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SUNDAY 25 MAY 2008.**

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CRI 2008-409-69

LEUATEA PESETA IOSEFA

v

NEW ZEALAND POLICE

Hearing: 21 May 2008

Appearances: Mr R Raymond for Appellant
Mr C McVeigh QC for Respondent

Judgment: 23 May 2008 at 1.30 pm

JUDGMENT OF MALLON J

Introduction

[1] Mr Iosefa is a barrister. He is facing a charge of theft (ss 222 and 227 of the Crimes Act). The trial is now scheduled to take place in August 2008. Since his first appearance on 24 January 2007 he has had the benefit of an interim order suppressing his name and identifying particulars. In a decision dated 19 March 2008

the District Court cancelled the interim order. Mr Iosefa appeals against that decision.

Background

The charge

[2] It is alleged that between 20 December 1999 and 18 May 2000, when Mr Iosefa was practising as a solicitor, he misappropriated \$83,700.73 held in his trust account for one of his clients. As described in the summary of facts it is alleged that this money was to be held on trust for his client but was used for other purposes. It is alleged that since late 2000 the client sought to make partial withdrawals, but these payments were significantly delayed and on one occasion the client received less than she had asked for. It is alleged that following a complaint to the Law Society three further payments were made. It is alleged that in the end the client received the full amount of her deposit but that the interest she received was less than it should have been.

Basis on which interim orders were granted

[3] When Mr Iosefa first appeared in the District Court on 24 January 2007 on the charge of theft an interim suppression order was sought. It was not opposed by the police. The District Court Judge (Judge Walsh) made a suppression order to apply to the end of the preliminary hearing. The main reasons for granting the order were that:

- a) It was the first call of an indictably laid charge in respect of which disclosure was yet to take place. It related to matters alleged to have occurred seven years ago. Mr Iosefa had no other previous convictions for dishonesty. The presumption of innocence applied.

- b) The consequences of publication could have a profound impact on Mr Iosefa and his wife, particularly as the proceedings would take many months yet to resolve.
- c) Mr Iosefa no longer had access to a trust account.

[4] The orders suppressed Mr Iosefa's name, ethnicity and occupation. Photographic images of Mr Iosefa were also prohibited.

Basis on which interim orders continued

[5] The preliminary hearing took place on 27 July 2007. Mr Iosefa conceded that there was a prima facie case and he was committed for trial. Mr Iosefa sought continuation of the interim suppression order. The Crown informed the Court that it intended to apply to have the suppression order reviewed. In the meantime the Justices of the Peace continued the name suppression. Mr Iosefa subsequently advised the Court that he was seeking continuation of the suppression until he had instructed new counsel. On 26 September 2007, without hearing from the Crown, the District Court Judge (Judge Moran) directed that the interim suppression order remain in place until the commencement of trial.

Basis on which the District Court cancelled the interim order

[6] On 21 December 2007 the Crown applied to the District Court to have the suppression order lifted. On or about 9 March 2008 Mr Iosefa sought an adjournment of the hearing of this application which was scheduled to be heard on 10 March 2008. At the 10 March 2008 hearing Mr Iosefa failed to appear. In a later affidavit filed in support of the application requesting an adjournment of the trial date (see below [10]) Mr Iosefa said that, despite efforts to do so, he had been unable to instruct counsel, and that his former counsel had advised him not to represent himself and that the application to cancel the suppression order would be dealt with on the papers.

[7] In a reserved decision dated 19 March 2008 the District Court Judge (Judge Moran) found that since the interim order was made the balance had moved in favour of publication. The Judge referred to a prima facie case as having now been established with Mr Iosefa's committal for trial, the imminence of the trial and the real possibility that other complainants would come forward if suppression was lifted. Applying *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, the Judge said that it could no longer be said that the balance came down clearly in favour of suppression. The suppression order was therefore no longer a reasonable limitation on the right to receive and impart information as could be demonstrably justified in a free and democratic society.

[8] The Judge ordered that the suppression order would expire on 10 April 2008. The extension to this date was on the basis that Mr Iosefa had not been represented at the hearing and might wish to appeal. An appeal was filed on 9 April 2008.

Further adjournments

[9] The appeal from the decision cancelling the suppression order was to have been heard in the High Court on 15 May 2008. Mr Iosefa applied to adjourn the hearing on the basis of unavailability of counsel. The adjournment was granted but on the basis that the matter was to proceed on 21 May 2008.

[10] Mr Iosefa's trial was scheduled for the week commencing 9 June 2008. On or about 12 May 2008 Mr Iosefa sought an adjournment of the trial until a date in 2009. This was on the basis that the counsel he wished to instruct to represent him was not available until then. The application was granted, but not for the period that had been sought. The trial will now take place on 4 or 18 August 2008.

Appeal jurisdiction

[11] The right to appeal a refusal to make an interim order (which must also apply to the lifting of an interim order because the Judge has refused to continue an interim order) arises under s 115C of the Summary Proceedings Act 1957. Because the

decision whether to order suppression under s 140 of the Criminal Justice Act 1985 is a discretionary one, this Court will not disturb the District Court's decision unless it is based on some wrong principle or is clearly wrong: *R v Liddell* [1995] 1 NZLR 538 at 545; *Re Victim X* [2003] 3 NZLR 220 (CA) at [32] and [56].

Relevant principles

[12] The starting point on applications for suppression orders is the importance of freedom of speech, open judicial proceedings and the right of the media to report on those proceedings. The competing considerations must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome: *R v Liddell* at 546; *Lewis v Wilson & Horton Ltd* at [43]; and *Re Victim X* at [36]. This applies at both the pre-trial and post-trial stage: see, for example, *Prockter v R* [1997] 1 NZLR 295 (CA) at 299; and *Tannahill v Bartlett* AP 307/98 18 December 1998 at 3.

[13] The Court is required to identify the relevant public and private interests in the case. A consideration that applies at the pre-trial stage which does not apply post-trial is the presumption of innocence. This additional consideration has meant that suppression orders have been granted more commonly at the pre-trial stage: see for example *J v Serious Fraud Office* HC AK A126/01 10 October 2001 and *T v Police* HC CHCH CRI 2005-409-000098 7 June 2005. It is not, however, an overriding consideration that necessarily overcomes the prima facie presumption.

[14] However, even if a case is made out for interim suppression at an early stage that does not mean that it should continue until trial or during. Depending on the circumstances, the presumption of innocence may be given greater weight prior to a preliminary hearing and committal for trial than at a later stage of the proceeding. That is because prior to the preliminary hearing the strength of the case against the accused may not be known and irreparable or disproportionate harm may sometimes be caused from the fact of a prosecution even if ultimately the charges are not proven.

[15] For example in *T v Police* an order granted at an early stage in T applied “until the preliminary hearing or other substantive hearing of the charges” at [28]. The Court considered that suppression was appropriate “at least until the stage when evidence is placed before the Court” (at [27]). And in *J v Serious Fraud Office* at [39] the Court said that the interim order should continue until “the commencement of the lower Court hearing when the case moves into its initial evidence stage; that view could alter if circumstances change or further evidence emerges”.

[16] Obviously the presumption of innocence still applies after the preliminary hearing and at trial. But after the preliminary hearing a prima facie case has been established so it cannot be said that the charges are without any foundation at all. Also any financial or other harm caused by public knowledge of the fact of the charges alone, that may have been the reason for the interim suppression, may be less or more confined because the time period until trial, or until the conclusion of the trial when the outcome will be known, is less. At trial there is the additional consideration that the hearing of criminal cases should be held in open court (see *J v Serious Fraud Office* at [23]).

Application of the principles

[17] For Mr Iosefa it is submitted that the discretion was properly exercised at the outset and that the time for revisiting the interim order is not upon us. It was accepted that the issue would have to be revisited in the event of conviction. It was also accepted that the issue would need to be revisited at the time of the trial. Up until that point it is said that there was no change in circumstances warranting a cancellation of the interim order.

[18] I do not accept that the time for revisiting the order has not yet arisen. I consider that it was appropriate to revisit the issue following the committal. Any suppression order is a limit on open justice and freedom of speech. That limit must be confined to what is reasonably necessary in light of the competing considerations. That means that it should be as short, and as limited in scope, as is reasonably necessary. Judge Walsh was correct in my view to limit the suppression order as

applying only until the end of the preliminary hearing to enable it to be revisited at that stage.

[19] As matters have transpired, through a combination of the application by the Crown not being made until December 2007 and the District Court not being able to deal with that application until March 2008, the District Court did not reconsider the matter until March. Similarly, through a combination of an adjournment application by Mr Iosefa in this Court and availability of Court time, the appeal has not come to be reconsidered until now. I do not think it is correct to take the view that it is now so close to trial that it is appropriate to hold things over until the trial judge considers it. That does not recognise that the matter was to have been reconsidered at the preliminary hearing and that any orders should be as limited as is reasonably necessary.

[20] Judge Moran referred to the imminence of trial as being a relevant factor in the balance having moved in favour of publication. I agree. Judge Walsh had considered that publication could have a profound impact on Mr Iosefa's career. At the time of the initial application for interim suppression orders Mr Iosefa filed an affidavit setting out the nature of his barrister's practice, his extensive community involvement, and his outgoings. He said that if he was unable to generate income as a barrister he would encounter considerable financial hardship in meeting his on-going commitments. In my view that submission had greater force at the time of Mr Iosefa's first appearance.

[21] I accept that publication of Mr Iosefa's name (or identifying particulars) will have some adverse effect on his practice. For example, for Mr Iosefa it had been submitted to Judge Walsh that he would need to brief out instructions on jury trials on which he would otherwise be appearing as counsel where there was a risk that the fact that Mr Iosefa faces these charges may impact in some way on the fair trial of those he is representing. Mr Iosefa's counsel at this hearing advises that Mr Iosefa presently has one jury trial between now and the trial date. In contrast, at the time the suppression order was granted Mr Iosefa had three upcoming jury trials.

[22] Other than potentially needing to find a replacement for the one jury trial on which he has instructions, if that is considered appropriate, the direct impact of publication on his ability to generate income is difficult to gauge. The identified risk in relation to jury trials does not arise in relation to Judge alone matters. His current clients will make an assessment on whether they wish him to continue to act for him and he will make an assessment on whether he should continue to act. But whatever impact it would have had if suppression had not been granted initially, that financial impact must now be less given the imminence of trial. That is because the period over which the impact will occur is now less.

[23] As was recognised in *Tannahill v Bartlett* at 7:

Of course a barrister and solicitor, whether practising in any particular area of litigation or otherwise, will be seriously affected in reputation and therefore in professional practice by the fact of charges such as those faced by the appellant.

[24] The appellant in that case faced dishonesty charges, was a well known practitioner in the Wellington district and had children who were financially dependent on him. The High Court upheld the District Court's decision to decline to order interim suppression of his name and identifying particulars.

[25] There are a number of similar examples of suppression being denied to lawyers pre-trial despite reputational and financial harm: see, for example, *Warburton v New Zealand Police* HC HAM CIV 2004-419-85 24 August 2004; *M v NZ Police* HC HAM CRI 2004-419-000019 2 April 2004.

[26] I consider that the evidence before the Court does not establish disproportionate reputational and financial harm to Mr Iosefa, as compared with others who come before the Courts on charges, if the suppression order is lifted at this stage, such that the limit on freedom of information and open justice is warranted. I agree that the Judge was correct to take into account the imminence of trial in this respect.

[27] The Judge also referred to Mr Iosefa's committal as being relevant. I agree that it was a relevant consideration. At the pre-committal stage it has not been

established that there is a prima facie case. The presumption of innocence would therefore usually be entitled to greater weight at the pre-committal stage.

[28] Mr Iosefa's affidavit set out details of the extensive community work he has been involved in over a number of years. This is relevant in that it means that he has a reasonably high profile in the community. That may mean that more attention may be given to publication that Mr Iosefa is facing this charge. It is also evidence of good character. These considerations are relevant but in this case they do not give rise to such disproportionate harm such as to outweigh the public interest in open justice. Mr Iosefa no longer operates a trust account, but he still holds positions of trust in representing people before the Courts and in his community work. The community is entitled to know that Mr Iosefa is facing this charge.

[29] Mr Iosefa's affidavit also set out details about his wife's high profile in the community and his concern that publication of his name or identifying particulars would have a serious negative impact on her employment affecting her ability to generate an income. There is no reason why that should be so. She is not facing the charge and nor is she in anyway implicated in the matter. While there may be some level of public comment about Mr Iosefa, despite the presumption of innocence, that his wife and family may wish to avoid, that is an unfortunate consequence for all families of those who face charges and must appear in the courts. The evidence does not establish any disproportionate harm in this respect such as to outweigh the public interest in open justice.

[30] Judge Moran considered the other factor as having moved the balance in favour of publication to be the real possibility that other complainants will come forward if suppression is lifted. For Mr Iosefa it is submitted that this was overstated. It was based on an affidavit from a Detective Constable who referred to her enquiries. From those enquiries the Detective said that "there appear to be three of such clients where misappropriation may also have occurred". She also said that a number of Mr Iosefa's former clients "are what could be termed 'trusting' clients who, because of age and personality, would probably never question the accused's behaviour, nor the fact that funds were not forthcoming when they should have been". The affidavit concluded by the Detective Constable stating her belief that if

Mr Iosefa's name were to be published, "it may well encourage potential complainants to approach the police".

[31] The statement from a person on which the information in the affidavit is based was made available to Mr Iosefa and to this Court. For Mr Iosefa it is said that the affidavit overstates the matters that are disclosed in that statement. Having reviewed the statement I do not think it does. In any event, in a charge involving alleged misappropriation of one client's funds, there is the potential that other clients' funds may have been misappropriated. It is a factor that must be considered even without any specific evidence of concerns about other clients' funds.

[32] For Mr Iosefa it is also submitted that the information on which the Detective Constable's affidavit is based is not new information. It is based on a statement dated 4 July 2007 and yet the police have done nothing to advance matters. It is said that even if there was publication now and other complainants did come forward, it is now too late for anything to be done in relation to the present trial. The opportunity for any new charges to be heard at the same time as the present charge is lost. I agree that is a relevant factor. On the other hand there is a public interest in any further complainants coming forward sooner rather than later. The present complainant is 88 years old. If there are other potential complainants of this sort of age then the sooner publication occurs the better.

Result

[33] It follows that I consider the District Court Judge did not apply a wrong principle and nor was he plainly wrong. I agree with his decision that continued suppression is no longer justified. The appeal is dismissed.

Publication of this decision

[34] In the event that the suppression order was to be lifted Mr Iosefa's counsel requested some time to enable Mr Iosefa to advise anyone he wished to of this matter

in advance of any publicity about the matter. I am prepared to allow him until the end of Sunday 25 May 2008 to do so. The cancellation takes effect after this.

[35] Mr McVeigh submits that the reasons advanced by the Crown in support of the cancellation of the suppression order will need to be suppressed until the conclusion of the trial. He submits that there are fair trial issues if matters such as the Crown's view of the strength of the case are published. In view of the imminence of the trial I agree. Accordingly, after midnight on Sunday the media may report that the interim suppression order has been cancelled. The reasons advanced by counsel and discussed in this judgment are suppressed until the conclusion of the trial.

Mallon J

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