

**ORDER PROHIBITING PUBLICATION OF THE MATTERS REDACTED  
FROM THE JUDGMENT PURSUANT TO SS 200 AND 205 OF THE  
CRIMINAL PROCEDURE ACT 2011.**

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CRI-2024-404-000649  
[2025] NZHC 33**

BETWEEN	LG ELECTRONICS AUSTRALIA PTY LIMITED Appellant
AND	THE KING First Respondent
	DOWAN KIM Second Respondent

Hearing: 9 December 2024

Appearances: S J P Ladd for Appellant  
N F Flanagan for Crown

Judgment: 30 January 2025

Reissued: 18 March 2025

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**JUDGMENT OF ANDERSON J**

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*This judgment was delivered by me on 30 January 2025 at 3.00 pm*

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*Registrar/Deputy Registrar*

Solicitors:  
Bell Gully, Auckland  
Meredith Connell, Auckland, Crown Solicitors

[1] LG Electronics Inc is a global electronics company. Its presence in the Pacific is managed by the appellant, LG Electronics Australia Pty Ltd (LG). LG is an Australian company which has a sales and marketing branch in New Zealand. In 2020, the Commerce Commission commenced an investigation into potential anti-competitive conduct in the supply of consumer televisions in New Zealand. LG was one of several manufacturers included in the investigation. The investigation was completed in or about June 2022 with no charges being laid for such conduct. In the course of its investigation, the Commission issued a notice under s 98 of the Commerce Act 1986 requiring LG to provide it with certain communications. A key focus was communications between manufacturers and retailers.

[2] Discharges without conviction have been granted to [redacted] persons then employed by LG following guilty pleas for their conduct in responding to the s 98 notice. Specifically, Dowan Kim, the then LG Country Manager for New Zealand pleaded guilty to a charge of attempting to obstruct the course of justice for instructing certain employees to delete any messages on their phones that might be an “issue” before handing their phones over to the Commission. [Redacted] Nicholas Clarke, then one of LG’s account managers, pleaded guilty to charges of failing to comply with a s 98 notice by deleting messages in response to that direction.<sup>1</sup>

[3] Some, but not all, deleted messages were recovered. Those recovered did not disclose incriminating material. The Commission does not allege that the unrecoverable messages would have disclosed Commerce Act breaches.<sup>2</sup>

[4] [Redacted] Mr Clarke was unsuccessful in seeking name suppression.<sup>3</sup> I have also dismissed an appeal against a decision declining Mr Kim name suppression.<sup>4</sup>

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<sup>1</sup> An offence under Commerce Act 1986, s 103(1)(a).

<sup>2</sup> This was one of the agreed facts for Mr Kim’s sentencing. The Crown rejects that this goes so far as the Commission accepting there was no incriminating material as opposed to not being in a position to allege this in the absence of recovering it.

<sup>3</sup> *Clarke v R* [2023] NZHC 3175.

<sup>4</sup> *Kim v R* [2025] NZHC 32.

[5] In this decision I address LG’s appeal against a decision of Judge Gibson declining LG name suppression as a person connected with the [redacted] criminal proceedings against these former employees.<sup>5</sup>

[6] LG’s case for suppression was, and remains, two pronged. First, it says that publication of its name in connection with the proceedings against the abovementioned defendants would be likely to cause it undue hardship.<sup>6</sup> It says there will be disproportionate prejudice to LG’s reputation as publication would undermine trust in its brand, with a corresponding effect on sales.<sup>7</sup> Specifically, LG says it would not only be associated with the defendants’ conduct the subject of the proceedings but people will wrongly infer or suspect from the nature of that conduct that LG had something to hide. It refers to its dependence on consumer trust and to its branding as a company with high ethical standards.

[7] [Redacted]

### **Legal principles — name suppression**

[8] Under s 202(1) of the Criminal Procedure Act, an order may be made for name suppression for a person who:

- (c) is connected with the proceedings, or is connected with the person who is accused of, or convicted of, or acquitted of the offence.

[9] Section 202(2) provides that the Court may make an order for name suppression in relation to a connected person only where, among other matters, the Court is satisfied that publication would be likely to “cause undue hardship to the ... connected person”<sup>8</sup> [redacted]

[10] A two-stage approach applies to determining applications for suppression under s 202.<sup>9</sup> At the threshold stage, the Court must be satisfied that “publication

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<sup>5</sup> *R v Kim* [2024] NZDC 25774 [LG suppression decision].

<sup>6</sup> Criminal Procedure Act 2011, 202(2)(a).

<sup>7</sup> LG suppression decision, above n 5, at [7].

<sup>8</sup> Section 202(2)(a).

<sup>9</sup> *Parker v R* [2019] NZCA 350 at [6] applying the approach to applications under s 200; see *D (CA443/2015) v Police*; and *Robertson v Police* [2015] NZCA 7.

would be likely” to result in one of the listed consequences.<sup>10</sup> The word “likely” in this context means “a real and appreciable risk”<sup>11</sup> or a “real risk that cannot be readily discounted”.<sup>12</sup>

[11] The consequence of “undue hardship” under subs 202(2)(a) has been held to entail “hardship that is disproportionate to the purpose which justifies publication, namely the public interest in the open reporting of court proceedings and the right to freedom of expression”.<sup>13</sup> The assessment of whether that threshold has been met is contextual. It entails a relative comparison between the contended hardship and the consequences normally associated with publication of a name. It must be something beyond the ordinary associated consequences.<sup>14</sup>

[12] Open justice is the starting point in decisions about name suppression.<sup>15</sup> In exercising discretion in the second stage balancing exercise, the Court must weigh counter-balancing factors on a case-by-case basis against that principle and the underlying interests it serves.<sup>16</sup>

### **Approach on appeal**

[13] The appeal is brought under s 283 of the Criminal Procedure Act. The first-stage “threshold test” involves the application of general appeal principles.<sup>17</sup> Accordingly, the principles in *Austin, Nichols & Co Inc v Stichting Lodestar* apply.<sup>18</sup> If my view on the s 202 threshold differs from the District Court Judge, I must go on to make my own determination about whether suppression should be granted.<sup>19</sup>

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<sup>10</sup> Criminal Procedure Act, s 202(2).

<sup>11</sup> *Wallis v Police* [2015] NZHC 2904 at [22].

<sup>12</sup> *Beacon Media Group Ltd v Waititi* [2014] NZHC 281 at [17]. See also *Huang v Serious Fraud Office* [2017] NZCA 187 at [9]–[10]; and *F v R* [2022] NZHC 2547 at [44]–[46].

<sup>13</sup> *Beacon Media Group Ltd v Waititi*, above n 12, at [27].

<sup>14</sup> *Robertson v Police*, above n 9, at [49].

<sup>15</sup> *Beacon Media Group Ltd v Waititi*, above n 12, at [27], citing *R v Liddell* [1995] 1 NZLR 538 (CA) at 546; and *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [44].

<sup>16</sup> *M (SC 13/2023) v R*, above n 15, at [44].

<sup>17</sup> *Parker v R* [2020] NZCA 502 at [29]; and *C (CA123/2022) v R* [2022] NZCA 566 at [17].

<sup>18</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

<sup>19</sup> *S v R* [2020] NZHC 2279 at [29].

[14] An appeal on the second stage “discretionary assessment” involves the application of the principles for appeals against the exercise of a discretion.<sup>20</sup> Here, the Judge decided that the application failed at the jurisdictional, threshold stage. His comments on what he would have done had he accepted the threshold test was met are obiter. Counsel agreed that, in those circumstances, if I allow the appeal from the Judge’s decision on the threshold evaluation, I should go on to exercise afresh the discretion at the second stage.

### **District Court decision**

[15] The Judge rejected that LG had met the threshold test of undue hardship. LG filed evidence in support from Toolendrie (Evelyn) Soud, LG’s legal and compliance director. This deposed to the likely consequences of publication on LG’s brand. The Judge concluded that Ms Soud’s evidence was “simply speculative and [was] from someone who [he could not] accept would be an expert.”<sup>21</sup> He also considered that “There [was] no evidence from anyone who could be qualified as a marketing expert giving evidence of the effect of publication of LG’s name.”<sup>22</sup>

[16] The Judge considered the evidence supported only general prejudice, such as the claim that it would be inferred LG had something to hide. The Judge considered that in the event of publication it would be widely published that the Commission had not charged LG, which he said would assist LG in that respect.<sup>23</sup>

[17] [Redacted]

[18] Even had the threshold test been met, the Judge held that the interests of LG would not overcome the undoubted public interest in publication.<sup>24</sup>

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<sup>20</sup> The test is that the appeal must be allowed if the Judge: (a) made an error of law or principle; (b) failed to take into account a relevant consideration; (c) took into account an irrelevant matter; or (d) was plainly wrong: *Parker v R*, above n 17, at [29]–[30]. However, also see *M (SC 13/2023) v R*, above n 15, at [47] where the Supreme Court queried whether the second stage is truly a discretionary exercise, rather than evaluative.

<sup>21</sup> LG suppression decision, above n 5, at [7].

<sup>22</sup> At [5].

<sup>23</sup> At [7].

<sup>24</sup> At [9].

## Grounds of appeal

[19] LG appeals on the basis that:<sup>25</sup>

- (a) the Judge erred in assessing the s 202(2)(a) threshold was not met by:
  - (i) ignoring the evidence of Ms Soud;
  - (ii) relying on the fact that LG's name had already been published in connection with the persons charged when that was not the case; and
  - (iii) assuming without basis that in the event of publication it would be widely published that the Commission closed its investigation with no charges arising against LG;
- (b) [redacted]

## Discussion

*Was the Judge wrong to find LG did not meet the section 202(2)(a) threshold of undue hardship?*

[20] Mr Ladd for LG submits the Judge was wrong to find the evidence of Ms Soud went only to "general prejudice", not undue hardship. He submits that the undue hardship threshold is not particularly high and does not require the provision of expert evidence.<sup>26</sup> Mr Ladd therefore says that Ms Soud's evidence should not have been dismissed. He submits the matters upon which Ms Soud gave evidence were factual and straightforward, did not require expert opinion evidence, and provide a sufficient evidential basis for the harm LG says it will suffer.<sup>27</sup>

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<sup>25</sup> The amended notice of appeal also advanced grounds related to the exercise of the Judge's discretion at the second stage although, as noted earlier, the Judge did not in law exercise his discretion as he did not find the jurisdictional threshold established.

<sup>26</sup> *R v N* [2022] NZHC 2115 at [44].

<sup>27</sup> Ms Soud also annexed a report by Sarah Bolger, head of Colmar Brunton, which addresses the relevance of trust and reputation for businesses in New Zealand. Mr Ladd submits this does not appear to have been considered by the Judge at all. I do not see this as bearing on the key issues raised by the Judge.

[21] In my view, the Judge was not wrong to conclude that Ms Soud's evidence was an insufficient basis for determining the consequences to the LG brand and sales to which she deposes. It is correct, as Mr Ladd submits, that there are cases where the Court has relied upon evidence of likely loss of business from the connected person themselves, and has not required independent expert evidence.<sup>28</sup> However, the quality and strength of the evidence relied upon needs to be assessed in the context of the propositions being advanced.

[22] I accept the Crown's contention that it is far from an intuitive proposition that publication will likely result in material brand damage and a material loss in sales. I agree that this would require appropriate compelling evidence in order to be accepted. Ms Soud is not qualified to give expert evidence supporting this. Fundamentally, I do not accept the evidence.

[23] I do not accept Mr Ladd's submission that "undue" hardship to LG's reputation is obvious. LG's reputation generally may suffer due to publicity. That is a usual harmful consequence that does not meet the threshold of undue hardship. Moreover, I observe that commonly, name suppression for a connected person is being sought in a context where the employer is a victim or wholly unconnected with the employee's conduct. There is an artificiality in divorcing LG from the conduct of its employees in this case, when they were its senior staff in New Zealand responding to a Commerce Commission notice to LG.<sup>29</sup>

[24] Mr Ladd was critical that the Judge focussed on consumer reaction to the publicised connection, and loss of reputation and sales at a *consumer* level. He submitted that brand damage and loss of sales will occur due to brand and reputation impact at the level of LG's relationship with its *retail* clients. The criticism is misplaced insofar as the Judge was simply reflecting Ms Soud's primary emphasis in her evidence, which was on consumer reaction.

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<sup>28</sup> For example: *R v N*, above n 26, and on appeal *M v R (CA486/2022)* [2022] NZCA 502.

<sup>29</sup> LG strongly rejects a fact that was not negated beyond reasonable doubt for the purpose of Mr Kim's sentencing, that is, that Mr Kim acted on instruction of a more senior executive outside New Zealand. I accept that this is not a fact that should be assumed against LG.

[25] Ms Soud did add that the importance of reputation also affects LG's relationships with its important retail clients who LG sells to and who in turn sell to end consumers in what is a small and competitive market, with LG having few staff in New Zealand. She referred to the daily contact the defendants had in their specific roles with those clients, and hence that publication of Mr Kim's and Mr Clarke's names could materially damage relationships with retailers. Her evidence is to the effect that retailers in the small New Zealand market will know Mr Kim and Mr Clarke, and will therefore also know they were employed by LG.

[26] But LG's application does not seek suppression of these *defendants'* names on the basis of consequences for LG of publication. Therefore, this evidence is misconceived in providing a basis for suppression of *LG's* name due to undue hardship to it. Indeed, it goes the other way. Because Mr Kim and Mr Clarke do not have name suppression and are known by LG's retail clients, an order suppressing LG's name will not prevent the asserted consequences at the retailer level in any event.<sup>30</sup>

[27] Ms Soud gives evidence that because LG is a global brand, there is the likelihood of international brand damage if Australian or international media pick up the story, and in turn a material impact on sales. This proposition suffers from the same lack of sufficient support as the proposition of loss of consumer sales in New Zealand.

[28] I have considered the particular additional dimensions LG relies upon. The Commission investigation is now stale, having concluded in June 2022 with no breaches pursued. As noted earlier, LG says publication of the prosecutions now will lead people to assume that LG had something to hide and will re-ignite publicity about potential breaches.<sup>31</sup>

[29] In my view these factors are not sufficient to meet the threshold of "undue" hardship in the present context. LG says that the Judge erred in assuming that publicity

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<sup>30</sup> Compare *M v R (CA486/2022)*, above n 28, at [48].

<sup>31</sup> Mr Ladd emphasised that the Judge proceeded on the basis that Mr Kim was directed to delete messages by an LG executive. He submits this is denied by LG, who has not had an opportunity to test the evidence. I accept that this is not a factor that could be relied upon against LG, but it is not clear to me that it formed a basis for the Judge's reasoning.

of the prosecutions would include that the Commission had closed its investigation with no charges against LG. In my view, a fair media release would include this. In any event, LG is well-placed to mitigate incorrect conclusions being drawn and give its side of the story. It can emphasise that the Commission closed its investigation, that material was recovered and that the Commission does not allege that unrecovered information revealed anti-competitive conduct. It would presumably also rely on aspects Mr Ladd emphasised in his submissions. He says that LG took all proper steps to respond to the Commission's notice. When it became aware of the deletions, it took immediate steps to fix the issue. The Judge was not wrong to assume that fair reporting would reflect LG's response.

[30] As to LG's contention that the Judge was wrong to say that it had previously been named by the Commission in connection with the defendants, in my view nothing turns on this point for the substance of the appeal. The facts are that LG was named as one of the manufacturers in the electronic market in the background section of the Commission's media release at the time it announced the outcome of its investigations. Earlier, an RNZ article had identified LG as a manufacturer being investigated and, when asked for comment, an LG representative's response confirmed that it was, and that the investigation had been concluded.

[31] The Judge was incorrect in the way he introduced the prior media as being in connection with the present charges (rather than in connection with the Commission investigation) and he gave a slightly inaccurate description of the media engagement. However, nothing turns on this in context, because the Judge went on to accept that the prior media was historic.<sup>32</sup> The prior publicity is evidently not a matter he placed any emphasis on.

[32] LG also refers to a later comment by the Judge that "there [had] been publication at the outset of [the] fact" that LG had been the subject of a Commission investigation.<sup>33</sup> This statement is substantively correct, and in any event relates to how the Judge would have exercised his discretion, not the threshold question on which the Judge determined the case.

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<sup>32</sup> LG suppression decision, above n 5, at [6].

<sup>33</sup> At [11].

[33] In short, I agree with the Judge that the threshold of undue hardship was not met. I am not satisfied that the likely consequences of publication are greater than the usual consequences. The other aspects of the argument before me are not of consequence because it is unnecessary to consider how I would exercise the discretion.

[34]–[38] [Redacted]

### **Result and orders**

[39] [Redacted]

[40] LG indicated it may seek leave to appeal.

[41] In the circumstances, I make interim orders continuing the suppression of LG's name until:

- (i) 20 working days after the date of this judgment (to enable an application for leave to be filed); or
- (ii) the relevant appeal is finally determined if notice is filed by that date and leave is given.

[42] [Redacted]

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Anderson J