ORDER PROHIBITING PUBLICATION OF THIS JUDGMENT (INCLUDING ITS RESULT) UNTIL 5.00 PM ON 27 MAY 2024.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 138/2023
[2024] NZSC 60

BETWEEN	THE PATHWAY TRUST Applicant
AND	NZME PUBLISHING LIMITED AND STUFF LIMITED First Respondents
	JOSEPH JAMES BRIDER Second Respondent
	THE KING Third Respondent

Court:	Glazebrook, Ellen France and Kós JJ
Counsel:	K J Beaton KC and C A Twyman for Applicant T C Goatley and K M Wilson for First Respondents J R Rapley KC and D M Kirby for Second Respondent H G Clark for Third Respondent
Judgment:	20 May 2024

JUDGMENT OF THE COURT

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

B **We make an order prohibiting publication of this judgment (including its result) until 5.00 pm on 27 May 2024.**

REASONS

[1] The applicant seeks leave to appeal a judgment of the Court of Appeal quashing a High Court order suppressing the name and identifying particulars of the applicant and associated entities.[1]

[2] The applicant is a registered charity which provides reintegration services to prisoners and parolees, including in collaboration with the Department of Corrections. It was through the provision of these services that the applicant became connected to the second respondent, Joseph Brider. Near the end of his sentence for sexual violence offences, Mr Brider was paroled from prison to a flat owned by the applicant. It had been working with Mr Brider for some five months prior to his release through a reintegration programme called the Navigate Initiative. On 22 January 2021, Mr Brider broke into the flat next door and murdered Ms Bonilla-Herrera. Ms Bonilla-Herrera was not aware of Mr Brider's background or prior offending.

[3] The first respondents are media organisations seeking to publish the applicant's name in connection to Mr Brider's offending. The third respondent, the Crown, also opposes suppression. Mr Brider indicated his support for the proposed appeal, but elected not to file submissions.

[4] In the course of the criminal proceedings against Mr Brider, the applicant sought name suppression under s 202(1)(c) of the Criminal Procedure Act 2011 as an entity connected with Mr Brider, arguing that it would suffer undue hardship if named in connection to the murder.[2] It submitted that the negative publicity would cause reputational damage and reduce its capacity to perform its purposes, which is dependent on the receipt of donations.

[5] The High Court made a suppression order, accepting that undue hardship to the applicant would result from publication.[3] However, the Court of Appeal quashed that order on appeal, finding that undue hardship had not been made out.

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1 *NZME Publishing Ltd v Brider* [2023] NZCA 590 (Miller, Gilbert and Mallon JJ) [CA judgment].
2 Criminal Procedure Act, s 202(2)(a).
3 *R v Brider* [2022] NZHC 3579 (Eaton J).

[6] In reaching this conclusion, the Court of Appeal reasoned that the applicant was connected to the offending, not just to the offender, and the connection was not coincidental or peripheral.[4] Although the applicant is not a public entity, there remained a strong public interest in its connection to the offending, regardless of whether it had done anything wrong.[5] Further, there were factors mitigating the hardship likely to result from publication. Media organisations could be expected to offer a balanced perspective, and the applicant could make contact with its supporters and explain its point of view.[6]

[7] The Court of Appeal noted for completeness that, even if undue hardship had been made out, it would have found that the open justice principle "must prevail … by a considerable margin" at the discretionary stage.[7] The case raised "questions of public policy toward prisoner rehabilitation services and processes" which required scrutiny, including of the applicant.

[8] The applicant seeks leave to appeal against the Court of Appeal's decision on three grounds. First, it submits the Court of Appeal erred by considering public interest at the threshold stage of the test under s 202(2). Secondly, the applicant submits the Court fundamentally misunderstood its functions and role in connection to Mr Brider, leading to an erroneous finding that it was connected to his offending. Thirdly, it submits the Court incorrectly concluded that the applicant's potential hardship was not disproportionate to the interests supporting publication, by conflating the public interest in Mr Brider's offending with a public interest in the applicant's involvement.

Our assessment

[9] The proposed appeal raises no matter of general or public importance.[8] We accept there has previously been some disagreement regarding whether the threshold stage in s 202 deals exclusively with the degree of hardship arising from publication, leaving all consideration of public interest to the discretionary stage, or

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4 CA judgment, above n 1, at [31].
5 At [32].
6 At [36]–[37].
7 At [41].
8 Senior Courts Act 2016, s 74(2)(a).

whether public interest can be considered at *both* stages.[9] However, this Court's recent decision in *M (SC 13/2023) v R* has resolved that disagreement in favour of the former formulation.[10] There is no need for this Court to revisit that issue in this case.

[10] Nor do we consider there is any evident risk of a substantial miscarriage of justice.[11] While the point above necessarily indicates an apparent error in the Court of Appeal's application of the test, we do not consider the outcome was materially altered by that defect. The Court was well aware of the differences between the roles of the applicant and of the Department of Corrections and the Parole Board in connection to Mr Brider, but ultimately concluded that this did not displace the legitimate public interest in the applicant's involvement, which existed independently of any wrongdoing.[12] The Court accepted that decisions about Mr Brider's accommodation, his release conditions and public notification ultimately rested with the Department of Corrections and the Parole Board, and that there may very well be nothing for which the applicant should be held accountable. But it found there was still a "clear public interest" in the applicant's role, arising from its involvement in Department of Corrections processes and its work with Mr Brider.[13] As noted, the Court also identified mitigating factors which were likely to soften the blow of publication, and concluded the principle of open justice must prevail in any event.[14] We consider the applicant has insufficient prospects of establishing the Court erred in reaching these conclusions.

[11] It follows that we are not satisfied it is necessary in the interests of justice for this Court to hear and determine the appeal, the applicant's prospects of success before us being too remote to justify that course.[15]

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9 See *Boag v R* [2022] NZSC 125 at [11].

10 *M (SC 13/2023) v R* [2024] NZSC 29 at [39]. While the decision was made in relation to s 200, which deals with suppression of a *defendant's* name, there is no reason why the approach ought not to be consistent in both provisions: see also at [106].

11 Senior Courts Act, s 74(2)(b).

12 CA judgment, above n 1, at [31]–[33].

13 At [33].

14 At [36]–[37] and [41]. See also discussion above at [6]–[7].

15 Senior Courts Act, s 74(1).

[12] We consider it is appropriate for publication of this judgment to be embargoed for seven days following its delivery to allow the applicant to prepare for publication, and will so order.

Result

[13] The application for leave to appeal is dismissed.

[14] We make an order prohibiting publication of this judgment (including its result) until 5 pm on Monday, 27 May 2024.

Solicitors:
Parry Field Lawyers, Christchurch for Applicant
Bell Gully, Auckland for First Respondents
Te Tari Ture o te Karauna | Crown Law Office for Third Respondent