13/12; [2012] VSC 153

SUPREME COURT OF VICTORIA

LEW v PRIESTER (No 2)

Davies J — 18, 24 April 2012

PROCEDURE – SUPPRESSION ORDERS – APPLICATION BY PLAINTIFFS FOR NON-PUBLICATION ORDER UNDER S18 OF THE *SUPREME COURT ACT* 1986 (VIC) AND THE INHERENT JURISDICTION OF THE COURT – NON-PUBLICATION ORDER SOUGHT COMMENSURATE AND CO-EXTENSIVE WITH RESTRICTION ON PUBLICATION UNDER S121 OF THE *FAMILY LAW ACT* 1975 (CTH) IN RELATED FAMILY COURT PROCEEDINGS – ALLEGED MISREPORTING OF THE PROCEEDING IN THE MEDIA – PROTECTION OF THE WELFARE OF CHILDREN – WHETHER THERE SHOULD BE PARITY BETWEEN THE CONFIDENTIALITY PROTECTION IN THE FAMILY COURT AND THE PROCEEDINGS IN THE SUPREME COURT – WHETHER THE MAKING OF THE ORDER IS NECESSARY TO PREVENT PREJUDICE TO THE PROPER ADMINISTRATION OF JUSTICE OR TO PREVENT ENDANGERING THE PHYSICAL SAFETY OF ANY PERSON – ORDER ONLY TO BE MADE IN EXCEPTIONAL CIRCUMSTANCES – COGENT AND PROBATIVE EVIDENCE REQUIRED – PRINCIPLE OF OPEN JUSTICE – MEANING OF THE WORD "NECESSARY": *SUPREME COURT ACT* 1986 (VIC), SS18, 19; *FAMILY LAW ACT* 1975 (CTH), S121; *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT* 2006 (VIC), SS17, 24.

L. applied for an order restricting publication of the proceeding to the extent that a prohibition on publication would apply under s121 of the *Family Law Act* 1975. The stated purpose of the application was to protect the welfare of the grandchildren of the plaintiffs if the proceeding was conducted in the Family Court. The plaintiffs said they wanted their grandchildren to have the same protections from publication of the proceeding as they did in respect of the Family Court proceedings and put their application on the basis that it was not an application for a closed court but rather an application for parity between the confidentiality protection in the Family Court and the proceedings in the Supreme Court. Various media interests intervened to oppose the order that was sought.

HELD: Application refused.

1. Sections 18 and 19 of the *Supreme Court Act* 1986 ('Act') provide an exception to the open justice principle regulating the conduct of proceedings in the Court. Ordinarily, proceedings in the Court are held in public and the corollary of conducting proceedings in open court is that anybody may publish a fair and accurate report of the proceedings, including the names of the parties and witnesses, and the evidence that has been given in the proceedings. The rule is not absolute, however, as there may be occasions where the public conduct of proceedings may not be in the interests of justice, as ss18 and 19 statutorily recognise.

2. The power conferred by s18 of the Act to make such an order is enlivened if the order is "necessary" in the opinion of the Court by reference to the matters set out in s19. In this regard, s19 reflects the position at common law that the exercise of the power to prohibit or restrict the publication of proceedings must be justified by reference to the necessity to make that order in the interests of the administration of justice.

3. The word "necessary" is a strong word and that the collocation of necessity to prevent prejudice to the administration of justice suggested Parliament was not dealing with trivialities. An order is not "necessary" because a party may wish to avoid publicity or media scrutiny or keep affairs confidential. Nor is it sufficient to justify the making of an order because it is convenient, reasonable or sensible, or to serve some notion of public interest. It is not a balancing exercise.

***Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651, applied.**

4. Furthermore, the cases make it clear that there must be material before the Court upon which the Court can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. A real risk of serious interference with the administration of justice must be demonstrated and an application for a non-publication order requires some cogent evidence to support the basis on which the application is made. A belief that the order is necessary is insufficient.

5. In relation to the plaintiffs' reliance on the rights of the grandchildren to be free from public harassment and the duty of the Court to protect the best interests of the children in order to engage the Court's power to make a non-publication order, it was undoubted that these considerations, in an appropriate case, may bear on the Court's exercise of power but the power was only enlivened by the plaintiffs showing that the order was necessary in order to prevent prejudice to the administration of justice or to prevent endangering the physical safety of any person (which are the two possible grounds open to the plaintiffs). To put it another way, the jurisdiction of the Court to make orders

restricting publication of any proceeding was not founded in the rights of the grandchildren but in s18 of the *Supreme Court Act* and the Court's inherent jurisdiction.

6. Accordingly, asserting the rights of the grandchildren as the basis for the exercise of power amounted to no more than asserting the conclusion that an order should be made, without demonstrating why the exercise of power was justified by reference to the necessity for that order in the administration of justice.

7. The application was not supported by probative evidence that further publication of the proceeding would have a detrimental emotional effect on the grandchildren. The concern to that effect expressed by L. and the children was an insufficient basis upon which the Court could reasonably reach the conclusion that it was necessary to make an order restricting publication. Mere belief that the order was necessary was insufficient. It was regrettable that the grandchildren had been subjected to gossip and hurtful comments at school arising from the publication of the proceeding to date which had caused them distress. However, that was not a sufficient reason to make a non-publication order.

DAVIES J:

Introduction

1. The plaintiffs have applied for an order restricting publication of this proceeding to the extent that a prohibition on publication would apply under s121 of the *Family Law Act* 1975 (Cth) ("the *Family Law Act*") if this proceeding was conducted in the Family Court of Australia. The stated purpose for which the order is sought is to protect the welfare of the grandchildren of the first and second plaintiffs ("Mr and Mrs Lew").[1] The plaintiffs allege that there has been a great deal of vindictive and deliberate misreporting of this proceeding by the media which has portrayed Mr Lew as "greedy"[2] and seeking to shut his three children (the third, fourth and fifth defendants) (collectively "the Lew children") out of the Lew Custodian Trust, when the claim brought by the plaintiffs against the Lew children is not concerned with beneficial interests in the Lew Custodian Trust but with the ownership of monies advanced by way of loan to the Trust. This misreporting is said to be causing harm to the grandchildren. Concern has been expressed by Mr and Mrs Lew and the Lew children that there will be a detrimental emotional effect on the grandchildren if there is further publication of this proceeding.[3]

2. This proceeding is a claim brought by the plaintiffs for declarations that the Lew children have no beneficial interest in loan accounts in their names to which distributions from the Lew Custodian Trust were credited.[4] The plaintiffs allege that Mr Lew, as the person in effective management and control of the trustee of the Lew Custodian Trust (the third plaintiff), caused distributions to be made from the trust to each of the Lew children in anticipation of legislative changes to the tax treatment of undistributed reserves of trusts.[5] The plaintiffs allege that Mr Lew put a proposal to his children that would ensure that the Lew Custodian Trust distributed its reserves before the change in tax law but in such a way as not to diminish Mr Lew's control over the assets of the trust.[6] It is alleged that Mr Lew proposed to each of his children that he would cause a distribution to be made to them subject to, and conditional upon, them (1) agreeing that they would have no beneficial interest, or beneficial claim, to any part of the amounts distributed to them, (2) that Mr and Mrs Lew had the sole beneficial interest in the amounts distributed, (3) that the whole of the amount distributed would be dealt with subject to, and in accordance with, the wishes and at the direction of Mr Lew and (4) that unless the children agreed, no distribution would be made to them.[7] It is further alleged that each of the children accepted the proposal.[8]

3. The plaintiffs seek the declarations in the broader context of concurrent matrimonial property disputes in the Family Court. The beneficial entitlement to the loan account in the name of the fourth defendant is an issue in the Family Court proceeding between her and her former husband, the first defendant. The beneficial entitlement to the loan account in the name of the fifth defendant is an issue in the Family Court proceeding between him and his former wife, the second defendant. The plaintiffs seek to have declared as against all the defendants in this proceeding, who include the former spouses, that the monies are owned by Mr and Mrs Lew.[9] The reporting of the Family Court proceedings is restricted by, and under, s121 of the *Family Law Act*.

4. The plaintiffs want their grandchildren to have the same protections from publication of this proceeding as they do in respect of the Family Court proceedings and put their application on the basis that it is not an application for a closed court but rather it is an application for parity between the confidentiality protection in the Family Court and the proceedings in the Supreme Court. Various media interests have intervened to oppose the order that is sought.

Plaintiffs' submissions

5. Several arguments were advanced on behalf of the plaintiffs in support of the submission that there should be parity between the confidentiality protection in the Family Court and the proceedings in this Court. These submissions were supported by the Lew children.

6. It was argued that the grandchildren have the right to be protected from the alleged deliberate and vindictive misreporting by the media. Reference was made to ss17(2) and 24(3) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic). It was submitted that the best interests of the children are of fundamental importance in any exercise of judicial discretion where the interests of children are involved.[10]

7. It was further argued that the power to provide that protection by making a non-publication order in this proceeding in the terms sought was acknowledged in an earlier decision in this proceeding. In *Solomon Lew & Ors v Adam Priester & Ors*,[11] the Court said that:

> In an appropriate case this court can make orders in a proceeding to ensure that any rights otherwise available under s121 of the *Family Law Act* 1975 (Cth) are not inappropriately lost.[12]

It was submitted that the Court recognised that the rights of confidentiality conferred by the Family Court can be commensurate and co-extensive with the rights of confidentiality conferred by the Supreme Court. Further, that the Court was concerned that there should be a parity of rights to confidentiality enjoyed by the parties.

8. It was also argued that it is important to avoid any disadvantage from this proceeding being heard in this Court and not in the Family Court. In both Family Court proceedings there are orders of the Family Court pursuant to s121(9)(g) of the *Family Law Act* permitting the publication of accounts of those Family Court proceedings in this proceeding.[13] It was submitted that an indirect consequence of those orders is that the benefit of the restriction on publication of that material provided by s121 of the *Family Law Act* will be lost without commensurate and co-extensive non-publication orders in this proceeding. It was accordingly submitted by the plaintiffs that s121 of the *Family Law Act* protection should be granted to the present proceedings in this Court in order to preserve the original protection provided to the Family Court proceedings.

Applicable law

9. The application was made under section 18 of the *Supreme Court Act* 1986 (Vic) ("the Supreme Court Act") and the inherent jurisdiction of the Court. Section 18(1)(c) of the *Supreme Court Act* permits the Court to:

> make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding.

10. Section 19 of the Supreme Court Act relevantly provides that the power contained in s18(1)(c) is exercisable if, in the Court's opinion:

> it is necessary to do so in order not to—
> (a) ... (b) prejudice the administration of justice; or
> (c) endanger the physical safety of any person; or
> (e) ... (f) ...[14]

11. Sections 18 and 19 provide an exception to the open justice principle regulating the conduct of proceedings in this Court.[15] Ordinarily, proceedings in this Court are held in public and the corollary of conducting proceedings in open court is that anybody may publish a fair and accurate report of the proceedings, including the names of the parties and witnesses, and the evidence that has been given in the proceedings.[16] The rule is not absolute, however, as there may be occasions where the public conduct of proceedings may not be in the interests of justice, as ss18 and 19 statutorily recognise.

12. The power conferred by s18 to make such an order is enlivened if the order is "necessary" in the opinion of the Court by reference to the matters set out in s19. In this regard, s19 reflects the position at common law that the exercise of the power to prohibit or restrict the publication of proceedings must be justified by reference to the necessity to make that order in the interests

of the administration of justice.[17] In *John Fairfax & Sons v Police Tribunal (NSW)*[18] McHugh JA explained:

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of the court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it.

The authorities make it very clear that non-publication orders should only be made in exceptional circumstances.[19]

13. In *Hogan v Australian Crime Commission*[20] the High Court stated that "necessary" is a strong word and "that the collocation of necessity to prevent prejudice to the administration of justice... suggests Parliament was not dealing with trivialities".[21] An order is not "necessary" because a party may wish to avoid publicity or media scrutiny or keep affairs confidential.[22] Nor is it sufficient to justify the making of an order because it is "convenient, reasonable or sensible, or to serve some notion of public interest". It is not a "balancing exercise".[23]

14. Furthermore, the cases make it clear that there must be material before the Court upon which the Court can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. A real risk of serious interference with the administration of justice must be demonstrated[24] and an application for a non-publication order requires some cogent evidence to support the basis on which the application is made. A belief that the order is necessary is insufficient.[25]

Evidence

15. The application here is supported by an affidavit affirmed by the plaintiffs' solicitor, Mr Bond. The affidavit exhibited numerous newspaper articles published about this proceeding which Mr Bond deposed contained substantial inaccuracies. Mr Bond also deposed that he has been informed by Mr and Mrs Lew and the Lew children and believes that:

> a. some of the grandchildren ... have been the subject of hurtful comments and gossip at school arising from the publication of the proceeding to date and this has caused them considerable distress
> b. each of [Mr] Lew, [Mrs] Lew, [and the three Lew children] has a real fear and concern that the grandchildren ... will be the subject of further gossip and further hurtful comments if the publication of this proceeding will continue
> c. the concern of [Mr] Lew, [Mrs] Lew, [and the three Lew children] is that there will be a detrimental emotional effect on the grandchildren... if there is further publication of this proceeding;
> d. the children of [the third defendant] have read some of the newspaper clippings...[26]

Decision

16. I am not persuaded that the Court's power under s18 of the *Supreme Court Act* or its power to make non-publication orders in its inherent jurisdiction has been enlivened.

17. First, the plaintiffs relied on the rights of the grandchildren to be free from public harassment and the duty of the Court to protect the best interests of the children in order to engage the Court's power to make a non-publication order. It is undoubted that these considerations, in an appropriate case, may bear on the Court's exercise of power but the power is only enlivened by the plaintiffs showing that the order is necessary in order to prevent prejudice to the administration of justice or to prevent endangering the physical safety of any person (which are the two possible grounds open to the plaintiffs). To put it another way, the jurisdiction of the Court to make orders restricting publication of any proceeding is not founded in the rights of the grandchildren but in s18 of the *Supreme Court Act* and the Court's inherent jurisdiction. Accordingly, asserting the rights of the grandchildren as the basis for the exercise of power amounts to no more than asserting the conclusion that an order should be made, without demonstrating why the exercise of power is justified by reference to the necessity for that order in the administration of justice.

18. Secondly, the Court's jurisdiction to make orders restricting publication of any proceeding is not founded in an equivalent provision to s121 of the *Family Law Act*. Section 121 of the *Family*

Law Act secures the purpose of protecting the confidentiality and privacy of the matrimonial proceedings because Parliament has legislated that matrimonial proceedings are to be conducted behind closed doors. Section 121 of the *Family Court Act* has no counterpart in ss18 and 19 of the *Supreme Court Act* or at common law. Sections 18 and 19 of the *Supreme Court Act* and this Court's inherent jurisdiction govern the making of non-publication orders in this proceeding. Hence there is a need to engage with the principles that apply in this Court. Reasons of comity or parity of rights may explain why the order is desired but those reasons do not address why the non-publication order is necessary within the terms of s19 of the *Supreme Court Act*.

19. Thirdly, the necessity for an order is not made out by the fact that material which is confidential in the matrimonial proceedings is able to be published in this proceeding pursuant to the order of the Family Court made under s121(9)(g) of the *Family Law Act*. The appropriate time for seeking a non-publication order to ensure the continued protection of s121 of the *Family Court Act* is when, and to the extent that, such material is sought to be relied on in this proceeding so that the application can be considered in light of the particular material which founds the "necessity" for the order and so that the order, if appropriate, will not go further than is necessary to secure the administration of justice.

20. Fourthly, an order in the terms sought is not justified even if there has been misreporting of this proceeding (about which I express no view). The order, if made, would have the effect of suppressing all reporting, including preventing, or at least restricting, the publication of fair and accurate reports of this proceeding. There can be no justification for any restriction on fair and accurate reporting of this proceeding, as the concern here is to protect the grandchildren against misreporting. If the proceedings have been misreported, the redress against inaccurate or unfair reporting is not a general order that would prevent or restrict all reporting. As McHugh J said in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*:[27]

> The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.

The courts have other powers that can be exercised against the particular journalists/media responsible.[28]

21. Finally, the application is not supported by probative evidence that further publication of this proceeding will have a detrimental emotional effect on the grandchildren. The concern to that effect expressed by Mr and Mrs Lew and the Lew children is an insufficient basis upon which the Court can reasonably reach the conclusion that it is necessary to make an order restricting publication. Mere belief that the order is necessary is insufficient.[29] It is regrettable that the grandchildren have been subjected to gossip and hurtful comments at school arising from the publication of the proceeding to date which has caused them distress. However, that is not a sufficient reason to make a non-publication order. In *Rinehart v Welker*[30] Bathurst CJ and McColl JA cited with approval the proposition in *R v Legal Aid Board; Ex parte Kaim Todner (a firm)*[31] that:

> In general…parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation.[32]

Similarly, in *John Fairfax Group Pty Ltd v Local Court of New South Wales*[33] Kirby J stated:

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms…a significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interest must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise powerful litigants may come to think that they can extract from Courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the Courts and may be openly reported.[34]

The price of litigation in this Court may be embarrassing and unwanted publicity but embarrassing and unwanted publicity is not a reason for the Court to make an order in the terms sought.

22. The application must therefore be refused. Of course, the refusal of the application does

not derogate from the expectation of the Court that further reporting of the proceeding will be fair and accurate.

SCHEDULE OF PARTIES
No. 7041 of 2011
BETWEEN:
SOLOMON LEW First Plaintiff
ROSE LEW Second Plaintiff
S LEW CUSTODIANS PTY LTD (ACN 006 259 954) Third Plaintiff
and
ADAM PRIESTER First Defendant
SARAH NOWOWEISKI Second Defendant
PETER LEW Third Defendant
JACQUELINE LEW Fourth Defendant
STEVEN LEW Fifth Defendant

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[1] Plaintiffs' Written Submissions (18 April 2012) at [3]; Transcript of Proceedings (18 April 2012), 10, 11, 26, 64 and 66.
[2] Plaintiffs' Written Submissions (18 April 2012) at [7.5]; Transcript of Proceedings (18 April 2012), 8, 10 and 11.
[3] Affidavit of Samuel Maxwell Bond affirmed 10 April 2012 at [8].
[4] Further Amended Statement of Claim filed 29 February 2012, 8-9.
[5] Ibid at [11].
[6] Ibid at [10]-[12].
[7] Ibid at [13], [17] and [22].
[8] Ibid at [14], [18] and [23].
[9] *Solomon Lew & Ors v Adam Priester & Ors* [2012] VSC 57 at [3].
[10] *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273.
[11] [2012] VSC 57.
[12] [2012] VSC 57 at [26].
[13] Exhibit 1.
[14] *Supreme Court Act* 1986 (Vic), s19.
[15] *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520 (Gibbs J).
[16] *Hogan v Hinch* [2011] HCA 4 at [22] (French CJ); *Attorney-General v Leveller Magazine Ltd* [1979] AC 440; and *John Fairfax & Sons v Police Tribunal (NSW)* (1986) 5 NSWLR 465.
[17] *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651, 664.
[18] (1986) 5 NSWLR 465, 476-477.
[19] *R v Robert Scott Pomeroy* [2002] VSC 178 at [11] and *R v White* [2007] VSC 471; (2007) 17 VR 308 at [21].
[20] [2010] HCA 21; (2010) 240 CLR 651.
[21] [2010] HCA 21; (2010) 240 CLR 651, 664 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).
[22] *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651, 667.
[23] *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651, 664 at [31]; *Rinehart v Welker* [2011] NSWCA 403 at [31].
[24] *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651, 664 [30]-[31]; *Rinehart v Welker* [2011] NSWCA 403 at [27]-[31] (Bathurst CJ and McColl JA) and [102]-[107] (Young JA).
[25] *John Fairfax & Sons v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476-477; see also *Hogan v Hinch* [2011] HCA 4 at [26] (French CJ); *Ex parte the Queensland Law Society Inc* [1984] 1 Qd R 166.
[26] Affidavit of Samuel Maxwell Bond affirmed 10 April 2012 at [8].
[27] *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476-477.
[28] *Friedrich v Herald and Weekly Times Ltd & Anor* [1990] VR 995, 1005.
[29] *John Fairfax & Sons v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476-477; see also *Hogan v Hinch* [2011] HCA 4 at [26] (French CJ); *Ex parte the Queensland Law Society Inc* [1984] 1 Qd R 166.
[30] [2011] NSWCA 403.
[31] [1998] EWCA Civ 958; [1999] QB 966.
[32] [1998] EWCA Civ 958; [1999] QB 966 at [54].
[33] (1991) 26 NSWLR 131.
[34] (1991) 26 NSWLR 131, 142-143. See too *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267.

APPEARANCES: For the plaintiffs Solomon Lew & Ors: JI Fajgenbaum QC with S McNicol, counsel. SBA Law, solicitors. For the first defendant Adam Priester: EN Magee QC with T Mitchell, counsel. Foster Nicholson Jones Lawyers. For the second defendant Sarah Nowoweiski: D Crennan with D Luxton, counsel. Nedovic & Co, lawyers. For the third, fourth and fifth defendants Peter Lew, Jacqueline Lew and Steven Lew: P Corbett, counsel. Strongman & Crouch, solicitors. For *The Age*, *The Australian Financial Review*, the ABC and Nationwide News (interveners): GI Scholl SC with WK Wolahan, counsel. Minter Ellison, solicitors.
