IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA323/2019
[2020] NZCA 178

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	27 February 2020
Court:	Miller, Dobson and Moore JJ
Counsel:	C S Henry for Appellant JEL Carruthers for Respondent M J Hodge and K J Eskildsen for New Zealand Law Society as Intervener
Judgment:	21 May 2020 at 2.30 pm

JUDGMENT OF THE COURT

A The questions of law set out at [2] are answered at [33] of this judgment.

B Mr Siemer's conviction is set aside.

C We remit the question of name suppression for Mr Wells' client to the Lawyers and Conveyancers Disciplinary Tribunal for further consideration.

D We make an interim order suppressing the name of Mr Wells' client.

REASONS OF THE COURT

(Given by Miller J)

[1] This is a second appeal, brought by leave of this Court. It arises from Mr Siemer's conviction for breaching a suppression order made by the Lawyers and Conveyancers Disciplinary Tribunal. He published in a blog post the name of a practitioner, Neil Wells, whom the Tribunal had censured while recording that "we consider" the circumstances "justify the permanent name suppression" of Mr Wells and his former client.[1]

[2] Leave has been granted on the following questions:[2]

(a) In the exercise of its statutory power to place restrictions on publication pursuant to s 240 of the Lawyers and Conveyancers Act 2006 (the Act), is the Tribunal required in its decision expressly to record that it is making an order or orders under s 240 of the Act?

(b) In light of the answer to question (a), did the High Court err in [2019] NZHC 1346 at [27] in finding that "the Tribunal's decision is sufficient to evidence the making of an order under s 240" in the circumstances of this case?

(c) In the light of the answers to the above questions, can the conviction of the appellant stand on the charge of contravening an order made by the Tribunal under s 240 of the Act, contrary to s 263 of the Act?

[3] It will be seen that the Court confined the grant of leave to specific questions of form and process. We make this point because it is evident from papers filed by Mr Siemer before us (unilaterally, although he is represented by counsel) that he continues to dispute factual findings made against him. He followed the disciplinary proceeding closely, and the courts below found that he understood a suppression order had been made.[3] As we explained at the hearing, the grant of leave does not allow him to contest that finding.

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1 *Waikato Bay of Plenty Standards Committee No. 2 v M* [2016] NZLCDT 34 [Tribunal decision] at [28].

2 *Siemer v Police* [2019] NZCA 574 at [11].

3 *Police v Siemer* [2018] NZDC 24353 [District Court decision] at [13] and [21(b)]; and *Siemer v Police* [2019] NZHC 1346 [High Court decision] at [42]–[44].

Background

[4] The relevant facts are few. On 24 November 2016, the Tribunal issued a written penalty decision against Mr Wells,[4] who had enjoyed interim name suppression throughout the proceedings to that date.[5] (Mr Wells has since died and the grounds for suppression no longer apply to him. We do not suppress his name in connection with this judgment.)

[5] One of the questions before the Tribunal was whether it should order permanent name suppression. When the penalty hearing on 8 November 2016 ended the Chair, Judge Clarkson, stated orally what orders the Tribunal "will be" imposing or making.[6] The last was that "name suppression will be granted".

[6] The written decision of 24 November was headed "Reasons of the Tribunal for Decision on Penalty".[7] However, it was not said to record reasons for decisions made at the hearing. Rather, it was expressed as the Tribunal's decision and reasons. For example, the Tribunal stated that it would impose a fine and censure and went on to specify what the practitioner must pay and to record that "in addition to the other consequences set out in this decision, we must formally censure you, and now do so".[8]

[7] We set out in full the Tribunal's discussion of name suppression:[9]

> [22] The reasons for interim name suppression are set out in our interim decision of 25 July 2016.
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> [23] The Standards Committee submit that the public interest in openness of the disciplinary process demands that the practitioner's name be published.
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> [24] We accept that an adverse finding means that the threshold for suppression is higher than at an interim stage.
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> [25] Mr Davey accepted the decisions of *H* and *ABC*. Both allowed permanent suppression in cases where the practitioners had serious health concerns. In the latter case the likely detriment to the practitioner's mental health had been certified by a psychiatrist. Mr Davey submits that, in the

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4 Tribunal decision, above n 1.
5 *Waikato Bay of Plenty Standards Committee No. 2 v W* [2016] NZLCDT 19 [Interim suppression decision].
6 *Waikato Bay of Plenty Standards Committee No. 2 v M* LCDT Auckland LCDT 007/16, 8 November 2016 [Penalty hearing].
7 Tribunal decision, above n 1.
8 At [34].
9 Citations omitted. Emphasis added.

> absence of a certificate from a psychiatrist, the Tribunal ought not to be satisfied in this regard. In the *H* matter both psychological and physical health problems were involved and the serious adverse consequences which might be suffered by the practitioner were his name published, tipped the balance against publication in that matter.
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> [26] In the present case there is ample information before the Tribunal to accept that there are both psychological and physical health conditions at a serious level. In addition to that, as referred to in our interim decision, the practitioner has in the past been pursued by a litigious and irrational person who might be expected to re-engage in a campaign against the practitioner should the present matters come to that person's attention.
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> [27] The litigation pursued by this person has been the subject of adverse judicial comment at all levels.
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> [28] Given that there is no risk to the public posed by this practitioner in the future, *we consider that the combination of factors referred to above do, in this unusual set of circumstances, justify the permanent name suppression of the practitioner, his former client and any identifying details*.

It appears that the person whom the Tribunal characterised as litigious and irrational was not Mr Siemer but rather Grace Haden, who appears to be an associate of his. We infer from paragraph [26] of the decision that Mr Siemer had not been present during the penalty hearing.

[8] It appears that the Tribunal's decision was published, with the name of the practitioner anonymised as "Mr M", on the Ministry of Justice website. The evidence suggests that it was published there shortly after it was delivered.

[9] It appears that by letter of 4 May 2017, the Tribunal advised the Ministry that there had been a complaint about breach by Ms Haden of what was characterised as its suppression order.

[10] On 28 May 2017 Mr Siemer published the practitioner's name in a blog post, in connection with allegations that the practitioner had appeared before the Tribunal in connection with a charge of negligence (incorrectly described by Mr Siemer as "fraud"). The post detailed Mr Wells's past conduct, summarised the content of the Tribunal's decision, and alleged that the Tribunal had concealed Mr Wells's name.

[11] On 30 August 2017 Mr Siemer was charged under s 263 of the Act with the offence of contravening an order made under s 240. Section 263 provides that:

> **263 Publication**
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> (1) Every person commits an offence who, without lawful excuse, acts in contravention of any order made by the Disciplinary Tribunal under any of paragraphs (a) to (c) of section 240(1).
>
> (2) Every person who commits an offence against this section is liable on conviction to a fine not exceeding $25,000.

The offence requires that the defendant breached an order that was in force at the time, with knowledge that the order existed and without lawful excuse.

[12] At some point the Tribunal's seal was affixed to the decision of 24 November 2016. It appears that this was done for purposes of the prosecution. We assume in Mr Siemer's favour that it happened after he published his blog post.

[13] Mr Siemer's blog post referred expressly to the decision, giving its date. In the District Court, Judge Blackie found that Mr Siemer had access to the Tribunal's decision and specifically demonstrated his knowledge of the suppression order; he had referred to the Tribunal's "reasons to again conceal [the practitioner's] identity from the unsuspecting public".[10]

[14] Judge Blackie concluded with a series of factual findings:[11]

> (a) The terms of the order were clear and unambiguous. They were binding on the defendant as they were on any member of the public in New Zealand.
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> (b) The defendant had knowledge of the order. Obviously, he had read the 24 November [2016] Tribunal decision, as he quotes verbatim passages or extracts taken from the decision, including extracts relating to non-publication.
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> (c) The defendant acted in breach of the terms of the order by publishing the name of the practitioner that the Tribunal suppressed.
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> (d) The defendant's conduct was deliberate in that he wilfully acted in a manner that breached the order. The whole purpose of the blog site publication was to expose Mr Wells as "a long, lingering case of a cobbled repeat fraudster where blanket Court suppression orders protected his "privacy"". He went on to state:

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10 District Court decision, above n 3, at [13].
11 At [21].

> "Proving corruption is perpetuated if not emboldened by Court suppression orders which prevent public awareness".
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> (e) In reality, it is quite clear that the principle behind the defendant's publication was to reveal and expose the activities of Neil Wells to his readers, despite his knowledge of and in the face of the Tribunal's order for name suppression.

[15] Mr Siemer has throughout maintained that the Tribunal never actually made or promulgated a suppression order. Judge Blackie dismissed that argument, concluding that an order was made.[12] He followed the judgment of Clark J in *Haden v Police*, in which the High Court upheld the conviction of Ms Haden for publishing very similar allegations about Mr Wells.[13] Clark J reasoned that the Tribunal had clearly intended to make a suppression order, and that orders within its jurisdiction need not adopt any particular format; and further, that Ms Haden had chosen to ignore the order on technical and semantic grounds that had no merit, since she plainly appreciated that the Tribunal had intended to suppress Mr Wells's name.

[16] Mr Siemer's appeal to the High Court was also dismissed.[14] In a judgment delivered on 14 June 2019 Edwards J held that what the Tribunal had done was sufficient to evidence the making of an order under s 240:

> [26] It would have been preferable for the Tribunal to expressly record that it was making a non-publication order in its decision, either in the section on suppression or at the end of its decision. That would remove any room for argument as to whether an order was in fact made, and the scope of the terms of that order. It may also have been preferable to include a banner on the front of the decision alerting all those who read it that a non-publication order had been made.
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> [27] However, I am satisfied that the Tribunal's decision is sufficient to evidence the making of an order under s 240 in this case. It is implicit in [28] of the decision that this is what the Tribunal is doing, and there is no room for doubt that permanent name suppression of the practitioner, his former client, and any identifying details was made. As discussed further in relation to knowledge, it is clear that Mr Siemer regarded the decision as evidencing a non-publication order at the time he made his post and was in no doubt that an order had been made. The Judge did not err in relying on the Tribunal's decision as evidencing an order.
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> [28] There is also no requirement that the Tribunal identify the practitioner by name in its suppression order. As counsel for the respondent submits, any such requirement would undermine the very purpose of a suppression order.

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12 At [21].
13 *Haden v Police* [2018] NZHC 498.
14 High Court decision, above n 3.

> The failure to identify the practitioner concerned does not detract from the validity of the order made in any way. I agree with counsel for the respondent's submission that, in practice, the non-publication order has limited effect, as it only prohibits publication of a practitioner's name if that name, and the fact that the practitioner is the subject of the Tribunal decision, is already known. In this case, and as discussed further, Mr Siemer published the name of the practitioner with full knowledge of the Tribunal's order.
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> [29] Finally, Mr Siemer's submissions appear to revive the argument made in the District Court that the order was not an effective order "against the world", but only bound the parties to the decision. That argument cannot be sustained in the face of the plain meaning of ss 240 and 263. Section 240 confers a clear power on the Tribunal to make an order to the public at large preventing publication of a practitioner's name, and s 263 specifies the reach of the offence to "every person". Clearly the order was effective against Mr Siemer in this case.
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> [30] It follows that I am satisfied that there was no error in the Judge's conclusion that there was evidence of a valid order of suppression that prohibited Mr Siemer from publishing the practitioner's name and identifying details. This ground of appeal must be dismissed.

[17] We need not discuss other parts of Edwards J's decision, but we do note in passing that she rejected an argument that the order ought to be deemed unlawful for non-compliance with s 14 of the New Zealand Bill of Rights Act 1990.[15] Following the judgment of the Supreme Court in *Siemer v Solicitor-General*, a contempt case, she held that the order must be treated as valid unless and until varied or set aside.[16]

The Tribunal's power and processes

[18] The Act regulates the provision of legal and conveyancing services to maintain public confidence in them, to protect the consumers of those services, and to recognise the status of the legal profession and the profession of conveyancing practitioner. Relevantly for present purposes, it records fundamental obligations of practitioners and establishes processes for investigating breaches of professional standards and disciplining practitioners who transgress. It continues the New Zealand Law Society as a body corporate with perpetual succession and a common seal and confers upon the Society regulatory functions that include the Act's enforcement.[17]

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15 At [37]–[39].
16 At [33]–[35] citing *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.
17 Lawyers and Conveyancers Act 2006, ss 63, 65 and 67.

[19] What follows is a brief survey of the procedures which the Tribunal would normally follow, focusing on its processes for making and facilitating enforcement of its orders. Sections 226 to 228 establish the Tribunal and its functions and provide for its membership. It may sit in divisions.[18] Section 234 provides that for purposes of any disciplinary proceedings the Tribunal must consist of a chairperson and certain other members. There is no provision for a seal. The Act regulates the Tribunal's processes by providing for representation, for public hearings and for evidence, and by providing that it must observe the rules of natural justice.[19] A schedule deals with power to summons witnesses.[20] Except as provided by the Act, or by rules made under it, the Tribunal may determine its own procedure.[21]

[20] The Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008 contain additional procedural provisions governing the laying of charges, service of documents and conduct of hearings. Regulation 34 provides that an order or decision of the Tribunal may, if the Tribunal thinks fit, be delivered by any one or more members. There is no prescribed form of order — notably, there is no requirement that an order should specify under what legislative authority it was made — and no provision for orders or decisions to be sealed or signed or otherwise made formal. It appears that the seal used by the Tribunal in this case may have been an artefact of its practice in a former life.

[21] The Tribunal's jurisdiction to make a suppression order is found in s 240 of the Act, which provides that the Tribunal may make orders prohibiting publication of, among other things, the practitioner's name:

> **240 Restrictions on publication**
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> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:
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> …

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18 Section 229.
19 Sections 236–239.
20 Schedule 4, clause 6.
21 Section 252.

> (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.
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> …
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> (4) For the purposes of exercising the Disciplinary Tribunal's power under subsections (1)(c) and (2) to make or revoke, before the start of the hearing of the charge, an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person, the quorum at any sitting of the Disciplinary Tribunal or a division of the Disciplinary Tribunal is, despite section 235(1), the 3-member quorum specified in section 235(5).

[22] Under s 255 of the Act, orders in which certain sanctions are made, such as striking-off, must be filed in the High Court, where they are deemed to take effect as if they were orders of that Court. They are also gazetted.[22] Section 258 provides that if the Tribunal makes an order (other than an order to which s 255 applies) under Part 7, which includes the power to suppress publication under s 240, that order "may be filed in an office of the High Court", in which case it takes effect as if it were an order of the High Court to like effect made within its jurisdiction.

[23] However, filing in an office of the High Court is not a prerequisite to a prosecution commenced to enforce an order made under s 240. Section 263 simply provides that every person commits an offence who, without lawful excuse, acts in contravention "of any order made" by the Tribunal under any of s 240(1)(a) to (c).

[24] That brings us to the question on which the appeal turns: whether an order was made.

Did the Tribunal make a non-publication order?

[25] It is arguable that an order was made at the conclusion of the penalty hearing on 8 November, when the chairperson stated that "name suppression will be granted".[23] An order pronounced orally by the chairperson in the presence of the Tribunal members sitting would comply with reg 34, and it would bind those with notice of it, including Mr Siemer had he been present.

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22 Section 256.
23 Penalty hearing, above n 6.

[26] However, the case was not argued in that way, for good reason. The Tribunal evidently intended that the orders would be made in its written reasons for decision. As noted above, the written reasons did not state that they recorded orders already made. And it is not suggested that Mr Siemer attended the hearing on 8 November. The police relied on the written reasons to establish that he had notice of the order, so establishing the mental element of the offence under s 263. We accordingly put any orders pronounced on 8 November to one side. We approach the appeal, as counsel did, on the basis that if an order was made at all, it was made in the written reasons of 24 November. This is a point of some moment in this case, as we explain below.

[27] The written reasons were recorded in a document intituled as a decision of the Tribunal, whose members it identified, in the proceeding against Mr Wells, who was identified as "Mr M" or "the practitioner". The document was signed by the chairperson, but as noted above the rules do not require a signature, still less the affixing of a seal. Mr Henry did not argue that the reasons were anything other than a decision delivered by the chairperson for the Tribunal.

[28] That brings us to the question whether the Tribunal "made" an order for non-publication by stating that "we consider" the listed factors and circumstances "do … justify the permanent name suppression of the practitioner, his former client and any identifying details".[24]

[29] On their face, these words state only that the Tribunal was satisfied that grounds for suppression had been made out. Mr Henry argued that nowhere did the Tribunal actually make an order. It did not follow the practice of recording suppression orders in a banner at the top of the first page, nor did it list the orders made in an order band or gather them together in a results section at the end of its decision. It did make some orders; as noted earlier, it stated clearly that it was fining and censuring Mr Wells.

[30] Mr Hodge accepted that the fact an order had been made must be clear to a reader of the decision. We agree and add that a suppression order, unlike other orders that the Tribunal may make, is addressed to the world at large and a breach may result

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[24] Tribunal decision, above n 1, at [28].

in criminal proceedings. That being so, the question whether its language was effective to make an order is to be answered objectively, from the perspective of the reasonable person having no knowledge of the case apart from the Tribunal's decision. That is the correct standard notwithstanding that, in this case, the reader would need to know some additional facts to appreciate that "Mr M" was in fact Mr Wells.

[31] It is at this point that we consider the courts below erred. They found it sufficient that Mr Siemer knew the decision concerned Mr Wells and understood that a suppression order had been made. There are two difficulties with that approach. First, it conflates two separate requirements: the making of an order and Mr Siemer's knowledge of it. The question, as we have explained, is whether a reasonable observer with no knowledge of the case apart from the written reasons would have understood that an order had been made. Second, it assumes that Mr Siemer acquired his knowledge by reading the decision. Plainly he knew more than that; he must have done, in order to appreciate that it concerned Mr Wells. For all we know (we do not suggest this is in fact the case) he may have been told of the order by someone who was at the penalty hearing on 8 November and heard the Chairperson's announcement that suppression would be granted.

[32] In our view the Tribunal's decision did not make it sufficiently clear that an order had been made. It did not say so in as many words. The conclusion that an order was made rests on an inference founded only on its decision that grounds for an order had been made out, but a decision is logically antecedent to an order. Mr Hodge pointed to the fact that Mr Wells's name was anonymised, but that need not evidence a suppression order. Anonymisation can be an alternative to suppression, used for example to limit publication of information in which there is a legitimate privacy interest.

Answers to questions posed

[33] For these reasons, we answer the questions set out at [2] as follows:

(a) No form of words is prescribed and it is not necessary to recite the Tribunal's legislative authority to make a suppression order. However, the Tribunal must make clear to the reasonable observer with

no knowledge of the proceeding apart from the decision that it is making a suppression order. It is best practice to record the order in a banner at the front of the decision and in an order band or results section recording the formal outcome.

(b) Yes. The Tribunal's language in this case did not make sufficiently clear to the reasonable observer that a suppression order was made.

(c) No. We set aside Mr Siemer's conviction.

[34] We did not hear argument on the question whether a suppression order ought to now be made with respect to Mr Wells' client. She has not been named in this judgment or those of the courts below, but her name will be mentioned in the Tribunal's records and we cannot exclude the possibility that someone with knowledge of that information would take the opportunity to publish her name. We remit the question of her name suppression to the Tribunal for further consideration. To preserve its opportunity to make such order, we make an interim order suppressing her name pending reconsideration by the Tribunal.[25]

Solicitors:
Meredith Connell, Auckland for Intervener
Crown Law Office, Wellington for Respondent

[25] Relying on the implied power of all courts to order suppression in a civil context where necessary for the administration of justice: *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.