

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2014-404-001729

BETWEEN

COLIN CLARK HENDERSON
Plaintiff

AND

BRENDAN FRANCIS JOHN HORAN
Second Defendant

On the papers:

Counsel: B Henry for Plaintiff

Minute: 4 August 2014

**MINUTE OF WOOLFORD J
(as to application by Fairfax Media and Ali Romanos
to access Statement of Claim)**

[1] Fairfax Media and Mr Ali Romanos, a barrister specialising in defamation matters, who also runs a website dedicated to defamation news at www.defamationupdate.co.nz have applied to this Court for a copy of the statement of claim in this proceeding. The statement of claim was filed on 14 July 2014. There is no statement of defence.

[2] Rule 3.13 of the High Court Rules deals with applications for permission to access documents, the court file or the formal court record other than at the hearing stage.

[3] There are a number of matters to be taken into account in determining an application under r 3.13. These are set out in r 3.16. These are:

- (a) The orderly and fair administration of justice;
- (b) The protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person;
- (c) The principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, Court hearings and decisions;
- (d) Freedom to seek, receive and impart information;
- (e) Whether a document to which the application or request relates is subject to any restriction under r 3.12; and
- (f) Any other matter that the Judge or Registrar thinks fit.

[4] The principal argument advanced by Fairfax media is that of the public interest as Mr Horan is an independent Member of Parliament. Mr Romanos has more of an academic interest.

[5] There have been cases in which the Court has allowed access by non-parties to the pleadings before the hearing has commenced. In *McCully v Whangamata*

Marina Society Inc,¹ the applicant was at that time a Member of Parliament and the Opposition spokesperson on conservation. He had a direct interest in examining the decision of the Minister of Conservation, which was under review.

[6] There is no doubt that there is some public interest in the subject matter of these proceedings as the defendant is an independent Member of Parliament. It is appropriate for the media to cover the case, but I am not aware, however, of any case in which access has been given to a non party to a statement of claim in a defamation case before the pleadings have closed.

[7] At any hearing the principle of open justice has predominance. The leading exposition of a principle of open justice is the House of Lords case of *Scott v Scott*² adopted by our Court of Appeal in *Broadcasting Corporation New Zealand v Attorney-General*³ and referred to by the Supreme Court in *Television New Zealand Limited v Rogers*.⁴

[8] Open justice is also reflected in the Defamation Act 1992. Section 14 of that Act grants absolute privilege of freedom of expression in judicial hearings. That extends to pleadings. However, it is not presumed by the Defamation Act that content of pleadings can be accessed and reported in the media prior to trial. Section 16 in conjunction with Part I of the First Schedule provides that qualified privilege in respect of pleadings only comes into play after the case has been set down for hearing. Part I of the First Schedule sets out publications not subject to restrictions in s 18. It includes:

5 The publication of a fair and accurate report of the pleadings of the parties in any proceedings before any Court in New Zealand, at any time after,-

- (a) In the case of proceedings before the High Court, a praecipe has been filed in those proceedings:
- (b) In the case of proceedings before a District Court, the filing of an application for a fixture for the hearing of those proceedings.

¹ *McCully v Whangamata Marina Society Inc* [2007] 1 NZLR 185.

² *Scott v Scott* [1913] AC 417.

³ *Broadcasting Corporation New Zealand v Attorney-General* [1982] 1 NZLR 120.

⁴ *Television New Zealand Limited v Rogers* [2008] 2 NZLR 277.

6. The publication of a fair and accurate report of the proceedings of any Court in New Zealand (whether those proceedings are preliminary, interlocutory, or final, and whether in open Court or not), or of the result of those proceedings.

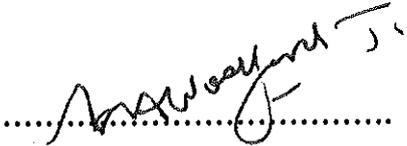
[9] Accordingly, it would be extremely unusual for this Court to allow the media access to a statement of claim prior to a praecipe having been filed. Praecipe is the former term for an agreement between the parties that the case is ready for hearing. That agreement only takes place after the pleadings in reply have been filed and then only at a much later date. Fair and accurate report of the proceedings would have to cover both the claim and the reply were it to be protected by qualified privilege.

[10] I note that the plaintiff opposes the requests by Fairfax Media and Mr Romanos on the grounds that the proceedings are not of sufficient public interest to justify the provision of the statement of claim and/or other Court documents to the media. It is submitted that the proceeding is the subject of a private civil matter. The second defendant is a Member of Parliament, but that has nothing to do with the general public of New Zealand, other than those who are interested in the Member's private life, outside his capacity and public role as a Member of Parliament.

[11] Counsel could have added that release of the statement of claim to Fairfax Media may give that organisation an opportunity to repeat what his client contends is the defamation. Should Fairfax Media do that, it would not, however, be subject to qualified privilege under the Defamation Act.

[12] Another factor I take into account is that defamation proceedings can be resolved by jury trials. Where there is a prospect that proceedings will be judged by a jury, the principle of sub judice is of considerable importance. Care must be taken to avoid any "trial by media", which might contaminate the integrity of any subsequent trial by jury.

[13] For these reasons I am satisfied that these applications are premature and cannot succeed. The applications are dismissed.

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Woolford J