ORDER EXTENDING THE EXISTING NAME SUPPRESSION FOR SIR JAMES WALLACE FOR 20 DAYS FROM THE DATE OF THIS JUDGMENT.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA294/2021
[2023] NZCA 56

BETWEEN	JAMES HAY WALLACE Appellant
AND	THE KING Respondent

CA311/2021

BETWEEN	MUSTAFA ERINC YIKAR Appellant
AND	THE KING Respondent

Court: Collins, Ellis and Dunningham JJ

Counsel: D P H Jones KC for Appellant in CA294/2021
Y Y Mortimer-Wang for Appellant in CA311/2021
M J Lillico for Respondents in CA294/2021 and CA311/2021

Judgment: (On the papers) 10 March 2023 at 9.30 am

JUDGMENT OF THE COURT

A The applications for name suppression are declined.

B Order extending the existing name suppression for Sir James Wallace for 20 days from the date of this judgment.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] On 9 February 2023 we dismissed appeals against conviction and sentence brought by Sir James Wallace and an appeal against conviction brought by Mr Yikar.[1]

[2] Sir James was convicted on 23 March 2021 in the High Court at Auckland following a trial by jury in relation to three charges of indecently assaulting three men (H, B and S) and two charges of attempting to dissuade H from giving evidence. Sir James was sentenced to two years and four months' imprisonment.[2] Mr Yikar was convicted at the same time of one charge of attempting to dissuade H from giving evidence. He was sentenced to home detention for 12 months.[3]

[3] Sir James has filed an application in the Supreme Court for leave to appeal his conviction and sentence. We are not aware of any application for leave to appeal by Mr Yikar.

[4] Sir James and Mr Yikar had the benefit of name suppression during their trials and their appeals. Sir James, and a charitable trust he chairs, now seek further suppression of Sir James' name. We shall briefly summarise the basis of the applications and the name suppression decisions already made in this proceeding before analysing the current applications.

The current applications

[5] There are two applications before us:

(a) An application from Sir James on behalf of himself and entities connected with him, namely the McLean's Mansion Charitable Trust (MMCT), the James Wallace Art Trust (JWAT) and a company called Ligar GP Ltd (Ligar). We explain these entities at [11] to [13].

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1 *Wallace v R* [2023] NZCA 6.
2 *R v Wallace* [2021] NZHC 1213.
3 *R v Y* [2021] NZHC 985.

It suffices for present purposes to record that this part of the application alleges:

(i) extreme hardship would be caused to Sir James or his connected entities if he no longer has name suppression; and/or

(ii) publication of Sir James' name in conjunction with his convictions would be likely to create a real risk of prejudice to any retrial that might be ordered by the Supreme Court.

(b) An application from the MMCT, which submits that undue hardship would be caused to the MMCT and persons connected to it if Sir James no longer has the benefit of name suppression.

Applications on behalf of Sir James and connected entities

[6] The ground of the application we have summarised at [5(a)(i)] relies on s 200(2)(a) of the Criminal Procedure Act 2011. The relevant portions of that section confers discretion on the court to make an order forbidding publication of the name, address or occupation of a person convicted of an offence only if the court is satisfied that publication would be likely to cause extreme hardship to the person convicted of the offence, or any person connected with that person.

[7] The basis of the application we have summarised at [5(a)(ii)] relies on s 200(2)(d) of the Criminal Procedure Act which provides that the court may make an order for suppression if satisfied that publication would be likely to create a real risk of prejudice to a fair trial.

Connected person application

[8] The application brought on behalf of the MMCT relies on ss 202(1)(c) and 202(2)(a) of the Criminal Procedure Act. Those sections authorise a court to suppress publication of the name, address, or occupation of any person connected with a person who is convicted of an offence. The court may make such an order only if it is satisfied that publication would be likely to cause undue hardship to the connected person. Sir

James submits that if the MMCT receives name suppression under s 202 then, it will be necessary to suppress his name under s 200(2)(f) in order to protect the name suppression order made in favour of the MMCT.

[9] In his supporting affidavit, Sir James identifies five factors which he says satisfy the criterion of extreme hardship in s 200(2)(a) of the Criminal Procedure Act.

His age and poor health

[10] Sir James states:

> I am now 85 years old and suffer from a number of serious health conditions. My health is only getting worse. On my last visit to my doctor on Friday 17 February 2023, I was advised that my condition will continue to decline with age. The court has previously been advised (in my application for bail in 2021) of my falls from unexplained loss of consciousness. These have become more frequent and it is distressing that it is likely I will suffer an episode while incarcerated, in an unfamiliar environment.

The MMCT

[11] Sir James has been actively involved in the restoration of the McLean's Mansion, a large historic home in central Christchurch, which was severely damaged in the Christchurch Earthquakes. The trustees of the MMCT hope to renovate and convert the mansion into an arts facility. Sir James became involved with the restoration of the McLean's Mansion in 2016. His role increased significantly in 2022, when he became chairman of the MMCT and took responsibility for funding the restoration of the mansion. Once the restoration project is completed, the MMCT will need further funding to be able to function as an arts centre. Sir James says that because his name is synonymous with the project there will be "no realistic prospect" of other funding if his name suppression application fails, because potential donors and investors will find it "unpalatable" to be associated with funding a project that is so closely linked with Sir James.

JWAT

[12] The JWAT was created in 1992 to manage Sir James' very substantial art collection and to provide support for the arts in New Zealand. In 2010 the JWAT moved into premises at the Pah Homestead, which is leased from the

Auckland Council (the Council). The Council also makes a grant of $400,000 each year to the JWAT. Since he was convicted Sir James has resigned from the JWAT. He says that since then there has been an "unrelenting approach taken by the remaining trustees to rid the [JWAT] of [Sir James] and [his] legacy". This was in part driven by the Council, which threatened to withdraw its annual grant unless "radical" changes were made to the JWAT. Sir James and the JWAT instituted proceedings which Sir James says have now "been settled, in principle" but that there are still important details to be negotiated. Sir James says that if his name is published in relation to his convictions the publicity "will only serve to weaken [his] position in these negotiations".

Ligar

[13] Ligar is a science and technology company. Wallace Corporation, one of Sir James' companies has invested $10 million in Ligar and is the majority shareholder in that company. Sir James says that Ligar requires significant additional investment. He explains that if his name suppression application fails then Ligar "is unlikely to receive the substantial investment required for the company to succeed".

Other concerns

[14] Sir James states that he and the Wallace Corporation are in the process of selling two significant investment properties and he is concerned the negotiations for the sale of these properties will be compromised if he no longer has name suppression. Sir James is also worried about a short film that he has invested in. He says that lifting his name suppression "would actively damage the development and release of this film".

[15] The application under s 200(2)(d) is predicated upon the Supreme Court granting Sir James' application for leave to appeal and then, granting his appeal in whole or in part. It is contended that absent name suppression his right to a fair "retrial" will be irredeemably prejudiced because of the extensive publicity that will inevitably occur if his name is published in connection with this conviction.

[16] The application by the MMCT under s 202 is supported by an affidavit from Ms Young, who is involved with the restoration of the McLean's Mansion and the development of the proposed arts centre. It is argued that as Sir James "is the very face and the funding behind the entire venture", declining his application for continued name suppression would cause undue hardship to the MMCT and persons connected to it.

Name suppression decisions

[17] Sir James appeared in the Auckland District Court on 24 February 2017, charged with having indecently assaulted H. He was granted interim name suppression.[4] The trial was set for 25 September 2017 but adjourned when Complainant B came forward. The trial commenced in the District Court on 4 March 2019.

[18] On 5 March 2019, Judge Collins, the trial Judge, dismissed applications for name suppression brought by Sir James, Mr Yikar and Mika X, who was another defendant charged with attempting to dissuade H from giving evidence.[5] Mika X subsequently pleaded guilty.

[19] Judge Collins reasoned there was no evidence of extreme hardship to Sir James in his application for name suppression and that there was insufficient evidence of undue hardship to the charities and entities he was associated with if his name were able to be published in connection with the charges. The Judge explained that even if he were wrong in these assessments, he would have exercised his discretion against granting name suppression.

[20] Judge Collins was forced to declare a mistrial on 18 March 2019 when further evidence came to light concerning the attempt to dissuade H from giving evidence.[6] The proceedings were then transferred to the High Court. At about this time, Sir James was charged with sexual violation by unlawful sexual connection and attempted sexual

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4 *Police v Wallace* DC Auckland, CRI-2017-004-1926, 27 April 2017 at [9]; and *R v J W W* DC Auckland, CRI-2017-004-1926, 29 June 2017 at [5].
5 *R v Wallace* [2019] NZDC 5414.
6 *R v Wallace* [2019] NZDC 6240.

violation by unlawful sexual connection in relation to complaints made by N. Sir James was also charged with indecently assaulting S.

[21] Venning J dealt with appeals by Sir James, Mr Yikar and Mika X from the judgment of Judge Collins declining them name suppression and appeals from two witnesses who were granted immunity by the Crown and who had been declined name suppression in the District Court.[7] In addition to appealing the District Court name suppression judgment, Sir James and his connected entities and Mr Yikar, made fresh applications for name suppression in the High Court.

[22] Venning J decided the appropriate course was to deal with suppression on the basis of the appeals that had been lodged. The Judge concluded in relation to Sir James:[8]

(a) That neither he nor his associated entities had established that publishing his name would cause them extreme hardship under s 200(2)(a) of the Criminal Procedure Act 2011.

(b) The connected entities had failed to establish that publication would cause them undue hardship under s 202 of the Criminal Procedure Act.

[23] Venning J also concluded however, that if the charges based on the complaints by N and S were severed from the other charges there was a real risk Sir James' rights to a fair trial would be prejudiced in relation to his second trial if his name was allowed to be published in relation to the first trial. The Judge therefore made an interim order granting Sir James name suppression until the severance application was determined, on the basis that if the severance application failed, then the interim suppression order would lapse.[9]

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7 *W v R* [2019] NZHC 1350.
8 At [49] and [57].
9 At [76].

[24] Mr Yikar's name suppression appeal was wholly dependent on the outcome of Sir James' appeal. As interim name suppression was granted to Sir James, an identical order was made in relation to Mr Yikar.[10]

[25] For completeness, we record that Venning J dismissed the appeals by Mika X and the immunity witnesses, but on the basis that they would have interim name suppression which would lapse should the interim orders in relation to Sir James and Mr Yikar also expire.[11]

[26] The application for severance was granted on 26 November 2019 in relation to the charges based on the complaints made by N.[12] The charges based upon the complaint by S remain part of the first trial. Sir James and Mr Yikar had the benefit of interim name suppression for the first trial solely to preserve Sir James' fair trial rights in relation to the second trial.

[27] On 29 August 2022, Sir James was found not guilty in relation to the charges based on the complaints by N. On the same day, Peters J, the trial Judge in relation to those charges issued a minute granting Sir James name suppression in relation to the second trial.[13] The Judge said:

> [1] This minute records my order suppressing publication of Mr Wallace's name and any identifying details in connection with the charges of which he has today been acquitted, this order [is] to continue pending further order of this Court or the Court of Appeal.
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> [2] Ms Owen from *Stuff* asked me whether this order extends to prohibit any "linking back" of this trial to the 2021 trial, which would have the effect of identifying the defendant as the same in each. I confirmed to Ms Owen, and record, that it does so extend.

[28] We are not aware of any other applications or orders concerning name suppression for Sir James or Mr Yikar.

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10 At [79].
11 At [98] and [107].
12 *R v W* [2019] NZHC 3084.
13 *R v W* HC Auckland CRI-2019-404-511, 29 August 2022.

Analysis

[29] It appears that the minute of Peters J has been interpreted as an order imposing a blanket suppression of Sir James' name in relation to his convictions following the first trial. We doubt that was the intention of the Judge's minute, particularly as Venning J had made very clear the limited basis upon which name suppression was granted in relation to the first trial.

[30] Instead of appealing the extant suppression orders made by Venning J on the basis of changed circumstances, Sir James has filed a new application for name suppression in this Court. He advances changes in his circumstances as the reason for making fresh applications. Changes of circumstance can, however, be legitimately pursued as part of an appeal. The approach taken by Sir James circumvents the limited appeal pathway that governs the bringing of a second appeal in name suppression cases. The tactic employed in this case is quite contrary to Parliament's intentions when it limited the pathways for second appeals in name suppression cases.

The application under s 200(2) by Sir James and on behalf of entities with which he is connected

[31] In *D (CA443/2015) v Police*, this Court explained the two-step analysis that applies to applications for name suppression based on one or more of the criteria in s 200(2) of the Criminal Procedure Act. This Court said:[14]

> [10] Section 200 mandates a two-step inquiry: whether one of the thresholds in subs (2) has been crossed and, if it has, whether in the exercise of discretion an order ought to be made. The first step gives the presumption statutory form; that is to say, it insists that the Court determine on what principled basis suppression might be granted. The legislation does not impose a burden of proof but the presumption will apply unless the applicant can point to something to displace it.
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> …
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> [12] At the second stage the Court must balance relevant considerations in the exercise of discretion. The open justice principle must be considered at this stage, notwithstanding that the threshold has been crossed. That is so because the ultimate question remains whether open justice should yield. The balance must "clearly favour" suppression. In a case turning, as this one does, on subs (2)(a), (d) and (e), relevant considerations accordingly include the open justice principle, the seriousness of the offending, the presumption

[14] *D (CA443/2015) v Police* [2015] NZCA 541, (2015) 27 CRNZ 614 (footnotes omitted).

> of innocence, the public interest in knowing the applicant's character and identity, the public's right to freedom of expression, the applicant's youth and the likely impact publication will have on the applicant's prospects of rehabilitation, any other circumstances personal to the applicant, the interest of victims and the interests of other affected persons.

Extreme hardship

[32] In *Robertson v Police*, this Court discussed extreme hardship in the following way:[15]

> [48] As regards the level of hardship required by the phrase "extreme hardship", we consider it clear beyond argument that it connotes a very high level of hardship. The word "hardship" on its own means "severe suffering or privation". The addition of the qualifier "undue" in s 200(2)(c) indicates that something more than hardship simple is required, while the word "extreme" in s 200(2)(d) indicates something more again.
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> [49] An assessment of whether the contended hardship is "extreme" cannot take place in a vacuum. It is self-evidently contextual and in our view must entail a relative comparison between the contended hardship and the consequences normally associated with a defendant's name being published. It must be something beyond the ordinary associated consequences.

[33] There is nothing extreme about the hardship described by Sir James. The effects on Sir James of publication and the effects on his businesses and charitable interests are an ordinary and normal consequence of conviction and publication of the name of a high-profile offender with commercial and charitable interests. In this respect, the language of s 200(3) of the Criminal Procedure Act is pertinent:

> The fact that a defendant is well known does not, of itself, mean that publication of his or her name will result in extreme hardship for the purposes of subsection (2)(a).

[34] This Court explained in *Lewis v Wilson & Horton Ltd*, that "it is usual for distress, embarrassment, and adverse personal and financial consequences" to follow from criminal convictions.[16] Financial loss is often the direct consequence of public knowledge of a defendant's offending. Sometimes the impact of conviction and publication of the offender's name will extend beyond the economic interests of the defendant and may cause loss to their family and persons associated with them.

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15 *Robertson v Police* [2015] NZCA 7 (footnotes omitted).
16 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [42].

However, as the Court stressed, these are the normal consequences of the offender's identity becoming public knowledge.

[35] It is significant that Sir James' current involvement with the MMCT started in 2022, long after his conviction and at a time when he knew that there was a very real prospect that his name would be published in connection with his offending. Suppressing Sir James' name on the basis of his involvement with the MMCT would fundamentally distort the principle of open justice that s 200 is designed to protect. The potential funders of the MMCT should be able to make decisions about donations and investments with the full knowledge of Sir James' criminal history.

[36] Sir James has resigned as a trustee of the JWAT. The JWAT's significant art collection can be enjoyed by the public and others irrespective of Sir James' current status. It is difficult to place weight on the suggestion that a settlement "in principle" might be compromised if name suppression lapses in the current situation because of the limited information that has been placed before us about the ongoing negotiations.

[37] Similarly, the principle of open justice means that potential investors within Ligar should make their decisions on a fully informed basis, including knowing the criminal record of Sir James.

Section 200(2)(d)

[38] There can be no certainty that the Supreme Court will grant leave or allow his appeal. We therefore cannot agree with the submission of Mr Jones KC that there is a real likelihood Sir James' "retrial" rights will be unfairly prejudiced if Sir James no longer has name suppression.

First step conclusions

[39] Sir James has failed by a considerable margin to demonstrate extreme hardship to himself or connected entities if he no longer has name suppression. We are also satisfied that Sir James has failed to demonstrate that there is any real likelihood of his fair "retrial" rights being compromised.

Second step conclusions

[40] Even if the criteria in s 200(a) and (d) were satisfied, we would have exercised our discretion against granting name suppression. Our reasons for declining to exercise our discretion in favour of Sir James can be succinctly summarised:

(a) All of the offences that Sir James has been convicted of are serious. His convictions for trying to dissuade H from giving evidence are particularly serious.

(b) It is important the public have the opportunity to assess the true character of a high-profile successful businessman and philanthropist who has traded on his hitherto excellent reputation for most of his adult life.

(c) Sir James' age and ill health are not in themselves factors that weigh significantly in favour of name suppression.

(d) This is not a case in which rehabilitation prospects are engaged.

(e) Ultimately, the prevailing factor is the principle of open justice and the right of the public to know, through the media, the details of cases heard in our criminal courts.

Application by MMCT

[41] The application by the MMCT under s 202 of the Criminal Procedure Act can only result in an order suppressing the name and identifying features of the MMCT. This is because s 202 was enacted to enable entities connected with a defendant to have the benefit of name suppression, particularly where the offending has nothing to do with the connected person.[17]

[17] See for example, *St Peter's College v R* [2016] NZHC 925, [2016] NZAR 788; and *Sansom v R* [2018] NZCA 49.

[42] There is no merit in the application by the MMCT which has been brought in an effort to provide Sir James with an alternative pathway for name suppression under s 200(2)(f) . It is significant that the hardship pleaded by the MMCT stems from the enhanced role that Sir James has played in the affairs of the MMCT since his convictions in 2021. The MMCT was aware of Sir James' convictions when he became Chairman of the MMCT. It is difficult to accept the MMCT will suffer undue hardship in circumstances where it allowed Sir James to become Chairman of the MMCT knowing he had been convicted of serious offences.

[43] Even if MMCT suffers undue hardship if Sir James' name is published in connection with his convictions, we would exercise our discretion against granting name suppression to the MMCT. Any potential investors in the MMCT are entitled to assess the merits of their proposed investment with full knowledge of the character of the man at the helm of the MMCT.

Result

[44] The applications for name suppression are declined.

[45] In a memorandum dated 7 March 2023, Mr Jones has said that Sir James will seek leave to appeal to the Supreme Court if his current applications are dismissed. He invokes s 286(2) of the Criminal Procedure Act on the basis that any appeal to the Supreme Court would be a first appeal under s 285 of the Criminal Procedure Act. While we do not accept that the correct procedure has been followed by commencing a fresh application for name suppression in this Court, we reluctantly extend the existing name suppression orders for 20 days from the date of this judgment. When that period lapses, we shall make public our reasons for dismissing Sir James' appeal against conviction and sentence and for dismissing Mr Yikar's appeal against conviction, subject, of course, to any orders to the contrary from the Supreme Court.

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