ORDER THAT PUBLICATION OF THE JUDGMENT (OTHER THAN NAME AND FORMAL ORDERS) AND ANY PART OF THE PROCEEDINGS IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE IS PROHIBITED UNTIL AFTER TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

ORDER THAT NAME AND FORMAL ORDERS NOT TO BE PUBLISHED IN THE NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL TEN WORKING DAYS AFTER DELIVERY OF THIS JUDGMENT.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA643/2015
[2015] NZCA 584

BETWEEN	MATTHEW JOHN YOUNG Applicant
AND	THE DISTRICT COURT AT HAMILTON Respondent

Hearing: 23 November 2015

Court: Randerson, French and Kós JJ

Counsel: Applicant in person
L Dunn for Respondent

Judgment: 2 December 2015 at 10.30 am

JUDGMENT OF THE COURT

A The application for continued name suppression is dismissed.

B Order that publication of the judgment (other than name and formal orders) and any part of the proceedings in news media or on the internet or other publicly available database is prohibited until after trial. Publication in law report or law digest permitted.

C Order that name and formal orders herein are not to be published in the news media or on the internet or other publicly available database until ten workings days after delivery of this judgment.

REASONS OF THE COURT

(Given by Kós J)

[1] Mr Young applies for continued name suppression. He seeks this pending hearing of his appeal against a decision of Moore J.[1] That decision dismissed his application for judicial review of a District Court decision yet again refusing name suppression.[2] Mr Young has taken every forensic step conceivably available to secure name suppression. The net result is that although his efforts have been unavailing across three applications, in three courts, in seven successive substantive judgments, all refusing him name suppression, he has in fact enjoyed suppression for nearly three years.

[2] Mr Young faces 38 counts alleging dishonesty offending. One of these is a joint charge with a Mr S. Mr S (1) has name suppression and (2) faces a further five charges on his own account. Trial is set down for April 2016 in the District Court at Hamilton. Messrs Young and S are on bail. It may be noted that three late-added fraud charges are alleged to have occurred while Mr Young was on bail and enjoying name suppression.

[3] The procedural history may be tabulated:

DATE	HISTORY
19 February 2013	Informations filed against Mr Young. Interim name suppression granted.
13 August 2013	District Court indictment filed.
19 August 2013	Crown files opposition to continuation of name suppression.

1 *Young v District Court* [2015] NZHC 2677.
2 *R v Young* [2015] NZDC 19709.

DATE	HISTORY
20 August 2013	Mr Young's first application for name suppression.
14 October 2013	Name suppression hearing for Mr S heard before Judge Marshall. Name suppression refused.
25 October 2013	Name suppression hearing for Mr Young before Judge Marshall. Name suppression refused. Interim suppression continued for 20 working days for filing of a notice of appeal.
19 November 2013	Mr Young files notice of appeal to High Court.
3 February 2014	New charges laid against Mr Young (alleged offending whilst on bail).
4 February 2014	High Court appeal against decisions of Judge Marshall heard by Courtney J. Appeal in relation to Mr Young refused, but interim suppression continued for filing of notice of application for leave to appeal. Co-accused Mr S granted name suppression until conclusion of trial.
17 June 2014	Court of Appeal hearing.
24 June 2014	Court of Appeal judgment delivered indicating it had no jurisdiction to hear the appeal. Any further application for name suppression will need to be filed by 27 June 2014.
26 June 2014	Mr Young's second name suppression application filed in District Court.
22 October 2014	Second name suppression hearing for Mr Young before Judge Thomas. Name suppression refused. Interim name suppression continued for 20 working days for filing of a notice of appeal.
20 November 2014	Appeal filed by Mr Young against decision of Judge Thomas.
3–4 February 2015	Appeal heard before Asher J.
11 March 2015	Asher J dismisses appeal.
1 April 2015	Application for leave to appeal to Court of Appeal filed by Mr Young.
22 April 2015	Hearing of application for leave to appeal to the Court of Appeal.
24 April 2015	Asher J declines leave to appeal. Interim suppression continued for filing notice of application for leave in Court of Appeal.

21 May 2015[3]	Mr Young applies to Court of Appeal for special leave to appeal.
18 August 2015	Third application by Mr Young for name suppression filed in District Court (the current application). (Mr S also makes application, on 25 September 2015).
19 August 2015	Hearing of application for special leave to appeal before Court of Appeal (second suppression application).
31 August 2015	Special leave to appeal refused by Court of Appeal. Interim suppression continued until 2 September 2015 against possibility of application for leave to appeal to Supreme Court.
28 September 2015	Hearing of third application by Mr Young before Judge Spear.
6 October 2015	Judge Spear strikes out application as an abuse of process. Interim suppression granted to 9 October 2015 to permit the filing of judicial review proceedings in the High Court.
9 October 2015	Brewer J directs a hearing on 14 October 2015 (dispensing with the filing of submissions, case books and other documents, save for a pro forma statement of defence if necessary).
14 October 2015	Application for judicial review hearing before Moore J
30 October 2015	Moore J dismisses judicial review application. Interim suppression continued for five days to enable filing of appeal to Court of Appeal and five days further for making application to Court of Appeal for interim orders.
6 November 2015	Mr Young files notice of appeal against decision of Moore J and seeks continued name suppression in Court of Appeal.
12 November 2015	Cooper J sets application for interim suppression down for 23 November 2015 and continues suppression until then.
23 November 2015	Hearing before Court of Appeal; interim suppression continued until judgment.

[4] Mr Young's first application, made on 20 August 2013, was based on s 200(2)(a) and (d) of the Criminal Procedure Act 2011. That is that publication would cause extreme hardship to him, or would create a real risk of prejudice to a fair trial. The latter was based on a severance application later dismissed.

[3] Application for leave made on the 18th day.

[5] As to the s 200(2)(a) ground, Mr Young deposed that complainants and creditors were harassing and intimidating him (to such an extent the Judge had granted a restraining order against two of those persons named). The Judge noted, however, that those persons prone to such behaviour already knew who Mr Young was and name suppression would give him no succour. If they persisted, further restraining orders might be sought. Mr Young also deposed to a medical condition (he having suffered a minor heart attack). The Judge noted that while the proceeding would be stressful, he was under medical supervision. Neither on its own nor in combination with the intimidation issue would disclosure amount to extreme hardship. So Judge Marshall dismissed Mr Young's application on 25 October 2013.[4]

[6] The first appeal to the High Court was brought on 19 November 2013. It was said that Judge Marshall had failed properly to consider the effect of publication on Mr Young's fair trial rights, the risk of physical harm to him and his medical condition. Justice Courtney dismissed Mr Young's appeal on 5 February 2014.[5] Mr S, however, was granted name suppression by Courtney J. That was on the basis of youth, absence of prior convictions, that he was a lesser player, did not pose a public risk, and would (if acquitted) be significantly harmed in obtaining further employment in the financial services industry.

[7] An appeal to the Court of Appeal was then dismissed on 24 June 2014 for want of jurisdiction.[6] Mr Young had not sought leave from the High Court first. The Court of Appeal provided that if a fresh application for name suppression was brought in the District Court (and an urgent hearing sought) interim name suppression would continue subject to further orders of the District Court.[7]

[8] A fresh application was filed on 26 June 2014. It was heard by Judge E M Thomas on 22 October 2014. The basis of the application was again s 200(2)(a): that publication would be likely to endanger Mr Young's safety. The separate s 200(2)(d) ground based on prejudice to fair trial rights previously pursued was abandoned

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4 *R v Young* DC Hamilton CRI-2013-019-945, 25 October 2015.
5 *Young v R* [2014] NZHC 64.
6 *Y v The Queen* [2014] NZCA 259.
7 At [10].

because Mr Young's severance application had by now failed. This application (and the affidavit evidence in support of it) was focused on Mr Young's health. Judge Thomas did not accept the mere fact of publication was likely to endanger Mr Young's safety or health.[8]

[9] An appeal against that decision before Asher J in the High Court was dismissed on 11 March 2015. The Judge noted that stress might worsen Mr Young's innate health condition, but "the increasing risk to his health that can be attributed to publication is relatively slight, rather than real or appreciable."[9] Asher J rejected a secondary argument, not advanced before the District Court Judge, of real risk of prejudice to fair trial. This related to the three additional fraud charges based on events allegedly occurring while Mr Young was on bail. Those charges had been laid in Auckland. A Crown application for joinder to the Hamilton District Court trial was pending. As the Judge noted, if the Crown's joinder application was successful, prejudice would not arise. If joinder was not ordered, however, there would be a gap of some 12 months between trials and clear directions would ensure prejudice was averted. Asher J then moved onto discretionary considerations. He said:

> [58] If the Crown charges are proved, then [Mr Young] is a man who is highly unscrupulous, who unhesitatingly tells lies and creates a false persona to extract large sums of money by fraud. He is a danger in our community. It is very much in the public interest that his name is published and people know about him. It is relevant that some of his alleged offending occurred while he was on bail. If his name is published, members of the public are more likely to make informed decisions as to whether they wish to be involved in business dealings with him.
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> [59] I have a real concern that if the allegations against [Mr Young] are well grounded, he may be continuing to seek to defraud members of the public. Thus, it is not just the principle of open justice that works against suppression in this case. It is also the specific need for the public to know the identity of a person who is alleged to be a serial fraudster.

[10] Mr Young immediately sought leave to appeal to the Court of Appeal. Asher J dismissed that application on 24 April 2015.[10]

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8 *R v Young* DC Hamilton CRI-2013-019-0945, 22 October 2014.
9 *JM v R* [2015] NZHC 426 at [46].
10 *JM v R* [2015] NZHC 830.

[11] Mr Young then made application for special leave to appeal to the Court of Appeal. That application was heard on 19 August 2015, and dismissed in a judgment delivered on 31 August 2015.[11] A wide ranging argument was advanced before the Court. But as this Court noted, the application subject to appeal before Asher J was based on s 200(2)(a) of the Criminal Procedure Act 2011, relating to hardship and personal safety due to a medical condition. Issues relating to the presumption of innocence and its relevance in name suppression decisions were not raised in the application, appeal or proposed further appeal. Rather the conclusions reached were essentially factual ones relating to the application of s 200(2)(a). No question of general public importance arose, the relevant principles having been set out clearly in *Fagan v Serious Fraud Office* and *M (CA762/2012) v R.*[12]

[12] On 18 August 2015, the day prior to the Court of Appeal hearing, Mr Young filed a third application for name suppression in the Hamilton District Court. On this occasion the application was made primarily on a different statutory ground: s 200(2)(f). It asserted publication of Mr Young's identity would "extremely likely" lead to the identification of his co-accused on the single joint charge, Mr S. Mr S filed an affidavit in support of that application. In his affidavit Mr S deposed he was a long-standing friend of Mr Young's, that they had common friends, particularly in the financial services industry, that Mr S took over the directorship or shareholdings of a large number of companies from Mr Young prior to his being bankrupted (for the third time). This was evidenced by the companies register.

[13] This third application came before Judge Spear in the District Court at Hamilton on 28 September 2015. He struck the application out as an abuse of process. The Judge considered the risk of Mr S now being identified to be "grossly overstated".[13]

[14] The abuse of process point had been taken by Ms Dunn, the Crown prosecutor. She complained that this issue had been before the Court from the outset. She referred to an earlier affidavit by Mr S, made on 25 September 2013. It made the point of connection. It said that if he was granted suppression, it would be

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11 *Young v R* [2015] NZCA 402.
12 *Fagan v Serious Fraud Office* [2013] NZCA 367; *M (CA762/2012) v R* [2013] NZCA 113
13 *R v Young* [2015] NZDC 19709 at [23].

"nullified" by non-suppression of Mr Young. In response, counsel for Mr Young, Mr Shaw, submitted that the particular issue had not been raised by Mr Young in his application or evidence.

[15] Judge Spear did not accept that proposition. In Courtney J's decision on the first application, where she allowed suppression for Mr S but not Mr Young, she must have taken account of the collateral risk identified in Mr S's affidavit.[14]

[16] The Judge considered Mr Young's third application utterly unmeritorious and an abuse of the process of the Court. He said that Mr Young had enjoyed:[15]

> … interim suppression for over two years notwithstanding that every decision of both this Court and the High Court had gone against him — and on the very issue Mr Young and Mr S now raise again. That outcome would surely bring the administration of justice in this country in to [sic] disrepute if not make a complete mockery of it.

Further interim suppression was granted for three days to enable the matter to be put before the High Court.

[17] Mr Young now filed judicial review proceedings (there being no right of appeal from Judge Spear's decision).

[18] In a comprehensive decision delivered on 30 October 2015, Moore J dismissed Mr Young's application for judicial review.[16] Mr Young this time appeared in person. An application for adjournment was declined.[17] As the Judge recorded it, Mr Young's application was really in two parts. First, that the Judge's decision was unreasonable because there had been no abuse of process. Secondly, that the Judge took into account irrelevant factors such as his previous appeals on the merits of his application.[18] The Judge said he was unconvinced that the Criminal Procedure Act should be interpreted as permitting "unlimited, serial, name

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14 At [27].
15 At [34].
16 *Young v District Court at Hamilton* [2015] NZHC 2677.
17 At [20]–[26].
18 At [36].

suppression applications".[19] But he did not have to decide that point. He was satisfied that Judge Spear's decision was perfectly rational and reasonable:[20]

> The timing of Mr Young's applications, combined with what appears to have been a deliberate tactic of delay in filing appeals, tends to indicate Mr Young is seeking to extend the statutory guaranteed interim suppression generated by each application for the longest possible time thereby engaging the provisions of the Criminal Procedure Act which have had the effect to extending his name suppression for more than two years.

The Judge went on to say that interim suppression pending appeal "is not intended to permit a defendant obtaining de facto permanent suppression by adopting the cynical artifice of making successful applications and filing serial appeals when the substantive applications fail".[21] So the Judge held that Mr Young's history of appeals was a relevant consideration. So too were the merits of Mr Young's applications, his drip-feeding of grounds over successive applications, his alleged offending on bail and Mr S's employment situation.[22]

[19] The application for judicial review was dismissed. Interim name suppression was extended for five working days to enable the filing of a notice of appeal, and a further five working days in that event to enable him to make urgent application to the Court of Appeal for interim orders.

[20] On 6 November 2015 (the day on which name suppression was due to lapse) Mr Young filed a notice of appeal in this Court. He applied by letter for further interim suppression. The question of whether there should be continued name suppression was set down for hearing by this Court on 23 November 2015. Interim suppression was continued until then. On the date of hearing we extended interim suppression until the date of delivery of this judgment.

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19 At [40].
20 At [41].
21 At [42].
22 At [42]–[49].

Analysis

[21] The starting point is a presumption in favour of open justice.[23] As well as the general public interest in open proceedings, there is a specific public interest here in identifying Mr Young given the false representations he is alleged to have made, some of which are alleged to have been made while he was on bail and had interim name suppression. Members of the community considering transacting with him are entitled to know that he has been charged.[24] In other cases, publication may also enable and encourage potential witnesses to come forward for the trial.[25] We discount that point in this case however, as Ms Dunn acknowledged that police investigation of the existing charges has been completed.

[22] Whether interim name suppression should be continued pending hearing of Mr Young's appeal against Moore J's judicial review decision appears to us to depend on a single question: does Mr Young have seriously arguable grounds of appeal?

[23] If interim suppression is not continued, it is plain that the appeal will be rendered nugatory. On the other hand, if there is no realistic prospect of the appeal being allowed, Mr Young should not be permitted to game the system by serial applications, and serial appeals, none of which have ever succeeded, thereby gaining de facto suppression down to trial, despite compiling seven successive substantive judicial decisions refusing suppression across more than two years.

[24] Mr Young's first ground of appeal advanced in argument before us was that the High Court's truncation of statutory appeal periods was prejudicial. There is nothing in this point. The approach taken is orthodox where a judicial finding of abuse of process has been made. Mr Young could not point to any material prejudice caused by truncation of normal time frames.

[25] Mr Young's second point was that unless interim continuation is extended now his substantive appeal (to continue suppression) will be rendered nugatory. We

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23 *D (CA443/2015) v R* [2015] NZCA 541 at [9]–[10].
24 As Asher J noted in his decision, *JM v R*, above n 9, at [58]–[59].
25 *Re Victim X* [2003] 3 NZLR 230 (CA) at [5].

accept that is so, but it begs the question whether the substantive appeal is seriously arguable at all.

[26] Mr Young's third point was that both Judge Spear and Moore J were wrong to dismiss the s 200(2)(f) ground based on risk of identification of Mr S. This point addresses the merits of the substantive appeal. There are two answers to it.

[27] The first is that we are not persuaded that the view Judge Spear took as to the risk of consequential identification of Mr S can be shown to be wrong. There is a single common charge among the 38 against Mr Young. It is apparent from Mr Young's own affidavit evidence, together with the evidence of Mr S, that (1) many members of the public are already aware that Mr Young faces serious criminal charges and (2) many members of the public are well aware of the "close friendship/relationship" between the two men. In these circumstances it does not follow at all that (3) disclosure of Mr Young's name will cause other persons to conclude that Mr S is co-accused with Mr Young, or (4) that members of the public will then use searchable company records to draw a connection between the two men, to the same effect. As Judge Spear said, the risk identified has been grossly overstated. It was clearly open to the Judge to find it unlikely that Mr S would be identified.

[28] The second answer is that the real question here is simply whether Mr Young's third successive application is an abuse of process. We consider that any other view is now simply inarguable. New factual considerations may arise which would justify a second suppression application after failure of the first. But this is not such a case. The risk of cross-identification in the event of single suppression only was apparent at the outset. Mr S took the point, even although Mr Young did not. But the point was available to him. Nothing factually has changed since then. Absent new factual circumstances, there is no legitimate basis to revisit suppression. Courts will not generally permit serial applications, eking out by instalment the various statutory grounds provided for in s 200(2). That is what Mr Young has done here. Repeated applications seeking identical relief in the absence of changed

circumstance will generally be treated as an abuse of process.[26] Repeated applications advancing new grounds that could with reasonable diligence have been advanced on a previous occasion may well also be an abuse of process, although the whole circumstances are to be considered.[27]

[29] The present application, considered in the entire circumstances of the preceding applications and appeals, is an abuse of process. There is no realistic prospect of this Court taking a different view at the hearing of Mr Young's appeal from the decision of Moore J. His substantive appeal is not seriously arguable.

[30] Mr Young has indicated he may seek leave to appeal from the Supreme Court. We will not continue the suppression order. We will however make the orders in [32], which will allow Mr Young time to consider whether to seek leave to appeal to the Supreme Court from this decision and, if he does do so, apply for interim orders in the Supreme Court.

Result

[31] The application for continued name suppression is dismissed.

[32] We make orders:

(a) That publication of the judgment (other than name and formal orders) and any part of the proceedings in news media or on the internet or other publicly available database is prohibited until after trial. Publication in law report or law digest permitted.

(b) That name and formal orders herein are not to be published in the news media or on the internet or other publicly available database until ten working days after delivery of this judgment.

Solicitors:
Almao Douch, Hamilton for Respondent

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26 *Ex parte Bouvy (No 2)* (1900) 18 NZLR 601 (SC); *Creser v Creser* [2015] NZSC 116 at [3].

27 *Henderson v Henderson* (1843) 3 Hare 100 at 114–115; 67 ER 313 (Ch); *Johnson v Gore Wood & Co* [2002] 2 AC 1(HC) at 31; *Siemer v O'Brien* [2015] NZSC 89 at [3].