Notes for Media Slot Nine To Noon Wednesday 17 April 2013

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Leaking and breach of confidence – a handy FAQ

As we know, it's been a month of leaking, blogging and breaching court orders. I thought it would be a good idea to try and answer some general questions around the relevant laws, some of which have got mangled a bit in the reporting.

What is a leak in terms of the law?

Usually a leak involves a person who works for the government, a private organisation or for another individual publishing information that belongs to their employer and which they only know because of their employment relationship, to someone else who is not entitled to have it. This sort of activity is covered by the law called breach of confidence. This is not a criminal offence, but rather is a civil (or private) claim which one party brings against another. Third parties who receive such information and pass it on even though they know it is confidential, or even if they simply should know it is confidential, may also be breaching confidence. This area of the law is one that often impacts on media, which commonly receives information in unmarked envelopes, anonymous phone calls and so on.

What is breach of confidence?

Bringing an action requires that a claimant shows the information was confidential in nature and that it has been or may be published and that will cause detriment to the claimant.

Crucially, there is a public interest defence to this sort of claim. Usually, if a claimant can establish the information is confidential, it is the party who has published or wants to publish who has to demonstrate that in fact there was public interest in the information. However, where the information, as for example in the EQC blogger leak, is government information, that burden stays on the claimant, who has to show that there is a public interest in the information remaining secret. EQC has released statements to the effect that the information is commercially sensitive and may skew the market for repair and rebuild work in Christchurch if it is released. I assume that is the sort of public interest EQC has been pointing to in its recent court case against Unknown Defendants who are thought to have come into possession of the information.

Another defence that can be argued in breach of confidence cases is that the information has already been made public. This defence is a difficult one to succeed

with as otherwise it might encourage deliberate leaking. It cannot be pleaded by anyone connected with the original leak.

What is an injunction?

The main aim in bringing a breach of confidence claim will be to stop the leak somehow. Although damages are a possible remedy, money usually will not do that. So if a claimant can prevent publication before it occurs, or stop or limit publication where it has occurred, there will be a better remedy. Injunctions are the most appropriate remedy in such cases.

Injunctions are simply court orders which prohibit a party from doing or continuing to do something, (such as publishing information), or order them to undo something that has been done (for example, destroying a publication, like a book).

What are interim injunctions?

Interim injunctions are temporary orders made by the court intended to maintain the status quo for the applying party so that they do not suffer serious damage before the matter is dealt with at a proper hearing . Because they are temporary, interim injunctions only have effect for a limited time. The first interim order in the EQC case lasted for two days and then came up for review. That order was extended until 26 April when the judge will review what further information he needs to decide whether it should be made permanent. A full hearing of that question is contemplated for 6 May.

Another thing to note about interim orders is that they are often argued urgently, meaning the judge is under considerable pressure and has to rely on the documents that are presented to the court by the applicant. Further, due to that urgency, the parties who might be affected by the order are often not notified or are notified too late to appear and argue against the application. It appears that in the EQC case, the blogger was not notified of the original hearing, and although notified of the second, was not able to get to that hearing. That is undesirable. In the United Kingdom, there are now clear guidelines used when, for example, privacy injunctions are applied for, that require the best efforts to be made to notify the other side when free speech may be affected by an order, even if the matter is urgent. Really, that approach should be taken in New Zealand too.

Because temporary injunctions can have significant effects, courts are supposed to grant them sparingly and with care. The court has to decide whether the matter is serious enough, who would suffer the most damage if an order is not made, and what the overall justice in the case is. Additionally, in cases where an order might shut down

speech, there is case law suggesting even more stringent requirements – the claimant has to show they have a 'clear and compelling case' to be able to pre-censor speech (*TV3 Network Services v Fahey* [1999] 2 NZLR 129). Lawyer Steven Price has pointed out that it is not clear from the judgment in the EQC case that this extra requirement was addressed. It may well have been, but currently that is not obvious from the reasons given for the decision.

What are suppression orders?

Injunctions are not the same as suppression orders although they may have the same effects in some cases. Suppression orders are most commonly made in criminal cases to suppress the identity of accused persons, their victims and sometimes also evidence in a case. Suppression orders can be temporary or permanent too. The main purpose of such orders is to preserve the right to fair trial of the accused, but they also serve other important public interests – examples are automatic suppression orders which arise under statute where the offence is a sexual one and the victim could be identified if the alleged offender is named. Another example is where the offender's health or the health of a relative would be under serious threat if they were named publically.

The law around criminal suppression will always be controversial, I think, but in NZ it was tightened up in 2011 after a thorough review by the Law Commission and we don't need another review just because suppression and the internet gets sensational coverage in the media. A new Criminal Procedure Act now sets out the grounds on which a judge can suppress the identity of a defendant, and they are quite tough. The grounds are broadly these:

- extreme hardship is likely to the accused or persons connected to them,
- undue hardship would be caused to a victim,
- a real risk of prejudice to fair trial,
- danger to a person's safety,
- possible identification of another person who has suppression,
- prejudice to the maintenance of the law, or to the security or defence of New Zealand.

An example of a possible breach of a suppression order in a criminal case is the young Christchurch man who allegedly posted cellphone video footage of two men accused of assaulting cricketer Jesse Ryder on YouTube at a time when court orders prohibit the publication of the names or faces of the men charged over the assault. He has just been charged.

What about orders in civil cases that suppress speech?

There are orders that can be made in civil cases that are sometimes confusingly referred to in media as suppression orders. The most common are in fact injunctions

made in privacy cases to prevent the identity of a person becoming known in connection with the release of embarrassing personal information, for example, a woman involved in an adulterous affair with a public figure, or a young person alleged to have been sexually involved with a political figure. Other orders are simply orders made by the judge in the course of proceedings to protect identity in civil cases, with privacy cases again featuring strongly here.

Who can be covered by an injunction?

Usually and most helpfully, an injunction will apply to specific, named people. It used to be thought that injunctions bound only the defendant against whom they were issued. But there is English case law which suggests it can in some circumstances be a contempt of court for other members of the media to publish information which is the subject of an injunction already granted against one of their number. This occurs where publication took place *with knowledge of the injunction*, if the publication has a significant and adverse effect on the administration of justice, and if there was an intention to prejudice the administration of justice. A contempt finding is most likely to be made if the publication wholly frustrates the administration of justice in the relevant case. This could also apply to non-media third parties who are not named in injunctions but publish in the full knowledge that an injunction exists – anyone else in the EQC case who publishes the leaked information could be covered under this principle.

However, the EQC situation could be covered in another way. This is because it is rare, but not unheard of, for injunctions to be made against unknown parties. The order made in the EQC case refers to 'those who have received the information contained in the spreadsheet inadvertently released by EQC on 22 March' and the decision is directed at unknown defendants. A few years ago, Don Brash obtained an injunction against unknown persons restraining them from releasing emails belonging to him which may have come into their possession (*Brash v John and Jane Doe* CIV-2006-485-2608, 16 November 2006), although he later withdrew the order when he discovered the recipient was Nicky Hager and not the people he thought had obtained the information.

Orders against unknown defendants are extraordinary and should be made only for exceptional reasons, in particular where media are clearly potential defendants. But sometimes orders go even further. In the United Kingdom, a privacy injunction against 'all the world' has been maintained for years to prevent the disclosure of the identity and location of the two young men who murdered the toddler James Bulger following their release from prison. That was new law, but the order is still being enforced. In February this year, the UK Attorney General's Office announced that it was instituting contempt of court proceedings against several people who had allegedly published photographs online showing Thompson or Venables as adults. It was stated

that potentially innocent individuals might be wrongly identified as being one of the two men and placed in danger. The order protects not only Venables and Thompson but also those members of the public incorrectly identified as being one of the two men.

Doesn't the internet make enforcing injunctions and suppression orders pointless?

I hear this argument all the time and it is greatly overstated. Yes, the fact that information can now be put on the internet very easily and can be moved to overseas websites makes it more difficult to enforce some injunctions which effectively ban publication, but it does not make it impossible or pointless. It is important to remember that suppression laws have never managed to suppress everything. Even before the advent of the internet, and even since, gossip, rumours and unsubstantiated information have been spread in breach of suppression laws via other means – the pamphlet being an ancient example used, for example, during the Rickards/ Shipton/Schollum historic rape trial. There, a number of people were fined for handing out pamphlets at the railway station in Wellington, and information was also removed from TradeMe.

What the judges sensibly do with suppression laws is use them so that the most harmful, accessible speech is removed and that tends to be in mainstream media still. Bloggers etc, whether off-shore or elsewhere, remain less of a worry because they tend not to be trusted or trustworthy. But if they set out deliberately to breach the law, they will be prosecuted as examples, which has always been the case, no matter what form of publicity is used.

With injunctions, judges do look at the practicalities of enforcing these orders – one of the guiding principles when judges make an order is whether it can actually be enforced. This is because the law must not look an ass. But this is not a binding principle – it guides only. Many judges believe a strong value in such orders is the symbolic one of deterrence. There will always be those who choose to deliberately disobey the law – most others continue to be guided by it. So these orders can remove the most damaging material, and have an educative effect as well.

Furthermore, even where information is sited off-shore, if a New Zealand citizen is connected to that activity, New Zealand law can apply. Additionally, New Zealand based ISPs can be contacted and asked to remove material which is illegal and damaging. Those who see themselves as responsible corporate citizens do their best to conform with the law.

There is always a time when a new technology becomes mainstream when there is uncertainty about how the law applies to it. We are going through that now. The thing to remember is that, as media know, the power to publish is a wonderful thing and can

serve many public interests, but it also comes with the responsibility to prevent harm to others. That is also in the public interest.

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