublemaker who was not to be trusted, and would be a risk" to any of the hospitals if he were credentialled;

(c) encouraging the hospitals to take "identical action" towards Mr Greenbaum's applications for credentials, essentially by discouraging the hospitals from granting credentials and insinuating that WDHB would take an adverse view of any hospital granting him credentials; and

(d) refusing to provide Mr Greenbaum's surgical logbook so that he could establish the work he had done in the final nine months of his time at WDHB.

[23] Mr Greenbaum alleges the defendants' interference was unlawful against the hospitals under the Fair Trading Act 1986; in negligent misstatement; under the Commerce Act 1986 (despite the Commerce Commission having decided not to investigate); or, in the case of the logbook, was otherwise unlawful.

[24] Mr Greenbaum also contends that, in interfering as alleged, the defendants intended to, and did, cause him harm.

Discovery

[25] WDHB and Dr Watson have given discovery of all relevant documents in their control. Southern Cross accepts the documents now in issue are relevant to the issues in Mr Greenbaum's proceeding and thus subject to third party discovery but for s 69.

General appeal

[26] It is common ground that the appeal is a general appeal, being one in which the court must arrive at its own view of the merits of the case, but with the appellant

to "identify the respects in which the judgment under appeal is said to be in error, to convince the appellate court to reach a different view".[5]

Section 69 of the Evidence Act 2006

[27] Section 69 provides:

> **69 Overriding discretion as to confidential information**
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> (1) A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
>
> (a) a confidential communication:
>
> (b) any confidential information:
>
> (c) any information that would or might reveal a confidential source of information.
>
> (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
>
> (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
>
> (b) preventing harm to—
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> (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
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> (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
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> (c) maintaining activities that contribute to or rely on the free flow of information.
>
> (3) When considering whether to give a direction under this section, the Judge must have regard to—
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> (a) the likely extent of harm that may result from the disclosure of the communication or information; and
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> (b) the nature of the communication or information and its likely importance in the proceeding; and
>
> (c) the nature of the proceeding; and
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> (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
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> (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and

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5 *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308 at [42]; and *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [30].

(f) the sensitivity of the evidence, having regard to—

(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and

(ii) the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

…

[28] By way of preliminary observations, first, s 69 is concerned with confidential communications, information and sources. The Act does not define "confidential" but we agree with the Judge — and this too is common ground — that information will be confidential for the purposes of s 69 if the party claiming confidentiality could have a reasonable expectation of confidentiality.[6] The documents at issue in this case are confidential in the sense to which we have referred. The communications were made in confidence, the documents record confidential information and we expect disclosure would reveal the sources.

[29] Secondly, as s 69(2) makes clear, there is a public interest in all relevant information, confidential or not, being disclosed in a proceeding. All concerned, not least the court, should have all relevant information when litigating disputes. The effect of s 69(2) is that this public interest prevails, and a direction for non-disclosure will be refused, unless another public interest of the nature identified in s 69(2) exists and outweighs the public interest in disclosure having regard to the matters in s 69(3) and any others considered relevant (see s 69(4)).

[30] Toogood J was satisfied that the credentialling process relies on the free flow of information and that a public interest exists in maintaining the process.[7] He was satisfied that the credentialling process is critical to patient safety; that it depends on the hospital concerned having the best information available regarding the applicant; that this in turn depends on a hospital's ability to give an assurance that information

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6 See also *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181 at [48]; and *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [27].

7 High Court judgment, above n 1, at [37]; and Evidence Act 2006, s 69(2)(c).

supplied will be kept confidential; and that a hospital's ability to obtain information would be hindered or "chilled" if there was a prospect of disclosure. These findings are not challenged on appeal, although the importance of the public interest in the credentialling process is in issue.

[31] The issue on appeal is whether the Judge was correct to find that the public interest in maintaining the confidential nature of the credentialling process should prevail in this particular case. Mr Long submits that the Judge erred in this determination:

(a) by placing no or insufficient weight on the public interest in Mr Greenbaum's entitlement to a fair trial in light of all relevant evidence;

(b) in the way he approached the public interest in maintaining the confidentiality of the credentialling process; and

(c) in failing to consider other means of preventing or restricting public disclosure of the evidence if given, a mandatory consideration under s 69(3)(e).

First ground of appeal: public interest in a fair trial

[32] In embarking on the weighing process required by s 69, the court must accord sufficient weight to what Mr Long described as the "general public interest factor itself". Mr Long says the Judge failed to do so; failed to give any or sufficient weight to the importance of the documents sought in the context of Mr Greenbaum's proceeding; and did not consider the consequence of non-disclosure of the documents.

[33] As to the first of these, Mr Long submitted that the Judge did not "fully appreciate" the weight to be accorded to the public interest in disclosure, and referred us to many authorities which state this principle and the importance attached to disclosure. The following examples suffice.

[34] In *Science Research Council v Nassé*, Lord Salmon said:[8]

> The law has always recognised that it is of the greatest importance from the point of view of public policy, that proceedings in the courts or before tribunals should be fairly disposed of. This, no doubt, is why the law has never accorded privilege against discovery and inspection to confidential documents which are necessary for fairly disposing of the proceedings. What does "necessary" in this context mean? It, of course, includes the case where the party applying for an order for discovery and inspection of certain documents could not possibly succeed in the proceedings unless he obtained the order; but it is not confined to such cases. Suppose, for example, a man had a very slim chance of success without inspection of documents, but a very strong chance of success with inspection, surely the proceedings could not be regarded as being fairly disposed of, were he to be denied inspection.

[35] In *D v National Society for the Prevention of Cruelty to Children*, Lord Diplock said:[9]

> The fact that information has been communicated by one person to another in confidence, however, is not of itself a sufficient ground for protecting from disclosure in a court of law the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain facts which are relevant to an issue upon which it is adjudicating: *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405, 433-434. The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law.

[36] Mr Long submitted that the Judge's failure to accord sufficient weight to this public interest affected his assessment of the consequences of non-disclosure, namely that Mr Greenbaum would be without documents of critical importance to his case, and that a witness at trial would be entitled to refuse to answer a question concerning the contents of the withheld documents. These matters are relevant considerations under s 69(3)(b).

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8 *Science Research Council v Nassé* [1980] AC 1028 (HL) at 1071.

9 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 (HL) at 218.

[37] Mr Long referred us to the following statement in *R v Secord*, submitting that the "central" importance of the documents in this case magnified the public interest in disclosure:[10]

> If the evidence is important to the determination of the issue, then it is likely that the public interest will favour disclosure; the more serious or important the issue, the more likely that is.

[38] In response to these submissions, Mr Ross QC first submitted that the public interest in disclosure in a proceeding was not absolute, and in an appropriate case would have to yield to a competing public interest. This follows from s 69 itself, and indeed is apparent from the passage in *D v National Society for the Prevention of Cruelty to Children* cited above. Nor did Mr Ross accept that the documents were of critical importance to Mr Greenbaum's case. Mr Ross submitted that the consequences to Mr Greenbaum of not receiving the documents were minimal. Mr Greenbaum was not being deprived of access to the court and could continue his proceeding. Mr Greenbaum had not said he would discontinue his proceeding in the absence of the documents. Mr Greenbaum also had the defendants' discovery, including emails, draft affidavit(s), and documents relating to the employment dispute, all of which would have informed Mr Greenbaum of the view held of him within the WDHB. Mr Ross submitted that any conspiracy within the WDHB to interfere in Mr Greenbaum's career and professional standing would be evident from this discovery. Mr Greenbaum also knew what Dr Watson appeared to have said to Southern Cross.

Discussion

[39] We agree with Mr Long as to the importance of the public interest in disclosure. Of course, whether sufficient weight has been afforded to this interest can only be ascertained by considering the strength of the countervailing factors which we shall do shortly. As to Mr Long's specific criticism of the Judge, we think Toogood J was cognisant of the importance of this public interest, as appears from the following:

> [33] The starting point for the Court's discretion under s 69 is the consideration that the disclosure of relevant communications or information in a proceeding is in the public interest. It is that which promotes

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[10] *R v Secord* [1992] 3 NZLR 570 (CA) at 575.

> access to a fair and just system of adjudication by the courts. For the purposes of this case, the question posed by s 69(2) of the Act is whether that interest is outweighed by the public interest in maintaining an activity that relies on the free flow of information.

[40] We also accept that the documents sought are likely to be important in the proceeding, as they will disclose who said what to Southern Cross, and that a consequence of non-disclosure may be that a witness at trial might decline to answer questions regarding the contents of the documents. The fact that Mr Greenbaum has received the defendants' discovery is not an answer to his application for discovery from Southern Cross. In short, we accept that Mr Greenbaum is likely to require the documents he seeks, if he is to cast his net wider than Dr Watson.

[41] However, for the reasons that follow, we find that this consideration is outweighed by the interests in non-disclosure.

Second ground of appeal: public interest in confidentiality

[42] Mr Long submitted that the Judge erred in the way he considered the public interest claimed in maintaining the confidentiality of the documents. He submitted the Judge ought to have considered Southern Cross's interest "mainly private". Mr Long also submitted that the Judge erred in placing "significant weight" on the waiver and on the Privacy Act 1993, as matters counting against Mr Greenbaum. The Judge considered these last two matters under s 69(4).

[43] As to the first issue, the essence of Mr Long's submission was that the Judge was wrong to place significant weight on the prospect that disclosure would be likely to inhibit a private hospital's ability to obtain information. Mr Long submitted that the court is not usually persuaded by arguments that disclosure will have a chilling effect on the free flow of information. Mr Long referred us to *Conway v Rimmer*, *Science Research Council v Nassé* and *Campbell v Tameside Metropolitan Borough Council* as examples of instances in which the court had declined to accept such an argument without further enquiry.[11] In each of the cases to which we have just

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[11] *Conway v Rimmer* [1968] AC 910 (HL) at 957; *Science Research Council v Nassé*, above n 8, at 1070 and 1081; and *Campbell v Tameside Metropolitan Borough Council* [1982] QB 1065 (CA) at 1077.

referred, disclosure of confidential information was resisted on the ground that such would have an adverse or chilling effect on the future provision of candid information. In each case the court inspected the contentious documents, or recommended that such be done, and in *Campbell v Tameside Metropolitan Borough Council*, the Judge inspected the documents and ordered disclosure. Mr Long submitted that only in very few circumstances will the court decline disclosure, such as cases involving criminal informants. Mr Long submitted that we should be similarly sceptical of Southern Cross's contentions in this case.

[44] In response, Mr Ross noted that in the vast majority of the cases to which Mr Long referred, the court was considering information that had been supplied or compiled pursuant to a duty. Those writing the reports or making the statements recorded therein were duty bound to do so. Hence the court's scepticism of arguments that those concerned would fail in their duty because of the occasional order that their reports or statements should be disclosed. Mr Ross submitted that this case was different, being one in which information had been sought from and provided by a person who was under no obligation to speak. Mr Ross submitted the present case was closer to *D v National Society for the Prevention of Cruelty to Children.*[12] In that case, a third party complained to the NSPCC that a child was being ill-treated.[13] The child's mother sought the identity of the third party. The court declined to order disclosure on the grounds that the greater public interest was best served by preserving anonymity.[14]

[45] Before we address this point in detail, it is convenient to address a point in Mr Long's written submission (but not argued at the hearing of the appeal) that a private hospital's process for credentialling specialists does not affect the public at large sufficiently to engage a significant public interest if a public interest at all. Mr Long submitted that the credentialling process was primarily of interest to the private hospital itself and to those who use it.

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12 *D v National Society for the Prevention of Cruelty to Children*, above n 9.
13 At 175.
14 At 219, 229, 241 and 242.

[46] We do not accept this submission because it is apparent from Dr Baird's evidence that private hospitals must play an important part in New Zealand's health system. Dr Baird's evidence is that Southern Cross owns and operates 10 hospitals in New Zealand, and is a party to joint ventures in other hospitals and healthcare facilities such as radiology and endoscopy clinics. Approximately 1,000 specialist surgeons and anaesthetists are credentialled to have access to Southern Cross hospitals, treating approximately 65,000 patients per annum. That evidence, for Southern Cross alone, gives some measure of the part played by private hospitals. Private hospitals are also regulated and audited. They cannot be categorised as purely private facilities in which the general public has no or little interest.

Evidence

[47] We turn now to the evidence in this case on the consequences or lack of them if Southern Cross is ordered to disclose the documents.

Dr Baird

[48] Dr Baird clearly believes that there is a substantial risk Southern Cross will be denied the free and frank information it seeks, and which he says it requires, if there is a risk of disclosure. The gist of his evidence is that it is extremely difficult to persuade colleagues and other staff (nurses, junior doctors, administrators) with whom an applicant has worked to speak candidly and that the ability to assure confidentiality is critical. Although Dr Baird is not independent of Southern Cross, he is an experienced and senior practitioner, a past president of the MCNZ and the New Zealand Medical Association, and it is apparent from his affidavit that he is well versed in the workings of public and private hospitals, and the credentialling process.

Professor Paterson

[49] Professor Paterson was the Health and Disability Commissioner between 2000 and 2010 and is now a Professor of Law at the University of Auckland specialising in health law. His evidence may be summarised as follows.

[50] All hospitals, public or private, require that referees be willing to give frank advice, both as to competence in the sense of technical skills and as to the surgeon's ability to work within a team and to communicate with colleagues. Teamwork is increasingly recognised as a critical skill in the surgical setting.

[51] Credentialling is particularly important in a private hospital given the isolation in which surgeons practise. The peer review processes of a public hospital, such as surgical audit, and mortality and morbidity meetings, are not undertaken. (Professor Gorman disputes this evidence.) Given that, a patient in a private hospital is much more dependent on the surgeon's competence and professional behaviour; that is, on the surgeon being attentive, visiting, and responding promptly to concerns raised by nurses.

[52] Professor Paterson has investigated numerous complaints of substandard surgical care. His experience has been that colleagues of a poorly performing surgeon are extremely reticent in raising concerns or expressing opinions. This is so whether the doctor is seeking employment in a public hospital or credentials in a private hospital.

[53] Colleagues fear repercussions. As Commissioner, Professor Paterson saw "difficult/litigious doctors who chilled the free flow of information because colleagues feared legal repercussions" if their opinion became known. Professor Paterson knows of instances in which a doctor who expressed concerns was subsequently the subject of complaint or sued.

[54] For these reasons, Professor Paterson considers colleagues will be "highly reluctant to express a free and frank opinion to [a] prospective employer or private hospital" if that may later be disclosed in a court proceeding. Disclosure could have a chilling effect and significantly inhibit the free flow of information. The result is that concerns about a doctor's competence or professionalism are less likely to be aired, and patients more likely to be exposed to harm.

Professor Gorman

[55] Professor Gorman is a Professor of Medicine and Associate Dean in the Faculty of Medical and Health Sciences at the University of Auckland, and was the head of the University's School of Medicine from 2005 to 2010 inclusive. Professor Gorman's evidence may be summarised as follows.

[56] The MCNZ is the primary and most important vehicle for verifying competence. MCNZ's processes are comprehensive and address not only the candidate's qualifications, skills and experience but also his or her "fitness for registration". The latter includes matters such as whether he or she may have been the subject of any disciplinary process here or elsewhere. MCNZ does not provide third parties with any assurance of confidentiality.

[57] Professor Gorman considers Professor Paterson and Dr Baird have overstated the extent to which confidentiality is necessary in the private hospital credentialling process. Access to a private hospital's facilities is a question of "marketability" for the hospital concerned, to ensure that there is a full complement of disciplines and to ensure those credentialled are capable of performing within that area. Private hospital credentialling is more akin to an "employment process", in which the hospital assesses the suitability of a specific person for a specific role. Professor Gorman does not agree patient safety requires that no information about credentialling should ever be disclosed. Professor Paterson and Dr Baird have sought to "elevate its importance under the guise of 'patient safety'" in a way it does not deserve. It would be surprising if a legitimate "competence concern" was raised in response to an enquiry by a private hospital that the MCNZ or a district health board had not already considered. And, if so, the private hospital would be required to bring it to MCNZ's attention where there would be "full transparency". Surgical audits, and mortality and morbidity meetings occur in private hospitals and are required as part of a facility's accreditation.

[58] Professor Paterson overstates the medical profession's reticence in confronting and taking steps to address incompetence. Moreover, it would be desirable for an allegedly incompetent doctor to be confronted by that incompetence, and a poor

outcome for patients if that doctor was not told why he or she has failed to obtain a position.

Discussion

[59] We accept it is conducive to patient wellbeing, and therefore in the public interest, for a private hospital granting credentials to have information that goes beyond a practitioner's technical competence; we accept such information is more likely to be forthcoming if there is a guarantee of confidentiality; and we accept that no absolute assurance of confidentiality can be given if Southern Cross is required to disclose the documents sought. The issue is the likely extent of harm that may result to the information gathering process from disclosure of the documents sought. In considering this, we place greater weight on the evidence of Dr Baird and Professor Paterson than on Professor Gorman's. We are unable to dismiss their evidence of the profession's reticence as exaggerated or unnecessarily cautious, given their experience. Although Professor Gorman takes a more robust view of the profession, we think it stands to reason that a referee, who may be a nurse or junior doctor starting out in their career, is more likely to give their opinion if assured of confidentiality.

[60] To conclude on this point, having regard to the evidence before us, we accept that significant harm may result to the relationship between private hospitals and those from whom they seek information if the documents are disclosed, and that this may have repercussions for patient safety and wellbeing.

[61] There is one further point we should mention. It would not be right to apply s 69 to protect a referee or source whose adverse comment about a candidate has been motivated by malice or some other purpose unrelated to the reason for the hospital's enquiry. Although MCNZ was satisfied as to Mr Greenbaum's competence, and Mr Greenbaum considers any adverse view expressed of him to be unfair and untrue, there is no evidence of malice or other wrongful purpose in this case.

[62] We turn now to Mr Long's submissions as to what he contends was the undue weight the Judge placed on Mr Greenbaum's waiver and Privacy Act considerations.

Waiver

[63] The Judge considered the waiver to be an important consideration counting against Mr Greenbaum. The Judge said:

> [44] Furthermore, I regard as significant the acknowledgement by Dr Greenbaum that confidential information would be sought. It was not a condition of his consent to confidential inquiries being made that confidentiality would not apply to unfavourable information or opinions. On the contrary, the purpose of confidentiality is to encourage full disclosure of facts and opinions, especially those that may be unfavourable. In my view, Dr Greenbaum's prior consent to the making of confidential inquiries weighs heavily under s 69(4) in favour of preserving confidentiality.

[64] Mr Long submitted that the fact information was communicated following a promise of confidentiality should not weigh heavily in favour of non-disclosure. In this regard he refers to the same passage of *D v NSPCC*, cited above at [35], later cited by *Campbell v Tameside Metropolitan Borough Council*.[15] For convenience, we set it out again:

> The fact that information has been communicated by one person to another in confidence is not, of itself, a sufficient ground for protection from disclosure in a court of law, either the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain facts which are relevant to an issue upon which it is adjudicating…. The private promise of confidentiality must yield to the general public interest, that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or identity of the informant from disclosure in a court of law …
>
> (Citations omitted.)

[65] *Campbell* was a very different case from the present. The plaintiff was a school teacher employed by the defendant. She was injured by a boy she alleged the defendant knew to be dangerous and unbalanced, and she sought discovery of all documents in the defendant's possession relating to the boy, including psychologists' and psychiatrists' reports. The court considered the documents crucial to the plaintiff's claim and that there was a real risk of the plaintiff being denied justice if they were not disclosed. Quite aside from the factual differences between a case such as

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15 *Campbell v Tameside Metropolitan Borough Council*, above n 11, at 1075.

Campbell and the present, the confidential information the plaintiff wished to have in that case was not obtained on the strength of any assurance she had given.

[66] Mr Long submitted that there has been a change in the position which prevailed at the time Mr Greenbaum signed his application form and thereby gave the waiver. Mr Greenbaum has pleaded a case, the defendants have not applied to strike it out, and Mr Greenbaum is serious about pursuing the matter. Mr Long submitted that Mr Greenbaum did not forego his rights to discovery by giving the waiver.

[67] By his waiver, Mr Greenbaum authorised Southern Cross to obtain information from third parties for the purpose of making a decision on whether or not to credential him; consented to the provision of such information; and agreed that information might be provided in confidence and not disclosed.

[68] A waiver or acknowledgement such as this may not always be relevant or determinative but Mr Long's arguments in the context of this particular case are not persuasive. This is a proceeding brought by, as opposed to against, Mr Greenbaum in which he would have a third party, who has no interest in the case, breach a confidence in information that was only ever obtained because of his undertaking. We accept Mr Ross's submission that Mr Greenbaum's application for credentials would never have been considered but for that waiver.

[69] Nor is there anything in the point that Mr Greenbaum has pleaded a case. Section 69 only applies if a proceeding is on foot.

[70] We note that this court has upheld a claim to confidentiality in respect of information received on an undertaking that the information would be kept confidential. For instance, in *Dotcom v Attorney-General*, Winkelmann J declined to order disclosure of the identity of a party who had allowed the police to install surveillance cameras on his or her property on the ground his or her identity would be kept confidential.[16] That said, the material was not critical to the plaintiffs' case and any unfairness could be met in another way. In *Financial Markets Authority v Hotchin*, Winkelmann J was required to consider numerous documents that the defendants were

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16 *Dotcom v Attorney-General* [2013] NZHC 695 at [29].

seeking from the Financial Markets Authority, including documents received from third parties.[17] The FMA asserted confidentiality in many of the documents. The Judge allowed redactions.[18] We doubt whether this case could be resolved in the same way because Mr Greenbaum will need to know the source of the information provided if he is to have any prospect of sheeting home liability to WDHB.

Privacy Act 1993

[71] Mr Long was also critical of the Judge's reference to the Privacy Act as a relevant consideration. The Judge's reference to the Privacy Act was brief. The Judge said:

> [45] The privacy principles under the Privacy Act 1993, while also not binding, are similarly relevant to the exercise of discretion under s 69.
>
> (Footnotes omitted.)

[72] It is not apparent to us that this reference was made in the context of the evaluative material, rather than the comparative material that was also sought when the matter was before the High Court. However, if a reference to the former, Mr Long submitted that the Privacy Act cannot be relevant to an application under s 69. Mr Long submitted that the information privacy principles in the Act do not create "standalone" legal rights and the Act provides that they might yield to other legal processes.[19] He also submitted that the information privacy principles relate to an individual's private interest, not the public interest in disclosure.

[73] The significance of the Privacy Act in the present case is that in legislating s 29(1)(b) of the Act — see [19] above — Parliament provided that an agency might withhold evaluative information supplied in confidence. This was no doubt because of the harm that disclosure might cause to whoever had supplied the information and the provision of information in the future. The same considerations arise here.

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17 *Financial Markets Authority v Hotchin*, above n 6.
18 At [41]–[42].
19 Privacy Act, s 6.

Third ground of appeal: failure to consider means of preventing or restricting public disclosure of the evidence if given — s 69(3)(e)

[74] In presenting this part of Mr Greenbaum's appeal, Mr Grimmer submitted that Mr Greenbaum had proposed alternative measures if the Judge were minded to direct non-disclosure. These alternatives were to make the documents available "on a counsel-to-counsel basis, or under some other controlled-access restrictions". Mr Grimmer submitted that the Judge did not consider these options.

[75] Mr Grimmer submitted that, on reflection, "counsel-to-counsel" disclosure might not be sufficient and that another option would be for Mr Greenbaum to undertake that he would not commence separate proceedings or seek to join other parties to the existing proceeding without leave of the court. Mr Grimmer also submitted that access to the courtroom could be restricted during the trial, and redactions made to the judgment to protect the identity of referees. Mr Grimmer submitted such steps would minimise potential harm and allow Southern Cross to inform future referees it had gone to the "full extent possible" to protect the confidentiality of referees. Mr Grimmer anticipated that a referee's main concern would be the "stress and understandable embarrassment" of giving evidence.

[76] None of these proposals negate the harmful consequences of disclosure with which we are concerned because Mr Greenbaum will know who spoke to Southern Cross, and it will become known that Southern Cross was required to disclose information in respect of which it had guaranteed confidentiality.

[77] We have not inspected the documents ourselves because we are not persuaded anything would be achieved by doing so. We assume the contents are adverse to Mr Greenbaum, but we would not know whether the opinions expressed were honestly or fairly held. If we ordered disclosure but allowed redaction of identifying information, Mr Greenbaum's case would not be advanced particularly and Southern Cross might still be affected adversely. We doubt the concerns of each of Mr Greenbaum and Southern Cross can be met by adopting an alternative approach.

Conclusion

[78] Taking all of these matters into account, we agree with the Judge that this was a proper case in which to direct non-disclosure. We accept the information sought is likely to be important in the proceeding. On the other hand, this proceeding concerns what are now relatively historical matters; there is no suggestion of egregious conduct such as discrimination or anti-competitive activities; disclosure would be likely to cause harm to Southern Cross's access to information it requires; those who provided information in this case were promised confidentiality on the basis of Mr Greenbaum's own waiver; and we are not persuaded that there is any way in which the information could be made available without causing harm.

Result

[79] We dismiss this appeal.

[80] Costs follow the event. Mr Greenbaum must pay Southern Cross's costs for a standard appeal on a band A basis with usual disbursements.

WILLIAMS J

[81] I agree with the conclusion reached by Peters and Gendall JJ and broadly with their reasons. There are, however, two additional matters which I would emphasise.

[82] First, s 69 gives the court an "overriding discretion" to protect the confidentiality of communications where their disclosure is sought in proceedings. The task of the court is to balance competing interests. As the learned authors of *Mahoney on Evidence* note, the section is concerned only with competing *public* interests.[20] On the one hand, there is the public interest in ensuring that relevant unprivileged material is disclosed to litigants. This goes to the right of parties to a dispute to a fair trial according to law. On the other hand, there is the public interest in the need to avoid implicating the court's processes in disclosures that might harm

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[20] Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters New Zealand, Wellington, 2018) at [EV69.04]; referring to *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13]; and *Small v Body Corporate 324525* [2018] NZHC 19 at [6].

individuals or important relationships of confidence, or have a chilling effect more broadly on the free flow of information in the context of such relationships.

[83] A private interest such as that in holding the other side to a bargain of confidentiality will be relevant only if such bargain can be said to embody some wider public interest deserving of protection. Section 69 is not primarily a contractual enforcement mechanism.

[84] For that reason, the waiver signed by Mr Greenbaum is not in and of itself relevant. Rather, its relevance is derivative. The important point is that it is evidence that the hospital and Mr Greenbaum must be taken to have implicitly accepted that confidentiality between the hospital and its credentialling sources was important because of the public interest in the free flow of honest information between those parties. Mr Greenbaum must have known and accepted that patient safety and wellbeing made it necessary for those confidences to be respected.

[85] In this case, the public interest in protecting the relationship of candour between hospitals and those providing them with information relevant to credentialling is obvious and it will be a weighty factor in the balancing exercise.

[86] The second point I would make is that s 69 also requires the court to give appropriate weight to the nature of the proceeding[21] and the likely importance of the communication or information sought in it.[22]

[87] This requires the court to make an assessment, as best it can, about how important the information sought might be in the applicant's assembling of their case. The fact that the respondent can establish the existence of a relationship of confidentiality whose protection is in the public interest is not an end to the matter. There is also a legitimate public interest in ensuring that such relationships are not abused. Section 69 was not intended to prevent those injured by unlawful behaviour from obtaining a remedy in court. It should not protect a confidential source whose

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21 Evidence Act, s 69(3)(c).
22 Section 69(3)(b).

motive was, for example, not patient safety and wellbeing; but irrelevant personal enmity, professional competition, racism, or similar.

[88] This is so for two reasons. First, it would be an abuse of the court's processes to prevent the disclosure of communications that might demonstrate these improper purposes. Secondly, where a communication is made for some improper purpose, the reason for keeping communications within the relationship confidential falls away. There is no public interest in encouraging dishonest communications made for an improper purpose. When in doubt, the court can always inspect the documents for itself.

[89] It is important therefore to properly consider the nature of the allegations in the applicant's pleading and the argument as to why the confidential communications may be relevant to them. The key allegation in the amended statement of claim is that Dr Watson and the WDHB spread misinformation about Mr Greenbaum's competence and character. It suggests that the instigator of that "campaign" of lies was Dr Watson and that other third parties had advised Mr Greenbaum they had been approached to join this campaign. Mr Greenbaum alleged the campaign amounted to deceptive conduct under the Fair Trading Act, negligent misstatement and/or a restrictive trade practice under the Commerce Act.

[90] Dr Watson's comments to the respondent have been disclosed. He suggested that Waikato Hospital held an affidavit from one of its staff regarding sexual innuendo and bullying, that Mr Greenbaum was "disruptive", and that staff were uncomfortable working with him. A report following a discussion with Dr Watson and another person also notes that Mr Greenbaum failed to turn up when rostered, bullied general (that is, non-medical) staff, and lacked the necessary skill to do some of the kinds of surgery for which he was hired. These views, if honestly held, are the very sort of communication the public interest in the free flow of credentialling information is designed to protect.

[91] Weighed against that is Mr Greenbaum's allegation that others were asked to join in this malicious or negligent campaign of lies and had told him so. Any communication between those individuals and the alleged campaigners is clearly not

confidential. Mr Greenbaum is aware of the alleged content of such communications because those individuals allegedly told him what was said. Significantly, they have not provided affidavits in support of this application. Beyond that, Mr Greenbaum merely has allegations. There is no basis in the disclosures thus far to give reasonable cause to suspect that relationships of confidentiality were abused by the respondent's sources in the ways alleged.

[92] Without smoke, that confidentiality ought to be respected. The fact that the sources have not complained to the MCNZ about Mr Greenbaum's behaviour or competence is too speculative to be suspicious. Such failure may well simply be because once he had left their employment, the WDHB had no appetite for being dragged into proceedings before or about the MCNZ's disciplinary function.

[93] In the foregoing circumstances, allowing disclosure would permit the applicant to embark on a fishing expedition in which the mere levelling of an allegation would undermine the relationship of candour protected by s 69.

[94] I too am satisfied that the public interest in protecting the confidentiality of the respondent's sources and the free flow of information between those sources and the respondent outweighs the public interest in requiring such information to be disclosed.

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