NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF W REMAINS IN FORCE.

ORDER CONTINUING SUPPRESSION OF THE APPLICANT'S NAME, ADDRESS, OCCUPATION AND ANY IDENTIFYING PARTICULARS UNTIL 2 PM ON FRIDAY 28 OCTOBER 2022.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 68/2022
[2022] NZSC 125

BETWEEN	MICHELLE BOAG Applicant
AND	THE KING First Respondent
	NZME PUBLISHING LIMITED Second Respondent
	STUFF LIMITED Third Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	D M Salmon KC and D Nilsson for Applicant R K Thomson for First Respondent T C Goatley and S C Brougham for Second and Third Respondents
Judgment:	26 October 2022

JUDGMENT OF THE COURT

A **The application for leave to appeal is dismissed.**

B **Order continuing suppression of the applicant's name, address, occupation and any identifying particulars on the terms set out at [14] until 2 pm on Friday 28 October 2022. Suppression will lapse at that time.**

REASONS

[1] The applicant applies for leave to appeal against a decision of the Court of Appeal[1] in which it upheld a decision of the High Court revoking an order for suppression of the applicant's name.[2]

Background

[2] The order suppressing the applicant's name was initially made in the District Court. The applicant was to appear as a witness in the trial of a man (whose name is suppressed and whom we will call "W") for sex offences and for attempting to pervert the course of justice. The charge of attempting to pervert the course of justice involved an allegation that W had engaged a man called Jevan Goulter to go to Australia and attempt to persuade one of the complainants against W to withdraw his allegation. Mr Goulter and his colleague, Ms Edmonds, were given immunity from prosecution and were going to be Crown witnesses against W.

[3] Prior to the District Court trial, the applicant sought name suppression under s 202 of the Criminal Procedure Act 2011 and this was granted by the District Court Judge.[3]

[4] The District Court trial was aborted when a recording of a conversation between Mr Goulter, Ms Edmonds and one of W's co-defendants was discovered. In the recorded conversation, Mr Goulter indicated that the applicant was his business partner and knew of the proposal to procure the recantation by one of the complainants. Mr Goulter observed that the applicant had said Mr Goulter's fee was too low. Mr Goulter indicated that he was splitting the fee with the applicant. (We interpolate here that the applicant refutes all of this.)

[5] The suppression order in the District Court was made without opposition from the Crown and neither of the news agencies that are the respondents to this appeal was

---

1 *Boag v R* [2022] NZCA 277 (Miller, Duffy and Ellis JJ) [CA judgment].
2 *B v R* [2022] NZHC 353 (Venning J).
3 *R v [W]* [2019] NZDC 5018 (Judge Collins).

involved. The suppression order did not have an end date, but was expressed as being subject to there being no material change to the factual basis on which it was advanced.

[6] The criminal case against W was then transferred to the High Court and W stood trial in that Court. He was convicted. The applicant was not, in fact, called by the Crown to give evidence. Her evidence would have been that what Mr Goulter said was untrue and that she did not have anything to do with Mr Goulter's efforts. It appears that the police accepted the applicant's version of events and she was not interviewed or charged in relation to the attempt to pervert the course of justice.

[7] Stuff Ltd and NZME Publishing Ltd then applied to the District Court for the revocation of the suppression order. There was some confusion as to whether it was the High Court or District Court that had jurisdiction, but that is of no moment now. The District Court revoked the order[4] and the High Court upheld the revocation. The Court of Appeal treated the High Court decision as if it was the original decision revoking the suppression order.

Court of Appeal decision

[8] The Court of Appeal found that the suppression order made in the District Court was "permanent" for the purposes of s 208 of the Criminal Procedure Act, because it did not have an expressed end date. That was potentially significant because the authorities required that there be exceptional circumstances before a permanent suppression order is varied or revoked. However, the Court of Appeal considered that the requirement for exceptional circumstances did not apply in the present case because the order was permanent only in the sense that the Court making it had omitted to specify an expiry date.[5] The Court, however, ruled that, even if the exceptional circumstances requirement applied, it would have found that the circumstances in this case were sufficiently exceptional to justify revocation of the order.[6] The Court then listed eight reasons why revocation of the order was justified.[7] It is unnecessary for us to set these out here.

---

4 *NZME Publishing Ltd v Boag* [2021] NZDC 17894 (Judge Collins).
5 CA judgment, above n 1, at [47].
6 At [52].
7 At [52].

Application for leave

[9] The applicant wishes to argue, if leave is given, that the effect of the Court of Appeal decision is to create gradations of permanence in relation to suppression orders, which undermines the required certainty for those who are given name suppression when they are to give evidence in court. The applicant wishes to argue that the Court of Appeal erred in that respect. We do not see this as raising a point of general or public importance given that it is very much founded on the unusual situation that arose in this case where the Judge clearly anticipated the order would be reviewed but did not specify an end date.[8] In any event, the fact that both the High Court and Court of Appeal were satisfied that the circumstances were exceptional means that the decisions below were not dependent on the finding that the suppression order was not permanent for the purposes of s 208 of the Criminal Procedure Act.

[10] The applicant also wishes to argue that the circumstances in this case were not, in fact, exceptional. We see that as an entirely factual matter, raising no point of public importance, and we do not consider there is any real risk of miscarriage in the way the Courts below addressed that issue.[9]

[11] The applicant also wishes to argue that the Court of Appeal should not have taken into account the principle of open justice when determining whether the publication of the applicant's name would cause undue hardship. While we accept there may be an argument as to whether public interest factors should be taken into account when addressing the undue hardship aspect of s 202 of the Criminal Procedure Act, we do not consider that it has affected the outcome in this case. In those circumstances, it is not appropriate to grant leave on this point.

[12] The applicant also wishes to argue that the Court of Appeal was wrong in its assessment of undue hardship. Again, we see this as raising no point of public importance, being an assessment that is entirely based on the specific facts of the present case. Nor do we see any real risk of a miscarriage in the way the Court of Appeal assessed this issue.

---

8 Senior Courts Act 2016, s 74(2)(a).
9 Section 74(2)(b).

[13] We are not satisfied that the criteria for the grant of leave to appeal have been satisfied in this case. We therefore dismiss the application for leave to appeal.

[14] Accordingly, the interim suppression order made by the Court of Appeal will lapse. The applicant seeks an order that suppression continue for a period following the delivery of this decision to enable her to prepare for publication. We consider that is appropriate. We therefore make an order continuing suppression of the applicant's name, occupation and any identifying particulars until 2 pm on Friday 28 October 2022 at which time suppression will lapse. After that time, there will be no impediment to reporting of the applicant's name and identifying particulars. For the avoidance of doubt, we make it clear that this order does not prevent the applicant from notifying friends and associates of the impending discontinuance of suppression prior to suppression lapsing.

Solicitors:
LeeSalmonLong, Auckland for Applicant
Crown Law Office, Wellington for First Respondent
Bell Gully, Auckland for Second and Third Respondents