IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2010-409-000559
[2015] NZHC 3354

IN THE MATTER	of the Insolvency Act 2006
AND	
IN THE MATTER	of the bankruptcy of DAVID IAN HENDERSON
BETWEEN	HAVENLEIGH GLOBAL SERVICES LIMITED AND FM CUSTODIANS LIMITED Judgment Creditors (Substituted Creditors)
AND	DAVID IAN HENDERSON Judgment Debtor

Hearing: 17 December 2015

Appearances: C R Vinnell for Official Assignee
J Moss for D I Henderson (bankrupt) in person
(T Cooley as counsel assisting the court excused)

Judgment: 21 December 2015

RULING (11) OF ASSOCIATE JUDGE OSBORNE
as to revocation of prohibition of publication of Ruling No. 1 details

---

Introduction

[1] The Court is in the course of conducting a public examination of Mr Henderson (a bankrupt) as required by s 295 Insolvency Act 2006.

[2] On 29 July 2015 I gave a pre-examination ruling No. 1 (Ruling 1) as to information which the Assignee had obtained on summonses and notices issued under the Act.[1]

[3] The first subject of Ruling 1 was summonses which the Assignee had issued. They were not the immediate focus of the issues now raised by the Assignee.

[4] The second aspect of Ruling 1 relates to documents obtained pursuant to s 171 of the Act. Notices were issued by the Assignee including to Xero in respect of records of the companies.

[5] Mr Henderson had applied for an order which would have precluded the Assignee relying upon information obtained pursuant to such notices. Mr Henderson asserted that the notices were unlawful.

[6] My ruling was given at a time (29 July 2015) before the public examination of Mr Henderson commenced in Court. At that point the Court had no certainty as to how the information obtained by the Assignee pursuant to summonses and notices might be used in the public examination of Mr Henderson. Particularly to protect Mr Henderson's fair hearing interests in the course of his examination, I prohibited publication of the reasons in the ruling until the Court's judgment pursuant to the public examination of Mr Henderson (with the exception of publication in a law report or law digest). Mr Henderson's public examination commenced on 3 August 2015, shortly after Ruling 1 was given. On 20 August 2015 the Assignee completed her questioning of Mr Henderson. The Court had, in the conduct of the public examination to that date, also pursued the questions it wished to. Mr Henderson had added his own evidence. There remain some further matters of evidence which Mr Henderson wishes to adduce but (save for any questions which arise out of that evidence) it appears unlikely that the Court or the Assignee will have further questions of Mr Henderson in the public examination.

---

[1] *Havenleigh Global Services Limited v Henderson* [*Ruling No 1*] [2015] NZHC 1761.

The present application

[7] On 9 December 2015, the Assignee filed an application for directions in relation to the prohibition on publication of reasons for ruling. Leslie Currie, the Official Assignee in Hamilton, has provided affidavit evidence as to publicity in the news media of how Xero responded to the Assignee's s 171 Notice.

[8] An article was published in the *National Business Review* in November 2015 in the name of Rodney Hide. The tenor of the article is reflected in one of the initial questions asked rhetorically in the article:[2]

> … would Xero do a Westpac and release [your financial records] to State agents on simple request without warrant?

It appears from the article that the draft article must have been put to the Chief Executive of Xero, Mr Drury, as his response was included. Mr Drury's response did not refer to the ruling but asserted that there were factual inaccuracies in what Mr Hide had said.

[9] A further article by way of a "comment" appeared in the *National Business Review* on 4 December 2015. In the article it was recorded:[3]

> Mr Drury also said there was a court judgment which backed Xero's actions in this case. Despite extensive investigation *NBR* can't find any trace of such a judgment but searching for it has delayed this story.

[10] It seems clear that the judgment to which Mr Drury was referring was Ruling 1.

[11] The alternative directions sought by the Assignee were either a direction that the prohibition on publication of the reasons set out in the ruling will not be offended by publication to the news media, on the Internet, or on any publicly available media, or (alternatively) an order lifting the prohibition on publication to allow publication of the statement in Schedule A.

---

2 Rodney Hide "Xero denies Christchurch case raises doubt over its privacy policy" *National Business Review* (online ed, New Zealand, 6 November 2015).

3 Jenny Ruth "Xero caught in financial data issue" *National Business Review* (online ed, New Zealand, 4 December 2015).

[12] I do not here reproduce verbatim the articles which appeared in the *National Business Review*. It is sufficient to record that they set out Mr Hide's view of factual matters and of the law. He concludes that the Assignee, in obtaining information from Xero, acted outside her powers and that Xero did not act as a custodian of its customers' data. He records:[4]

> It would seem the Official Assignee bluffed Xero into release, just as the Police bluffed Westpac.

[13] It is clear from the comments attributed to Mr Drury in the December article that, but for the order prohibiting publication for the reasons set out in Ruling 1, Mr Drury would have referred not only to the existence of a Court judgment which "backed Xero's actions" but also to the reasons for that ruling.

[14] In other words, the non-publication order has prevented Xero from responding to allegations appearing in the news media by reference to a judgment of this Court which upheld the lawfulness of the Assignee's s 171 notice.

The competing positions

The Assignee's position

[15] The Assignee has brought her application upon the basis of a formal notice of interlocutory application. That has helpfully put matters in a formal way before the Court although I do not regard this particular matter as calling for a formal application. I added the original non-publication order, when giving my ruling, pursuant to the Court's powers to regulate its own processes.

[16] For the Assignee, Mr Vinnell provided the draft statement (Schedule A) which he submitted would ensure that all news media reporting on matters concerning the Xero notices could be accurate and could include reference to relevant Court rulings. As a result of issues raised for Mr Henderson, Mr Vinnell attempted to redraft the statement, the redraft being Schedule B to this judgment.

---

4 Hide, above n [2].

Mr Henderson's position

[17] As the Assignee filed a normal notice of interlocutory application, Mr Henderson filed a notice of opposition. He identified eight specific grounds of opposition:

a. With respect to paragraph 3 of the application, there is no jurisdiction to rescind or vary an order of this type. The applicant has to apply for leave to review the original decision of non publication;

b. With respect to paragraph 2 of the application, the proposed statement is clearly "publication of the reasons" as prohibited by the order;

c. The respondent has not had an opportunity to file any evidence in support of his opposition. There is no urgency such that his fair rights should be overridden;

d. The statement is wrong, misleading, and incomplete; wrong in the incorrect way it states the ruling in this proceeding, and misleading in that it conveys or implies a definitive ruling on the issues when that is not the effect of the ruling, and incomplete, in particular in that it fails to refer to the Court's minute of 8 July 2015;

e. The statement impacts significantly on the respondent's fair trial rights in a criminal trial he is facing. That charge is set to be heard by a jury who may be influenced by the statement issued with the endorsement of the High Court. In Ruling 2 [82(c)] Osborne AJ made it clear that nothing would be done to impact on the respondent's fair trial rights. In question in particular is the suggestion of "companies associated with Mr Henderson" (which includes "x", the very company he is facing charges in respect to) and the implication that a definitive ruling has been made on the lawfulness of the s171 notices;

f. There is a conflict between the applicant and Xero. The applicant makes the application essentially on behalf of Xero, an organisation that it has given millions of dollars in funding to. There may also be conflicts also if the presiding judge, any Assignee, or counsel hold shares in Xero;

g. The Assignee's asserted position that she wishes to ensure accurate media reporting is insincere. She refuses to release information that would clarify a number of issues (and would not breach the order) and is principally motivated by Xero's interests; and

h. An Associate Judge does not have jurisdiction to determine matters involving Ms Buxton or her companies. If the applicant or Xero wish to have the matter definitively dealt with, they are entitled to apply to the High Court for a declaration.

Jurisdiction to review order

[18] The order made was one prohibiting certain publication pending judgment on Mr Henderson's public examination.

[19] Mr Moss, for Mr Henderson, initially submitted as his first ground ("a") of opposition, that there is no jurisdiction (under r 7.49 High Court Rules) to rescind or vary an order of this type and that the Assignee must apply for leave to review the non-publication order.

[20] Mr Moss's submission overlooked a well-established line of authority which recognises the inherent jurisdiction of the Court.[5] The two decisions frequently cited are those of Greig J in *Foodtown Supermarkets Ltd v Tse*[6] and of Fisher J in *Ryde Holdings Ltd v Sorenson.*[7] In *Ryde Holdings,* Fisher J rejected arguments against the setting aside of consent orders relating to an arbitration. In doing so, his Honour observed:[8]

> Procedural orders of continuing effect may normally be revoked or modified at any time before a substantive judgment finally determining the parties' rights.

[21] The line of authority has been recognised by the Court of Appeal. For instance, in *Haylock v Patek* the Court referred to both *Foodtown Supermarkets* and *Ryde Holdings* in recognising:[9]

> … the High Court's inherent jurisdiction to review procedural orders which had continuing effect in circumstances where those orders have become unjust.

[22] An example of the application of this jurisdiction may be seen in the judgment of Master Gambrill in *Australian Guarantee Corporation (NZ) Ltd v Frater Williams & Co Ltd.*[10] The proceeding involved an application to put the defendant into liquidation. The plaintiff relied upon a judgment debt. The plaintiff

---

5 Summarised in *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR 7.49.07] and in *Sim's Court Practice* (looseleaf ed, LexisNexis) at [HCR 7.49.7].
6 *Foodtown Supermarkets Ltd v Tse* (1987) 2 PRNZ 545 (HC) at 546.
7 *Ryde Holdings Ltd v Sorenson* (1995) 8 PRNZ 339 (HC) at 345.
8 At 345.
9 *Haylock v Patek* [2010] NZCA 289, [2011] 1 NZLR 100 at [39].
10 *Australian Guarantee Corporation (NZ) Ltd v Frater Williams & Co Ltd* [1994] MCLR1 (HC).

had lodged an appeal against the judgment in question. Upon the defendant's application in the liquidation proceeding, the Court made an order staying the proceeding pending the hearing of the appeal.

[23] The defendant failed to satisfactorily progress the appeal from November 1992 to August 1993. The plaintiff wished to re-activate the liquidation proceeding. It was well out of time to apply to review the stay. It could have sought to strike out the appeal but that would have been expensive. It decided to rely on the inherent jurisdiction of the Court to order the conduct of its business. In doing so, it relied upon authorities including *Foodtown Supermarkets.* The Court applied *Foodtown Supermarkets,* finding that it had jurisdiction to vary the stay before the appeal had been heard.

[24] The non-publication order which I made was expressly to apply pending the Court's (substantive) judgment on the public examination being conducted. The order was, in terms of the authorities to which I have referred, an order of continuing effect (to continue to the point of judgment). Accordingly, the jurisdiction exists to vary or rescind the order.

[25] Faced with reference to the authorities to which I have referred, Mr Moss responsibly did not pursue a submission as to lack of jurisdiction electing instead to focus on how the Court might deal with the publication issues on the facts.

The Court's jurisdiction in relation to Ms Buxton

[26] I deal now with the final ground of opposition ("h") raised by Mr Moss as it also contains an express reference to a jurisdictional ground. It is asserted that an Associate Judge does not have jurisdiction to determine matters involving Ms Buxton or her companies. The suggestion is that if the Assignee or Xero wishes to have such matters "definitively dealt with", they may apply to the High Court for a declaration.

[27] This ground of opposition involves a confusion as to what the Court is being asked to do.

[28] Anything which the Court now does through this judgment will not affect the nature of the rulings contained in Ruling 1 or the reasons set out in the Ruling. The Assignee's application focuses solely on whether or not there should be permitted some publication of the Ruling.

[29] Ruling 1 was given in the context of the public examination of Mr Henderson. As it stands, it is a ruling which binds Mr Henderson and the Assignee. No matters, whether of *res judicata* or issue estoppel, affect Ms Buxton who was not a "party" to the public examination in any sense. Any decision now to be made in relation to publication of Ruling 1 involves no determination binding Ms Buxton or her companies.

[30] The fact that s 171 notices related in part to the operations of the companies, which Mr Moss refers to as "Ms Buxton's companies", is irrelevant to the Court's jurisdiction in relation to publication of Ruling 1.

Possibility of conflicts

[31] I now turn to the ground of opposition ("f") which raises the possibility of conflicts (of interest).

[32] Mr Moss submits that there is a conflict of interest between the Assignee and Xero. It is asserted that Xero is an organisation to which the Assignee has given millions of dollars of funding. That proposition was not explained in evidence or submissions and cannot be given any weight.

[33] The notice of opposition contains also the speculation that there may be conflicts if the presiding Judge, any Assignee, or counsel hold shares in Xero.

[34] I record that I hold no shares in Xero and will not therefore be recusing myself on that basis.

[35] The suggestion of other conflicts of interest is irrelevant. The determination which I will be making turns not on any relationship or lack of relationship between

the Assignee and Xero or any other parties. It turns on matters of public interest and the legitimate interests of those affected.

Sincerity of the Assignee's position

[36] A closely related ground of opposition to the "conflict of interest" point was contained in the suggestion (ground "g") that the Assignee is insincerely suggesting to the Court that she wishes to ensure accurate media reporting.

[37] In determining the matters now before the Court, I will not be concerned with the Assignee's motivation for making the present application. Her motivation will not affect one jot my deliberation, which must turn on objective considerations as to the nature of Ruling 1, its subject matter and the impacts which publication might have.

[38] The ground of opposition refers to "a number of issues" on which Mr Henderson apparently wants information released, stating that the Assignee has refused to release the information. The Assignee's stand concerning other information (the details of which are not before me) is again irrelevant to the determination I need to reach concerning the publication of Ruling 1.

Absence of urgency

[39] There are two aspects to Mr Henderson's ground of opposition "c".

[40] First, Mr Henderson's notice of opposition dated 14 December 2015 recorded that he had not had an opportunity to file any evidence in support of his opposition. I adjourned the hearing to today's date to provide Mr Henderson with that opportunity. Mr Moss has filed submissions but not any evidence.

[41] The second suggestion in this ground of opposition was that there was no urgency such that Mr Henderson's fair rights should be overridden. As explained by Mr Moss in his submissions, this was a proposition that (even if jurisdiction exists) I should not review the non-publication order, which should remain in force until my judgment on the public examination is delivered.

[42] Oral submissions following the evidence of the public examination are scheduled to commence on 24 February 2016, to be followed by a reserved judgment thereafter.

[43] Although the non-publication order was expressed to be to the date of the judgment, the period which most concerned me in terms of the fair process of the public examination was the period of the examination itself, particularly through questioning by the Court or the Assignee. I had found it difficult to predict how aspects of particular rulings I might have to make would impact on the examination process.

[44] Mr Moss did not submit that any fair hearing issues would arise in relation to the public examination were details of Ruling 1 to be published. I am also unable to find any interest of Mr Henderson in relation to the fair process of the public examination which requires continued non-publication of Ruling 1.

Mr Henderson's fair trial rights on criminal charges

[45] Mr Henderson is facing charges in the District Court in relation to alleged offences under the Insolvency Act. He has elected trial by jury. Mr Henderson's ground of opposition ("e") is that both forms of statement proposed by the Assignee (Schedules A and B) and indeed any publication of Ruling 1 as a whole will impact significantly on his right to a fair trial on the criminal charges. I am informed that Mr Henderson fears that a jury may be influenced by any statement issued with "the endorsement of the High Court".

[46] Mr Moss refers to the protection of Mr Henderson's interests which I had referred to in another ruling given on 29 July 2015 (Ruling 2).[11] I gave three Rulings on 29 July 2015. By Ruling 3, I refused the Assignee's application for an adjournment of Mr Henderson's public examination.[12] The Assignee had applied for an adjournment precisely because the Assignee, by the Crown Solicitor in Christchurch, had filed the charging documents in the Christchurch District Court in relation to the offences to which Mr Henderson now refers. Mr Henderson

---

11 *Havenleigh Global Services Ltd v Henderson* [2015] NZHC 1762.
12 *Havenleigh Global Services Ltd v Henderson* [2015] NZHC 1759.

successfully opposed the application for adjournment of the public examination, preferring to have it proceed notwithstanding implications which would arise for his (criminal) fair trial rights given the compulsory nature of a public examination under the Insolvency Act.

[47] Ruling 2 concerned matters of cross-examination and discovery. In the course of that Ruling, I identified the interest of various people in the public examination process. In relation to Mr Henderson, I observed:[13]

> (c) There is also the bankrupt's interest. The Court has the power (and duty) to ensure that the examination is not conducted oppressively or in such a way as to otherwise constitute an abuse of the process. The control of oppressive conduct is the Court's means of ensuring that an extraordinary process is confined to its proper purposes (enabling the Court to identify the factual position relating to the bankrupt's conduct, dealings and affairs as may inform the Court's decision under the Act, such as the discharge of the bankrupt or the prosecution of a bankrupt for offences) and not to a matter beyond (such as the gaining of the tactical advantage in the later prosecution of charges).

[48] Mr Moss referred to the proposed statements prepared for the Assignee (Schedules A and B) and in particular to Schedule A, paragraph [b], in which one effect of Ruling 1 is recorded as being:

> The comprehensive records that Xero held in relation to companies associated with Mr Henderson were an obvious justified subject matter of a s 171 requirement when the Assignee issued her notice.

[49] Mr Henderson notes that one of the two companies affected by the s 171 notices is the very company to which some of the charges he faces relate.

[50] Mr Moss submits that the implication of the Schedule A statement would be that the High Court has made a definitive ruling on the lawfulness of the s 171 notices.

[51] Below at [80] I will return to discuss Mr Henderson's interests in this regard.

---

[13] At [82](c).

[52] A final matter of fact needs to be recorded at this point. The working and personal relationship between Mr Hide and Mr Henderson is a matter of which the Court has heard evidence. Mr Hide is also the author of the first of the *National Business Review* articles to which the Assignee has referred. It is evident from the article that Mr Hide has liaised with Ms Buxton in assembling information for his article. In the article, Mr Hide refers to Ms Buxton as his friend and notes that her husband is Mr Henderson. The December *National Business Review* article refers to all three as friends. In these circumstances, and given that I would be called upon to consider potentially competing interests, I asked Mr Moss at the first call of this matter whether Mr Henderson had prior knowledge of Mr Hide's intention to publish such an article. Mr Moss has stated to the Court today that Mr Henderson has stated that he "probably knew about it before".

Schedule A as a "publication of reasons"

[53] Mr Henderson opposes any order also upon the basis that Ruling 1 would be infringed by a publication in the terms of either Schedules A or B in that the schedules identify reasons for Ruling 1.

[54] It will become unnecessary for me to analyse the Schedules in the way invited by this ground of opposition for reasons I come to. The schedules may be viewed as an attempt by the Assignee to trim down what is a lengthy ruling to some fundamental conclusions. To some extent, Schedule A can be viewed (as Mr Moss submits) as containing some aspects of reasoning rather than pure conclusion. I need take the criticism of the schedules no further than that for reasons which follow.

[55] Mr Moss's submissions in relation to the "reasons" aspect of any publication suggests that counsel may have overlooked the distinction within the non-publication order. The order expressly prohibits publication of the reasons set out in Ruling 1. The order did not prohibit decisions contained in the Ruling.

[56] Neither Mr Henderson in his notice of opposition nor Mr Moss in his submissions provided an alternative statement of the outcome of Ruling 1 (that is as an alternative to either Schedule A or B). At the very least, there would be a need to recognise that an accurate statement of the decisions within the Ruling (devoid of

"reasons") will not offend the non-publication order. For that reason the comment attributed to Mr Drury in the second *National Business Review* article – that there is a Court judgment which backs Xero's actions in this case – did not offend the non-publication order.

Discussion

The function of the non-publication order

[57] The non-publication order stemmed from the Court's perception of how best to ensure a fair examination process for the parties, but in particular for Mr Henderson. Although the order prohibiting publication was deliberately expressed to be to the date of judgment, on the public examination, the period which most concerned me in terms of fair process was the period of Mr Henderson's examination, particularly through questioning by the Assignee or the Court. I found it difficult to predict how aspects of particular rulings I might have to make might impact on the examination process. I considered the prohibition appropriate at the time it was made.

[58] Any such prohibition necessarily cuts across other interests. Importantly, it cuts across the interests of open justice and access to information. It has also impacted on the availability of a Court ruling in the way it would normally be accessed by those researching either what is happening in the courts factually or researching matters of law which arise. Ruling 1 cannot be accessed at present.

[59] When I adjourned the public examination for final submissions, it was at a point where I regarded the Court's and the Assignee's questioning of Mr Henderson as complete upon the basis of Mr Henderson's evidence to that point.

[60] The Court is in a more advanced position to now review the needs of non-publication. To do so, I now turn to consider the various interests involved. I will consider other interests and then those of Mr Henderson in particular.

The interests of open justice

[61] In considering the Court's statutory powers of suppression under the Criminal Justice Act 1985, the Court of Appeal in *R v Liddell* observed in relation to any grant of suppression that:[14]

> … the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public".
>
> … the basic value of freedom to receive and impart information has been re-emphasised by s 14 of the New Zealand Bill of Rights Act 1990. And the principles just mentioned must be seen in vigorous… operation in [judgments of the Supreme Court of Canada and of the High Court of Australia].

[62] Subsequently, in *Muir v Commissioner of Inland Revenue,* the Court of Appeal had to consider suppression issues in a civil case (a tax appeal).[15] The headnote to the Procedure Reports accurately summarises the Court's conclusions:[16]

> Held, (1) the principle of open justice applies equally to civil and criminal cases. In civil cases, the power to suppress publication of what happens in Court depends on the common law. There is jurisdiction to make confidentiality orders, despite the absence of any statutory power.
>
> (2) Tax cases inevitably throw up issues of confidentiality, but such issues fall to be determined in accordance with ordinary open justice principles.
>
> (3) While some of the taxpayers might have secured confidentiality without any real examination of the merits, this was not a controlling consideration in the case. There was a legitimate public interest in full reporting of the litigation, and the appeal would be dismissed.

[63] The Court again referred to s 14 of the New Zealand Bill of Rights Act which provides:

> 14 **Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and any form.

---

14 *R v Liddell* [1995] 1 NZLR 539 (CA) at 546.
15 *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA).
16 At 365 (citations omitted).

[64] The principle of open justice and the right to freedom of expression have particular significance as matters have developed in relation to discussion of the s 171 notice.

[65] It is clear from the exchanges which are recorded in the *National Business Review* articles that the continuation of the order prohibiting publication of the ruling has now had a gagging effect on Xero. Xero has been precluded from identifying and referring to the reasons contained in Ruling 1. Possibly because of a concern as to the extent of the prohibition on publication, Xero has also refrained even from identifying material decisions within Ruling 1 (save to state that there is a Court judgment which backs Xero's actions).

[66] There is here an erosion of the public interest in open justice and of the freedom to seek, receive and impart information. Precisely because of the importance which is attached to these interests, the authorities clearly establish that it requires exceptional circumstances to justify and sustain suppression orders.

Interest of news media organisations

[67] Closely related to the public interest in open justice and freedom of information is the empowering of news media organisations to carry out their role in society.

[68] In this case, the existing non-publication order appears to have frustrated the process by which a news media organisation would normally be able to verify or disprove matters of information and of legitimate public interest. In particular, Mr Hide's original article raises issues as to the protection of private information. The writer of the subsequent *National Business Review* article in December has apparently been unable to establish the existence, let alone the detail of Ruling 1.

Xero's interests

[69] The *National Business Review* articles invite the drawing of adverse inferences and conclusions as to Xero's approach to the privacy of clients' financial data.

[70] Given the non-publication order, Xero has apparently been or felt unable to do more by way of response than to state that a judgment exists which back Xero's actions in this case.

[71] The right of Xero to freedom of expression as inclusively defined in s 14 of the New Zealand Bill of Rights Act is plainly impaired by the existence and continuation of the non-publication order. [17]

[72] Xero has a further legitimate interest to protect as a result of the second National Business Review article. As quoted at [9] above, the *National Business Review* commentator referred to Mr Drury's observation as to a court judgment which backed Xero's actions, but added that "despite extensive investigation NBR can't find any trace of such a judgment."

[73] Given the inferences which might be drawn from those words, Xero has a legitimate interest in being able to refer to the judgment which supports the accuracy and truthfulness of what Mr Drury said.

The interests of the Official Assignee

[74] The *National Business Review* articles invite adverse inferences or conclusions as to not only the conduct of Xero but also of the Assignee. Mr Hide records that Ms Buxton's complaint is with the Official Assignee for asking [for the material], not with Xero for giving. Earlier in the article, Mr Hide has stated that "the law is clear" and refers specifically to the provisions of s 171 of the Insolvency Act. He later asserts that:[18]

> It would seem the Official Assignee bluffed Xero into release, just as the Police bluffed Westpac.

[75] Mr Currie concludes his affidavit by deposing:

> I am concerned to ensure that the reporting of these matters by the news media is accurate, and consider that this is not possible without reference to the Court decisions that uphold the Official Assignee's actions.

---

17 Above at [63].
18 Hide, above n [2].

[76] At one point of his written submissions, Mr Moss stated that:

> If you look at the media reporting to date you will see that it revolves around Xero's actions. Not the OA's in issuing the s 171 notice.

[77] Mr Moss's submission is incorrect. The Assignee's conduct was a specific focus of criticism in the *National Business Review* article.

[78] Mr Currie's concern is justified. It seems unlikely that Mr Hide would be unaware of the nature (if not also the detail) of the Court's Ruling 1. Yet, by publishing his own analysis of what the Assignee is or is not permitted to do by way of s 171 notices, Mr Hide effectively left Xero and the Assignee to defend their positions (while the non-publication order remains in force) by reference to limited facts.

[79] I do not record these matters as in any sense a criticism of Mr Henderson. The articles were published by others. My focus is upon the effect of the articles upon the relevant interests.

Mr Henderson's interests

[80] The only relevant interest of Mr Henderson to which Mr Moss referred in his submissions was in relation to the District Court criminal proceedings.

[81] In relation to the public examination, the examination itself and the taking of evidence are well-advanced. The focus of the resumed hearing will be on submissions.

[82] I now consider whether Mr Henderson's fair trial rights in relation to the criminal proceedings will be (as Mr Moss asserts) "impacted upon significantly by publication of details of Ruling No 1".

[83] Mr Henderson informs me that the District Court has set a pre-trial conference down for 15 April 2016, that he expects there to be a number of pre-trial issues to be dealt with and that at least 27 witnesses are involved. A trial of at least

four weeks is likely. On that basis it appears unlikely that a trial could commence before late-2016.

[84] When Mr Henderson opposed the adjournment of his public examination, while the criminal proceedings were yet to be heard, one of the major consequences of concern to the Assignee was that Mr Henderson would be publicly examined as to the subject-matter which is the focus of his present concerns (such as any involvement he had with particular companies). Extensive examination has indeed taken place. It has been reported in the media. A further consequence of having the public examination proceed was that I was most likely to give my judgment on Mr Henderson's public examination before the criminal trial was reached. The judgment dealing with whether a bankrupt should be discharged from bankruptcy will, by its nature, not be suppressed. These were all foreseen consequences of proceeding in the order Mr Henderson preferred.

[85] The way Mr Moss framed his submissions as to fair trial rights reflected the wording of the notice of opposition. I am advised by counsel that the charges in the District Court include allegations in relation to Mr Henderson's dealings with one of the companies referred to in the s 171 notice. The charges are brought under s 149 Insolvency Act and allege that Mr Henderson took part in the management or control of named companies. Information relating to one of them was provided in response to the s 171 notice which was dealt with in Ruling 1. Mr Moss noted that the Assignee's proposed statement in Schedule A included reference to "companies associated with Mr Henderson". Mr Moss submitted that a person reading the schedules will understand that the High Court has made a definitive ruling that the s 171 notices were lawful. That, says Mr Moss, may influence a jury when Mr Henderson at the criminal trial has a right to challenge the lawfulness of the s 171 notices.

[86] In fact, in Ruling 1 the Court made no findings (and recorded no reasoning) as to the management or control of any business. The validity of the s 171 notices turned on whether documents sought related to Mr Henderson's "property, conduct or dealings", a different concept. Mr Moss's submission invites a confusion in relation to a ruling which is clearly stated.

Balancing

[87] An order for suppression of details in a civil proceeding requires exceptional circumstances. Exceptional circumstances should also be required for the continuation of any such order when an appropriate point for its review has been reached as has occurred here.

[88] The interests of open justice and the legitimate interests of both Xero and the Assignee strongly favour publication of Ruling 1. This is particularly so now that a question has arisen through the media as to whether or not the Ruling even exists. It is undesirable that any uncertainty remain as to such an aspect of the administration of justice.

[89] Mr Henderson's fair hearing interests in relation to his public examination do not require any protection such as would be afforded by the non-publication of Ruling 1.

[90] This leaves for consideration as an exceptional circumstance only the criminal proceedings which Mr Henderson faces.

[91] In that regard I take into account the following matters:

(a) Mr Henderson has already been publicly examined about the subject matter which now concerns him;

(b) the media have reported detail of that examination. My judgment upon the public examination, including findings as to such subject matter, will almost certainly be published in coming months, before any criminal trial;

(c) if there is publicity concerning Ruling 1, it is conceivable that one or more of the jurors empanelled on Mr Henderson's District Court case (if it proceeds) may have seen the publicity;

(d) in that event, it is conceivable that one or more jurors might think, in the absence of explanation, that findings in the civil ruling which is Ruling 1 in some way constitute relevant evidence and findings against Mr Henderson in the criminal context;

(e) on the other hand, the finding of the lawfulness of the Assignee's s 171 notice given to Xero (based on whether documents relate to Mr Henderson's "property, conduct or dealings") does not involve any test on which the criminal charges are based (alleging involvement in the management or control of businesses);

(f) accordingly, if Mr Henderson or counsel at his criminal trial are aware of any significant publication of Ruling 1, it is to be expected (if they seek it) that the District Court Judge will give clear directions as to the irrelevance of any civil judgments;

(g) the perceived need for any directions by the District Court Judge is likely to lessen if the Assignee and/or Xero are now able to deal promptly with any response to the *National Business Review* articles and it transpires that the District Court trial is unable to proceed for many months; and

(h) to the extent that there remains the prospect of any adverse impact on Mr Henderson's interests, I must take into account the facts that:

(i) notwithstanding the recognition that complications would arise, it was Mr Henderson's strong preference in opposition to the Assignee's adjournment application to proceed with his public examination before the criminal charges came to hearing. In short, the Court departed from a well-established approach to adjournment in such circumstances and accommodated Mr Henderson's insistence; and

(ii) the friendship of Mr Henderson, Ms Buxton and Mr Hide, combined with Mr Hide's pursuit of the privacy concerns of Ms Buxton, makes it unlikely that Mr Hide would have published his article if Mr Henderson had voiced his concerns to Mr Hide. But for Mr Hide's article, this issue would not have been before the Court at this point.

Conclusion

[92] Weighing all the above matters, I am satisfied that there do not exist such exceptional circumstances as to justify a continuation of the non-publication order.

[93] I have contemplated the concept of an approved summary of conclusions and/or reasons from Ruling 1. I am not satisfied that there is a sound basis to permit the publication of a summary but to prohibit the publication of the full Ruling. The Ruling speaks for itself. It is a lengthy Ruling on a series of issues. As seen by the Assignee's attempts to provide a summary and Mr Henderson's objection to the drafts, even summarising Ruling 1 is not straightforward. It is better in the interests of justice that the Ruling now speak for itself.

Costs

[94] The Assignee did not pursue costs. That, in my judgment, was appropriate. The issue of publication has a public interest element.

Orders

[95] I order:

(a) In relation to pre-examination Ruling 1, I revoke the order prohibiting publication in the terms set out in the banner previously appearing on that Ruling, with the consequence that the Ruling may now be published without that banner.

(b) There is no order as to the costs of the Assignee's application herein.

Associate Judge Osborne

Solicitors:
Anthony Harper, Christchurch
Kensington Swan, Auckland

Copy to Mr D I Henderson, Christchurch

SCHEDULE A

Issues concerning Mr Henderson's bankruptcy and the provision to information by Xero Limited to the Official Assignee was ruled upon by Associate Judge Osborne on 29 July 2015. The effect of the court's rulings were:

a. A practical arrangement was reached between Xero and the Assignee whereby Xero provided physical forms of the electronic records thereby making the Assignee's request, under section 171 of the Insolvency Act 2006, for a user name and password superfluous.

b. The comprehensive records that Xero held in relation to companies associated with Mr Henderson were an obvious and justified subject matter of a section 171 requirement when the Assignee issued her notice.

c. Mr Henderson's application to have the information provided by Xero excluded from his Public Examination on the grounds that it was obtained through a section 171 notice issued unlawfully was dismissed.

Schedule B

Issues concerning Mr Henderson's bankruptcy and the provision to information by Xero Limited to the Official Assignee was ruled upon by Associate Judge Osborne on 29 July 2015. The effect of the court's rulings were:

a. A practical arrangement was reached between Xero and the Assignee whereby Xero provided physical forms of the electronic records thereby making the Assignee's request, under section 171 of the Insolvency Act 2006, for a user name and password superfluous.

b. The comprehensive records that Xero held in relation to “x” and “y” were an obvious and justified subject matter of a section 171 requirement when the Assignee issued her notice.

c. Mr Henderson's application to have the information provided by Xero excluded from his Public Examination on the grounds that it was obtained through a section 171 notice issued unlawfully was dismissed.