SUPREME COURT OF QUEENSLAND

CITATION:	*BYM v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* (No 1) [2023] QSC 298
PARTIES:	**BYM** (plaintiff) **v** **The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane** (defendant)
FILE NO/S:	
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2023 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2023 to 6 December 2023
JUDGE:	Williams J
ORDERS:	**1. The non-publication order made on 27 November 2023 be vacated.** **2. Subject to:** **(a) the exceptions in s 194(2) of the Child Protection Act; and** **(b) further order of the Court,** **identifying information (as defined in s 194(4) of the Child Protection Act) about the plaintiff must not be published.** **3. Subject to:** **(a) publication or disclosure for the purposes of conducting this proceeding and any appeal;** **(b) publication or disclosure for the purpose of an investigation into a complaint made by or on behalf of the plaintiff to the Queensland Police Service;**

(c) publication or disclosure required or authorised by law; and

(d) further order of the Court,

the name of, and other information which may identify, the person described as CD in the Further Amended Statement of Claim, and who was a witness at the trial, must not be published or disclosed.

CATCHWORDS: PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – alleged sexual abuse of plaintiff when a child – plaintiff now an adult – the plaintiff has not herself published identifying information or consented to the publication of identifying information – civil claim seeking damages for personal injuries – whether a non-publication order should be made – considerations under s 194 of the *Child Protection Act* 1999 (Qld) – whether non-publication order should be made in respect of alleged perpetrator who is also a witness in the civil proceeding – considerations under the *Criminal Law (Sexual Offences) Act* 1978 (Qld) – whether the Court has power to make a non-publication order where identification of a witness may identify the plaintiff

Attorney-General for the State of Queensland v Fardon [2019] QSC 2
Attorney-General for the State of Queensland v WMS (No 2) [2021] QSC 236
BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs [2023] QSC 266
Dovedeen Pty Ltd & Anor v GK [2013] QCA 116
J v L & A Services Pty Ltd (No. 2) [1995] 2 Qd R 10
John Fairfax & Sons Pty Ltd v the Police Tribunal of New South Wales (1986) 5 NSWLR 465

Child Protection Act 1999 (Qld), ss 5A, 194
Criminal Law (Sexual Offences) Act 1978 (Qld), ss 3, 7, 7B
Supreme Court of Queensland Act 1991 (Qld), s 8

COUNSEL: Mr G Mullins KC and Ms C Campbell for the plaintiff
Mr R T Douglas KC and Mr K Howe for the defendant

SOLICITORS: Maurice Blackburn Lawyers for the plaintiff

MinterEllison Gold Coast for the defendant
Ms R Drew of Holding Redlich for CD (witness)

[1] On 27 November 2023, a trial in this matter commenced in respect of a claim by the plaintiff for damages for personal injuries arising out of alleged sexual abuse which is said to have occurred in 1999.

[2] The file of this matter was originally endorsed pursuant to the relevant practice direction that was in place at the time, number 15 of 2013. Pursuant to that practice direction, a party was required to notify the Court if relevant legislation applied in respect of the identity of a party to the proceeding.

[3] A notice was given by the plaintiff's lawyers in respect of the applicability of s 194 of the *Child Protection Act* 1999 (Qld) (**Child Protection Act**). Accordingly, the registry file was endorsed as a restricted file, pursuant to Practice Direction 15 of 2013.

[4] By Practice Direction 20 of 2021, Practice Direction 15 of 2013 was repealed in or about August 2021. On the first day of trial, I identified to counsel appearing that I had some concerns about the references being made to the plaintiff's name and to the name of the person identified as CD in the (then) amended statement of claim. I queried whether there should be a non-publication order made in the circumstances.

[5] To give everyone the opportunity to fully consider the issues, an interim order was made on the first day of trial, 27 November 2023. That order was in general terms. Namely, that the name of the plaintiff and the name of the alleged perpetrator or other information which would identify those persons was not to be published.

[6] Subsequent to that, exchanges between counsel and the Court occurred over a number of days. This included identification of relevant authorities and potential issues that needed to be considered in relation to the non-publication order. Ultimately, submissions were made on behalf of:

(a) the plaintiff, as to the applicability of the Child Protection Act in particular; and

(b) the defendant in respect of principles of law only, but the defendant does not contend for a particular order.

[7] Further, as the person described as CD – and who appeared as a witness at the trial – was independently represented, notice of the various issues was given to Ms Drew, who appeared on behalf of CD, and both written and oral submissions were made on behalf of CD.

[8] In light of the written and oral submissions that were made and the exchanges between the various parties and the Court, draft proposed orders were prepared and circulated to the parties this morning. These reasons are the explanation of why those orders should be made.

[9] The starting point is the power of the Court. Under section 8 of the *Supreme Court of Queensland Act* 1991 (Qld) (**Supreme Court Act**), the Court has a power to limit the extent to which the business of the Court is open to the public. This is subject to the proviso that it is in the public interests or if the interests of justice require it.

[10] Justice Bowskill, as the Chief Justice then was, considered this power in *Attorney-General for the State of Queensland v Fardon* [2019] QSC 2, where her Honour stated:[1]

> "The Court has an express power under s 8 of the *Supreme Court of Queensland Act 1991* (Qld) to limit the extent to which the business of the Court is open to the public provided that the public interest or the interests of justice require it. As the Court of Appeal said in *R v McGrath* [2002] 1 Qd R 520, after referring to the earlier equivalent of this power[2] (at [8]):
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> > 'This is a confirmation and perhaps an extension of the common law power of the court to prohibit publication of proceedings where the court considers this necessary for the purpose of administering justice. The power includes the power to sit in camera if justice cannot otherwise be attained. However, the court has always regarded as fundamental the requirement that judicial proceedings be conducted in open court where members of the public may be present. The power of the court to exclude the public and limit publication of its

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1 At [105].

2 Then s 128 of the Supreme Court Act.

> proceedings is undoubted,[3] but as McPherson J (as he then was) observed in *Ex Parte The Queensland Law Society Incorporated*:
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> > '… the power of the court under general law to prohibit publication of proceedings conducted in open court has been recognised and does exist as an aspect of the inherent power. That does not mean that it is an unlimited power. The only inherent power that a court possesses is power to regulate its own proceedings for the purpose of administering justice.'"[4]

[11] Another relevant authority is the decision of *John Fairfax & Sons Pty Ltd v the Police Tribunal of New South Wales* (1986) 5 NSWLR 465, where McHugh JA, as his Honour then was, reasoned:[5]

> "The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient."

[12] The relevant legislation is the Child Protection Act. Section 5A of the Child Protection Act outlines the paramount principle, which states:

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3 Referring to *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166; *R v His Honour Judge Noud; Ex parte MacNamara* [1991] 2 Qd R 86; *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10; *R v Tait* (1979) 46 FLR 386 at 407 per Brennan, Deane and Gallop JJ.

4 *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 170. See also *Hogan v Hinch* (2011) 243 CLR 506 at [26] per French CJ and at [86]-[87] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

5 At 476-477.

> "The main principle for administering this Act is that the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life, are paramount."

[13] Relevantly, s 194(1) of the Child Protection Act states:

> "A person must not publish identifying information about a relevant person."

[14] Subsection (2) goes on to set out exceptions to that prohibition. Identifying information is defined in subsection (4) to be:

> "… about a relevant person –
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> (a) means information that identifies, or is likely to lead to the identification of, him or her as a relevant person; and
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> (b) includes –
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> (i) the person's name, address, school or place of employment; and
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> (ii) a photograph or film of the person or of someone else that is likely to lead to the relevant person's identification."

[15] Relevant offence is defined as:

> "… in relation to a relevant person, means an offence committed or alleged to have been committed in relation to the relevant person."

[16] Relevant person is defined to mean:

> "… a person who is or was a child in relation to whom an offence was committed or is alleged to have been committed."

[17] As indicated, the plaintiff's solicitors indicated to the Registry at the time of filing the original claim and statement of claim, that s 194 of the Child Protection Act applied. More recent submissions made on behalf of the plaintiff confirm this position.

[18] The most recent submissions identify the authorities recognising that the protection offered by s 194 applies to a person who was a child at the relevant time but is now an adult. This was recognised in the decision of *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266,

being a decision of Justice Crowley, which is consistent with the paramount principle.

[19] In the submissions made on behalf of the plaintiff, it is submitted that the protection accorded by s 194 of the Child Protection Act should be maintained and that information identifying the plaintiff should not be disclosed unless it is otherwise excused or permitted by s 194(2).

[20] The plaintiff's submissions particularly identify that it would be appropriate for the Court to anonymise the plaintiff's name and other information that may properly identify her in any reasons for judgment. This is consistent with considerations recognised by me in the *Attorney-General for the State of Queensland v WMS (No 2)* [2021] QSC 236.

[21] The practice of the Court in de-identifying the name of a party but also of others referred to in reasons and particular aspects of the reasons is well-known.

[22] The submissions on behalf of the defendant, as indicated previously, went to principles of law rather than advocating for the making of the order or not. The submissions on behalf of the defendant identify that the Court does have power, pursuant to s 8(2) of the Supreme Court of Queensland Act, but also the inherent jurisdiction of the Court.

[23] The defendant's submissions helpfully set out the relevant authorities, including *J v L & A Services Pty Ltd (No. 2)*[6] and *Dovedeen Pty Ltd & Anor v GK* [2013] QCA 116. The relevant passage of the decision in *Dovedeen* of Fraser JA, with whom Gotterson JA agreed, states as follows:

> "[35] The Court of Appeal has inherent power to make orders to the same effect as the orders made in the Tribunal and other orders concerning the non-publication of a party's name. At the hearing of the Application for Leave to Appeal, GK sought a non-publication order. Dovedeen Pty Ltd and Mrs Hartley did not oppose the application. GK's counsel noted that the orders for the use of initials only to identify GK were made in the Tribunal to protect the privacy of GK. He submitted, and

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6 [1993] QCA 12; [1995] 2 Qd R 10 ('***J v L & A Services***').

counsel for Dovedeen Pty Ltd and Mrs Hartley accepted, that the Court might act on the submission without further evidence, that the publication of GK's identity would cause distress and embarrassment to her and to her young children.

[36] An extensive discussion of the relevant authorities and principles may be found in *J v L & A Services*, in which Fitzgerald P and Lee J summarised the principles to be applied in the Supreme Court, subject to any statutory provision to the contrary, in the following passage:

> '1. Although there is a public interest in avoiding or minimising disadvantages to private citizens from public activities, paramount public interests in the due administration of justice, freedom of speech, a free media and an open society require that court proceedings be open to the public and able to be reported and discussed publicly.
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> 2. The public may be excluded and publicity prohibited when public access or publicity would frustrate the purpose of a court proceeding by preventing the effective enforcement of some substantive law and depriving the court's decision of practical utility. National security provides a further special, broadly analogous exception to the requirement of open justice because of its fundamental importance to the preservation of a democratic society based on the rule of law.
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> 3. The permitted exceptions to the requirement of open justice are not based upon the premise that parties would be reasonably deterred from bringing court proceedings by an apprehension that public access or publicity would deprive the proceeding of practical utility, but upon the actual loss of utility which would occur, and the exceptions do not extend to proceedings which parties would be reasonably deterred from bringing if the utility of the proceedings would not be affected. Courts do not have access to the information needed to determine whether or not parties are reasonably deterred by openness or publicity from bringing particular kinds of proceedings; for example, sexual complaints. Legislatures are better equipped than courts to make informed decisions on such matters.
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> 4. No unnecessary restriction upon public access or publicity in respect of court proceedings is permissible.

> 5. Different degrees of restraint are permissible for different purposes. Although the categories tend to coalesce, they are broadly as follows:
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> (a) Exclusion of the public or a substantive restraint upon publicity is not permissible unless abstractly essential to the practical utility of a proceeding; for example, prosecutions for blackmail or proceedings for the legitimate protection of confidential information: cf. *R v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society*.
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> (b) A limited exclusion or restraint is permissible if necessary to ensure that a proceeding is fair; for example, witnesses may be required to absent themselves from hearings, parts of jury trials may take place in the absence of the jury and limited or temporary restrictions on publicity may be imposed during the course of jury proceedings.
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> (c) An incidental, procedural restriction is permissible if necessary in the interests of a party or witness in a particular proceeding; for example, identities of witnesses or details of particular activities which are not directly material such as engaging in covert law enforcement operations or providing information to police may be suppressed."
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> [37] Bearing in mind the strength of the public interest in open justice, the grounds of the application for a non-publication order are not overpowering but, on balance, I am not persuaded that it is now appropriate to make a direction of the Court's own motion requiring an amendment to the title of the proceedings to substitute GK's name for the initials by which she has been identified to date."

[24] The defendants also refer to the relevant statement of principle in *J v L & A Services* where it states:[7]

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7 *J v L & A Services* at 34 [6]; Defendant's Submissions dated 30 November 2023, p. 4 at [10].

> "… information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or other "collateral disadvantage" …

[25] Additionally:

> "… when it is the interests of a party or a witness which is relied on as the basis for a proposed restraint, those considerations must be balanced against other factors, including the interests of others involved in the proceeding and others who may be affected. Open justice is non-discriminatory, whereas exceptions to the principle of open justice deny equal rights to the disputing litigants and provide a benefit to some litigants which is unavailable to members of the general public. Further, public scrutiny is a strong disincentive to false allegations and a powerful incentive to honest evidence, and publicity may attract the attention of persons with material information who are unaware of the proceeding."

[26] Submissions on behalf of the person described as CD in the Further Amended Statement of Claim were also made. These submissions address some additional issues that are particular to the circumstances of CD.

[27] It is submitted that the Court has power to make a non-publication order on the basis that identification of the witness may identify the plaintiff, and that by identifying the witness, CD, this may undermine the plaintiff's ability to claim the protection afforded to her under s 194 of the Child Protection Act.

[28] Further, it is also submitted that the Court should consider the extent to which the effect of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) (**Criminal Law (Sexual Offences) Act**) could be undermined if an order is not made. It is submitted on behalf of CD that given the alleged tort in this case constitutes criminal acts, if the witness's details were disclosed in these proceedings, it would have an irreparable negative impact on him, including his mental health and his family, beyond loss of privacy, embarrassment, distress, financial harm, or other collateral disadvantage, as referred to in *J v L & A Services*.

[29] I note that there is also some evidence of the specific distress caused to the witness CD by these proceedings, though this does not include any medical evidence of specific risk to safety.

[30] Further, it is submitted on behalf of CD that there is no submission that orders should be made restricting access to the proceedings or evidence on which the proceedings are based. In this regard, the proposed orders are no more extensive than is necessary.

[31] In respect of the Child Protection Act, it is submitted that under s 194, it is also necessary that the name of the school be protected, as it could identify the plaintiff. It is also submitted that the name of the witness would be covered by that, also to avoid undermining the protection of the plaintiff under s 194(1).

[32] In the particular circumstances of this case, the connection between the identity of the plaintiff and the identity of CD is not as clear as in some cases. For example, if there was a family relationship which would clearly identify one with the other, that would be more persuasive. However, I accept that it is at least open that there is a risk that if some of the identifying features, including the school and the name of CD, were identified, this may lead to the identification of the plaintiff and thereby undermine the statutory protection.

[33] Reference is also made to the provisions of the Criminal Law (Sexual Offences) Act. It is submitted on behalf of CD that at the heart of this proceeding are acts which could fall under the meaning of prescribed sexual offences pursuant to s 3 of the Criminal Law (Sexual Offences) Act.

[34] Whilst CD has not been charged with a criminal offence concerning the plaintiff, as there is no statute of limitation that applies and there is no practical impediment against his prosecution for such complaint, if such complaint was actually made, then considerations under that legislation do potentially arise.

[35] It is submitted that should the witness be named, it could reasonably be asserted that his name and details may become public knowledge in connection with a possible criminal proceeding, which conflicts with Parliament's intention under the Criminal Law (Sexual Offences) Act, which would allow him to seek a non-publication order pursuant to s 7 of the Criminal Law (Sexual Offences) Act.

[36] The Criminal Law (Sexual Offences) Act applies to a person charged with having committed a sexual offence. Relevantly, the more recent amendments to that Act

provide a process for a person charged with a prescribed sexual offence to apply to a Magistrates Court for an order prohibiting the publication before the defendant is committed for trial or sentenced or sentenced on the charge of identifying matter relating to the defendant.

[37] Section 7B of the Criminal Law (Sexual Offences) Act now sets out the grounds for a non-publication order. These are:

(a) the order is necessary to prevent prejudice to the proper administration of justice;

(b) the order is necessary to prevent undue hardship or distress to a complainant or witness in relation to the charge;

(c) the order is necessary to protect the safety of any person.

[38] These grounds largely reflect the matters that are identified in the case law which has previously been referred to.

[39] On behalf of CD, it is submitted that the orders proposed do not dictate that the conduct of the proceeding be in closed Court and does not preclude the reporting of the case. It is submitted that the proposed orders are properly directed at identification of the plaintiff, the witness, the name of the school and other identifying material, consistent with the protection under s 194 of the Child Protection Act.

[40] It is necessary for the Court to balance the various interests, including:

(a) the public interest in open justice; the interests of the plaintiff; the interests of the witness, CD; the nature of the claim itself, being a civil claim for compensation and not a criminal trial; and the existence of the statutory protections for the plaintiff under the Child Protection Act; and

(b) the purpose and matters under the Criminal Law (Sexual Offences) Act, including the potential for the undermining of the application of the Criminal Law (Sexual Offences) Act and the provisions identified in it.

[41] In all of these circumstances, I consider that the protection order in respect of the plaintiff should be maintained, consistent with the protections offered by s 194(2) of the Child Protection Act. The non-publication order made on 27 November 2023 was not precise in its wording and did not include the exceptions as identified in s 194(2) of the Child Protection Act.

[42] Accordingly, I propose that the non-publication order made 27 November 2023 be vacated and a more specific and targeted protection for the plaintiff be imposed, consistent with s 194 of the Child Protection Act.

[43] To the extent that it does not cover identification of CD, I consider, out of an abundance of caution, it is also appropriate to separately deal with a non-publication order in respect of CD, as named in the Further Amended Statement of Claim. The non-publication order in respect of CD is founded upon the power of the Court in s 8 of the Supreme Court of Queensland Act and the inherent jurisdiction to the extent that it goes beyond s 194 of the Child Protection Act.

[44] I consider that in the particular circumstances of this case, it is appropriate that a non-publication order be put in place in respect of CD, but also providing some exemptions to it, reflecting s 194(2) of the Child Protection Act for the purposes of the conduct of this proceeding and any appeal, but also enabling the plaintiff, should she so choose to do so, to make a complaint to the Queensland Police Service and for any steps to be taken as appropriate, as required or authorised by law. These further orders will be subject to further order of the Court.

[45] In these circumstances, I am satisfied that balancing the various factors, including the interests of open justice, that the orders proposed are to the limited extent necessary to protect the various interests involved, but also to maintain the principles of open justice as far as possible in the circumstances.

[46] Accordingly, the Court orders that:

(1) The non-publication order made on 27 November 2023 be vacated.

(2) Subject to:

(a) the exceptions in s 194(2) of the Child Protection Act; and

(b) further order of the Court,

identifying information (as defined in s 194(4) of the Child Protection Act) about the plaintiff must not be published.

(3) Subject to:

(a) publication or disclosure for the purposes of conducting this proceeding and any appeal;

(b) publication or disclosure for the purpose of an investigation into a complaint made by or on behalf of the plaintiff to the Queensland Police Service;

(c) publication or disclosure required or authorised by law; and

(d) further order of the Court,

the name of, and other information which may identify, the person described as CD in the Further Amended Statement of Claim, and who was a witness at the trial, must not be published or disclosed.