

## KEEPING MUM: SUPPRESSION AND STAYS IN THE RINEHART FAMILY DISPUTE

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*This article examines Gina Rinehart's numerous attempts to suppress information and stay proceedings in the extraordinary litigation in the Rinehart family trust dispute. The Rinehart litigation, while only at its pre-trial stage, has delivered significant judgments on the new legislative powers to depart from the principle of open justice and the law relating to stays of proceedings (stays of a substantive claim and stays pending an appeal to the High Court). The new legislation is the Court Suppression and Non-publication Orders Act 2010 (NSW), which has national significance as it is the model statute that aims to be implemented in all Australian jurisdictions and is a Federal Bill. The Rinehart litigation proves that the principle of open justice continues to be fundamental under the model statute and that the media has an important role in ensuring its protection. Possible future questions under the statute could be about the meaning of 'suppression' and the operational differences in seeking review under the Federal and NSW model. The Rinehart litigation is significant as it has redefined the test for seeking a stay of orders pending proceedings in the High Court. It has also considered whether a claim can be stayed due to an agreement to use alternative dispute resolution mechanisms. Further, it signals that future legal developments may occur on the issue of whether trustee disputes are arbitrable.*

### I INTRODUCTION

How does litigation proceed when the defendant has immense wealth<sup>1</sup> and is desperate to avoid the public airing of her family dispute? Can a pre-dispute agreement keep a dispute away from the court? Is it possible to suppress information

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This article is based on a presentation made in the Early to Mid Career Research Workshop on Civil Litigation, Australian National University, 17 February 2012. I am grateful to Professor Peta Spender for organising the Workshop. I would also like to thank the participants for their comments, in particular the commentator to my presentation, Professor David Bamford. Thanks also to two anonymous referees for their suggestions.

<sup>1</sup> Gina Rinehart is a mining magnate who is Australia's richest person and the richest woman in the world as ranked by BRW's 2012 Rich 200: Adele Ferguson, 'Rinehart World's Richest Woman', *BRW* (online), 23 May 2012 <[http://www.brw.com.au/p/sections/features/rinehart\\_world\\_richest\\_woman\\_JucE8ndw9hYfzDk5NuudTI](http://www.brw.com.au/p/sections/features/rinehart_world_richest_woman_JucE8ndw9hYfzDk5NuudTI)>.

about the litigation from the public so that private matters escape the embarrassment caused by the public spectacle of litigation? The aim of this article is to examine these questions by analysing the extraordinary pre-trial litigation in the proceedings commenced by three of Gina Rinehart's children in relation to the affairs of a family trust in which Gina Rinehart is trustee. This lengthy interlocutory litigation has already examined two significant areas of civil procedure and the hearing of the substantive proceedings has not yet begun. Gina Rinehart's repeated attempts at suppressing information and stopping her children's litigation appear unconstrained by the usual cost barriers. This litigation has interpreted the *Court Suppression and Non-publication Orders Act 2010* (NSW) (CSPO Act) which is the legislative model that aims to be implemented in each Australian state and territory, and is currently a bill before the Australian Federal Parliament.<sup>2</sup> The Rinehart litigation is used to evaluate the effectiveness of the new legislative model and to consider any unresolved issues of statutory interpretation. This article will then discuss the procedural developments in respect of the law relating to stays. The Rinehart litigation has focused on stays in two respects. First, it has redefined the test in New South Wales for the exercise of an appellate court's discretion to grant a stay pending an application for special leave to appeal to the High Court and, second, it has considered whether substantive proceedings should be stayed to give effect to a pre-dispute agreement for alternative dispute resolution. Another issue, one which divided the New South Wales Court of Appeal, is whether the Supreme Court's equitable or statutory jurisdiction for the removal of a trustee is susceptible to 'private justice' by way of an agreement to arbitrate.

## II THE PRINCIPLE OF OPEN JUSTICE AND THE POWER TO DEPART FROM IT

The principle of open justice is one of the most fundamental aspects of the system of justice in Australia.<sup>3</sup> It means that a court is physically open to the public and filed documents or tendered evidence can be accessed by the public. The reality is that few members of the public physically access the court; rather the public's knowledge of what occurs inside the courtroom is enabled by media reports of court proceedings. This means that a consequence of the open justice principle is that, absent any restriction ordered by the court, anybody may publish a fair and accurate report of the legal proceedings.<sup>4</sup> Reports about court proceedings are usually undertaken by media organisations. This is important because 'publicity of proceedings is one of the great protections against the exercise of arbitrary power and a reassurance that justice is

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<sup>2</sup> *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth). This Bill is before the Senate having been referred to the Senate Legal and Constitutional Affairs Legislation Committee for report. A report published 29 March 2012 recommends its implementation: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (2012).

<sup>3</sup> *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, 352 (Spigelman CJ). This was a case where a trial judge made a non-publication order in respect of guilty verdicts. On appeal, the non-publication order was found to be not necessary for the administration of justice.

<sup>4</sup> *Hogan v Hinch* (2011) 243 CLR 506, [22] (French CJ). This case concerned suppression orders prohibiting publication of information that might identify certain sex offenders who were the subject of post-custodial extended supervision.

administered fairly and impartially'.<sup>5</sup> The purpose of open justice is to ensure integrity and the accountability of those who administer justice.<sup>6</sup> Further, it has been said that witnesses are more likely to tell the truth if they testify in public.<sup>7</sup> Open justice enhances the public's confidence in the justice system and perpetuates the rule of law.<sup>8</sup> The provision of reasons by the court for its decision is also an expression of the open justice principle.<sup>9</sup>

Openness is usually placed with the right to a fair trial when set out as a right in bills of rights. Open justice is expressed as a right to have a 'fair and public hearing'.<sup>10</sup> Privacy is also protected in some statutes and it is balanced with the right to a public hearing.<sup>11</sup> In jurisdictions without a bill of rights, such as Australia, the common law first recognised the principle of open justice.<sup>12</sup> It has also been observed that the exercise of judicial power implied in Chapter III of the Australian Constitution, includes a requirement of openness.<sup>13</sup> In addition to the common law, there are statutes which expressly permit departures from the open justice principle.<sup>14</sup> A further constitutional argument has been raised in respect of statutory powers that depart from

<sup>5</sup> *R v Richards & Bijkerk* (1999) 107 A Crim R 318 (Spigelman CJ). In this case, the closing of the court was held to be necessary for the administration of justice to prevent tampering with jurors.

<sup>6</sup> *Russell v Russell; Farrelly v Farrelly* (1976) 134 CLR 495, 520 (Gibbs J). See generally, Peter Wright, 'The Open Court: The Hallmark of Judicial Proceedings' (1947) 25 *Canadian Bar Review* 721; Garth Nettheim, 'The Principle of Open Justice' (1984) 8 *University of Tasmania Law Review* 25; J J Spigelman, 'Seen to be Done: The Principle of Open Justice – Part I' (2000) 74 *Australian Law Journal* 290; Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press, 2002); New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003).

<sup>7</sup> Sir William Blackstone, *Commentaries on the Laws of England* (3<sup>rd</sup> ed, 1768) vol 3, 373; Jeremy Bentham, *Judicial Evidence* (1825) 67-8. Also see *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45 (Fitzgerald P and Lee J).

<sup>8</sup> See generally, J J Spigelman, 'Seen to be Done: The Principle of Open Justice – Part II' (2000) 74 *Australian Law Journal* 378. Also see *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 607-608 and *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [39].

<sup>9</sup> *Wainohu v New South Wales* (2011) 243 CLR 18, [58] (French CJ and Kiefel J).

<sup>10</sup> See for example *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 (Australia is a party to this Covenant and it is scheduled and annexed to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)); *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 6 (which is incorporated into English law by *The Human Rights Act 1988* (UK)); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1); and the *Human Rights Act 2004* (ACT) s 21(1).

<sup>11</sup> For example, art 8 of the *European Convention on Human Rights* recognises the right to privacy. However, this right is subject to the limitations in art 8(2) and also art 6 refers to the protection of the 'private life of the parties' as an exception to open justice if the test of strict necessity is met.

<sup>12</sup> The oft cited case for the foundation of the open justice principle is *Scott v Scott* [1913] AC 417 which stated that the general principle that a court must administer justice in public. This English case was soon followed in Australia: *Dickason v Dickason* (1913) 17 CLR 50.

<sup>13</sup> *Grollo v Palmer* (1995) 184 CLR 348, 379 (McHugh J); *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 703 (Kirby J); and writing extrajudicially, J J Spigelman, 'Seen to be Done: The Principle of Open Justice – Part I' (2000) 74 *Australian Law Journal* 290, 293.

<sup>14</sup> For example, *Civil Procedure Act 2005* (NSW) s 71 permits court proceedings to be conducted in the absence of the public; *Federal Court of Australia 1976* (Cth) s 50 permits non-publication orders (this section will be repealed by the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth)); and the power to make non-publication and suppression orders pursuant to the *Court Suppression and Non-publication Orders Act 2010* (NSW).

open justice. In a case involving a statutory power that permitted Australian Security Intelligence Office officers to give evidence anonymously, it was argued that such a power undermined the institutional integrity of the State court and therefore rendered it a less effective vehicle for the exercise of Federal jurisdiction.<sup>15</sup>

#### A *Power to Depart from Open Justice at Common Law*

The principle of open justice can be departed from in various ways. First, by in camera hearings, that is, by ordering the exclusion of the public from some part or all of a hearing.<sup>16</sup> Second, by restricting access to information, for example particular exhibits in a trial,<sup>17</sup> or by making pseudonym orders to prevent the disclosure of a witness' identity.<sup>18</sup> Third, by ordering non-publication of all or parts of proceedings or of the evidence.<sup>19</sup> Of course, more than one order can be made to protect information. For example, when an undercover police officer testifies, several orders are made to protect the operative's identity (a pseudonym order is made to protect the true identity, a closed court order is made to prevent the public seeing the operative and a non-publication order is made to prevent reports of the description of the operative). The Australian common law recognises that open justice is not absolute and there are departures from it. The test to depart from the open justice principle is based on necessity, namely, whether it is 'really necessary to secure the proper administration of justice'.<sup>20</sup> The power to depart from open justice could be in the exercise of a superior court's inherent jurisdiction or an inferior court's implied power.<sup>21</sup> The word 'necessary' was recently considered by the High Court in *Hogan v Australian Crime Commission*<sup>22</sup> where French CJ observed that 'necessary' in the context of the

<sup>15</sup> This argument was raised in *BUSB v R* (2011) 248 FLR 368 ('*BUSB*'). It invokes the line of authority commencing with *Kable v Director of Public Prosecutions* (1996) 189 CLR 51. However, the issue did not arise in *BUSB* as the Court found that the critical issue was that the court had the implied power to do what was necessary for the administration of justice: *BUSB* (2011) 248 FLR 368, [22] (Spigelman CJ).

<sup>16</sup> For example, *R v Richards & Bijkerk* (1999) 107 A Crim R 318.

<sup>17</sup> For example, *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* [2011] NSWSC 385 (5 April 2011) where orders were made to prevent access to documents relating to the remuneration of senior executives.

<sup>18</sup> For example, *Witness v Marsden & Anor* (2000) 49 NSWLR 429 (in a defamation case a witness who was a prison informer was known by pseudonym to the public but the parties knew his identity); *R v Hawi & Ors (No 2)* [2011] NSWSC 1648 (19 April 2011) (149 innocent bystanders sought to be known to the defendants and the public by pseudonym in a murder trial involving a several defendants who were all members of motorcycle gangs); *X v Sydney Children's Hospitals Specialty Network* [2011] NSWSC 1272 (27 October 2011).

<sup>19</sup> For example, *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 (non-publication order was not made in respect of disciplinary proceedings of Roger Rogerson); *Commissioner of Police v Nationwide News Pty Ltd* (2007) NSWLR 643 (non-publication orders were made in relation to the identity of undercover police officers and police methodology).

<sup>20</sup> *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465,477 (McHugh JA, Glass JA agreeing).

<sup>21</sup> For the exercise of implied power see *Grassby v The Queen* (1989) 168 CLR 1, 16-17 (Dawson J, Mason CJ, Deane and Toohey JJ agreeing); *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, [52] (Gaudron, Gummow and Callinan JJ); *TWLJ v The Queen* (2002) 212 CLR 124, [44] (Gaudron J). For applications of the exercise of implied power to depart from open justice see *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476 (McHugh JA); *John Fairfax Group Pty Limited v Local Court of NSW* (1991) 26 NSWLR 131, 161; *R v Mosely* (1992) 28 NSWLR 735, 739.

<sup>22</sup> *Hogan v Australian Crime Commission* (2010) 240 CLR 651. This approach was applied in

statutory provision applicable in the Federal Court<sup>23</sup> did not mean ‘convenient, reasonable or sensible or to serve some notion of the public interest’.<sup>24</sup>

The departures from open justice, that is, the categories of cases that could permit an order to close justice, are ‘few and strictly defined’.<sup>25</sup> But the categories are not absolute and may be extended to categories ‘closely analogous’ to the existing categories.<sup>26</sup> However, courts are loathe to expand the field.<sup>27</sup> The accepted categories are wards of State and mentally ill people,<sup>28</sup> blackmail and extortion cases,<sup>29</sup> where the disclosure of information would affect its commercial value,<sup>30</sup> informers<sup>31</sup> and to protect matters of national security.<sup>32</sup> As stated above, departures from open justice can also be permitted by specific legislation,<sup>33</sup> although such legislation has been criticised for enabling orders to be made too frequently and for producing uncertainty through the different legal bases.<sup>34</sup>

### B *Court Suppression and Non-publication Orders Act 2010 (NSW)*

The CSPO Act commenced on 1 July 2011. It is based on model legislation developed and endorsed by the Standing Committee of Attorneys-General (SCAG).<sup>35</sup> At this stage, New South Wales is the first (and only) jurisdiction to adopt the model. However, there is a Federal Bill<sup>36</sup> that proposes that the model applies to the four Federal courts.<sup>37</sup> A Senate inquiry has recently (March 2012) supported

<sup>23</sup> *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [27] (Bathurst CJ and McColli JA).  
*Federal Court of Australia 1976* (Cth) s 50.

<sup>24</sup> *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664.

<sup>25</sup> *John Fairfax publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, [19] (Spigelman CJ).

<sup>26</sup> *R v Kwok* (2005) 64 NSWLR 335, 340-341 (Hodgson JA).

<sup>27</sup> *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55; *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643, 648 [32]-[38] (Mason P and Ipp JA), 657-658 [90]-[91] (Basten J); *P v DI [No 3]* [2010] NSWSC 644, [11]-[20].

<sup>28</sup> *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane LC); *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694, 723 [165] (Meagher JA).

<sup>29</sup> See *R v Socialist Worker Printers & Publishers Ltd; Ex Parte Attorney-General* [1975] QB 637; *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131.

<sup>30</sup> *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* [2011] NSWSC 385 (5 April 2011).

<sup>31</sup> See *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 246 (McHugh JA); *Arthur Stanley Smith* (1996) 86 A Crim R 309; *Witness v Marsden* (2000) 49 NSWLR 429; *R v Lodhi* (2006) 65 NSWLR 573, 584 [25]-[26] (McClellan CJ at CL).

<sup>32</sup> See *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, 19 (Hunt J); *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131, 159 (Mahoney JA); *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, 357-358 [45]-[48] (Spigelman CJ); *BUSB* (2011) 248 FLR 368, [36].

<sup>33</sup> See examples at above n 14 and also see *Children (Criminal Proceedings) Act 1987* (NSW); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34; *Civil Procedure Act 2005* (NSW) s 71; *Witness Protection Act 1995* (NSW) s 26.

<sup>34</sup> See Andrew Kenyon, ‘Not Seeing Justice Done: Suppression Orders in Australian Law and Practice’ (2006) 27 *Adelaide Law Review* 279.

<sup>35</sup> In July 2008 SCAG formed a working group to develop a proposal on the harmonization of suppression and non-publication orders. In May 2010, SCAG agreed to endorse and consider implementation of the model: Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13553-4 (Brendan O’Connor). Note that SCAG is superseded by the Standing Council on Law and Justice.

<sup>36</sup> *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth).

<sup>37</sup> The High Court, Federal Court, Family Court and the Federal Magistrates’ Court.

implementation of the Bill.<sup>38</sup> The Senate inquiry concluded that the Bill accords with how the principle of open justice has been stated and applied at common law.<sup>39</sup> The Explanatory Memorandum to the Federal Bill notes that the Bill provides a ‘more robust legislative framework’ and that it ensures orders are ‘made only where necessary on the grounds set out in the Bill, taking into account the public interest in open justice and in terms that clearly define their scope and timing’. Significantly, the Explanatory Memorandum makes reference to *Hogan v Hinch*,<sup>40</sup> where French CJ said: ‘a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle’.<sup>41</sup>

The CSPO Act defines ‘non-publication order’ as an order that ‘prohibits or restricts information’, and a ‘suppression order’ means ‘an order that prohibits or restricts the disclosure of information (by publication or otherwise)’.<sup>42</sup> The legislation co-exists with the inherent jurisdiction and any other power that a court has to regulate its proceedings.<sup>43</sup> A central provision in the CSPO Act mandates that in deciding whether to make a suppression or non-publication order a court must take into account that ‘a primary objective of the administration of justice is to safeguard the public interest in open justice’.<sup>44</sup> The CSPO Act enables the court to make orders to suppress or not publish information that would reveal the identity of a party or witness, or information that is evidence or about evidence given in proceedings.<sup>45</sup> The grounds for making a suppression or non-publication order are: the order is ‘necessary to prevent prejudice to the proper administration of justice’; the order is ‘necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security’; the order is ‘necessary to protect the safety of any person’; the order is ‘necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)’; and/or ‘it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice’.<sup>46</sup>

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<sup>38</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 2. This report recommends that the Senate pass the Bill.

<sup>39</sup> *Ibid* 7.

<sup>40</sup> Explanatory Memorandum, *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth) [25], referring to *Hogan v Hinch* (2011) 243 CLR 506 and *Hogan v Australian Crime Commission* [2010] HCA 21, in particular where French CJ states that suppression orders conferred by statute should be construed so as to minimise their intrusion on the open justice principle: *Hogan v Hinch* (2011) 243 CLR 506, [27].

<sup>41</sup> *Hogan v Hinch* (2011) 243 CLR 506, [27] (French CJ). This approach was applied in *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [26] (Bathurst CJ and McColl JA).

<sup>42</sup> *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3.

<sup>43</sup> *Ibid* s 4.

<sup>44</sup> *Ibid* s 6.

<sup>45</sup> *Ibid* s 7.

<sup>46</sup> *Ibid* s 8. An example of suppression and non-publication orders under the legislation were made in coronial proceedings to restrain the publication and release of a DVD because it would prejudice future criminal proceedings: *Bisset v Deputy State Coroner* [2011] NSWSC 1182 (4 October 2011) (RS Hulme J). In another case, orders were made requiring a publisher to remove articles about the accused from a website to ensure a fair trial: *R v Perish*; *R v Lawton*; *R v Perish* [2011] NSWSC 1101 (11 July 2011) (Price J). Suppression orders were made in another case to protect the identity of an informer: *Nichols v Singleton Council* [2011] NSWSC 946 (25 August 2011) (Schmidt J). Non-publication orders were made in respect of evidence about police methodology relating to payments made by the Commissioner of Police to informers: *Da*

The court may make an order on application or on its own initiative.<sup>47</sup> Further, people entitled to appear and be heard on an application under the CSPO Act include: the applicant, a party to the proceedings, a government agency and a news media organisation.<sup>48</sup>

### III SUPPRESSION ORDERS AND STAYS IN THE RINEHART LITIGATION

#### A *The Litigation Commences and an Urgent Suppression Order Follows*

On 5 September 2011, Gina's Rinehart's four children filed a summons in the Equity Division of the New South Wales Supreme Court alleging breach of trust and seeking orders removing Gina Rinehart as trustee and varying the trust deed.<sup>49</sup> An application was made, *ex parte*, seeking relief in relation to the affairs of a family trust of which Gina Rinehart is the trustee.<sup>50</sup> The trust was created in 1988 by Langley Hancock with a deed of settlement where the principal assets were shares in Hancock Prospecting Pty Limited. The deed provided that on Hancock's death, Gina Rinehart became absolutely entitled to a proportion of the shares in the company, which constituted part of the trust fund. The balance of the shares in the fund was to be held by the trustee on trust until the date on which the youngest of the surviving children of Gina Rinehart attained the age of 25 years. After the execution of the trust deed, Gina Rinehart and her four children entered into a settlement deed which contained a clause that required the parties to resolve disputes under the settlement deed by way of confidential mediation or arbitration.<sup>51</sup>

From Gina Rinehart's first appearance to defend the claim brought by her children, she sought a suppression order<sup>52</sup> over information in the proceedings and a stay of

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*Silva v R (No 2)* [2012] NSWCCA 106 (9 May 2012) (Whealy JA, Hidden J and Schmidt agreeing). Non-disclosure orders were not made in another case to prevent disclosure of scandalous allegations: *Ashton v Pratt* [2011] NSWSC 1092 (12 September 2011) (Brereton J), however they were made in another case to prevent publication of the address of a party: *Showtime Touring Group Pty Ltd v Mosley Touring Inc* [2011] NSWSC 1401 (22 November 2011) (Walmsley AJ).

<sup>47</sup> *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(1).

<sup>48</sup> *Ibid* s 9(2).

<sup>49</sup> The youngest child subsequently removed herself as a plaintiff and joined proceedings as a defendant. On 21 September 2011, Brereton J made orders by consent that Gina Rinehart was removed as a plaintiff and joined as a second defendant: *Uniform Civil Procedure Rules 2005* (NSW) rr 6.29 and 6.24.

<sup>50</sup> The plaintiffs sought orders varying a deed of settlement made by Langley George Hancock as amended by a subsequent deed of amendment ("the trust deed") to vary the trust deed by splitting the trust into separate trusts and removing the trustee from one of the newly created trusts (the "second trust") and appointing themselves as trustees of that second trust. The plaintiffs also sought a declaration that the trustee had miscondacted herself in the administration of the trust: *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [7]-[8] (Bathurst CJ and McColl JA).

<sup>51</sup> In particular, the settlement deed provided at cl 20.8:

"Confidentiality of Proceedings:

The dispute the subject of the mediation/arbitration, the mediation and arbitration hearing and the submissions thereto and the decision of the mediation and/or arbitration shall be kept confidential."

<sup>52</sup> Rinehart sought suppression and non-publication orders in all applications, except in *Welker v*

proceedings on the basis that they were an abuse of process because they were commenced without prior compliance with the confidential alternative dispute resolution (ADR) procedures in the settlement deed.

On 13 September 2011, the suppression order was resisted by the media (but not objected to by the plaintiffs).<sup>53</sup> Brereton J granted a suppression order as it was ‘necessary to prevent prejudice to the proper administration of justice’<sup>54</sup> because ‘publication of the current proceedings would negate the purpose of the confidentiality provisions in the deed and circumvent the rights of the defendant to have the dispute resolved by confidential ADR’.<sup>55</sup> Further, Brereton J found that it is ‘otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice’ to enable the attainment of justice.<sup>56</sup> Brereton J suppressed ‘information as to the relief claimed, or any pleading, evidence or argument filed, read or given in, the proceedings’.<sup>57</sup> The order applied throughout Australia and until the dismissal of the defendant’s motion for a stay of the proceedings. In short, Brereton J found that the disclosure of information would deprive Rinehart’s stay application of much of its utility. His reasoning assumed a favourable outcome of the stay application. Interestingly, Brereton J found that the litigant’s interest in pursuing her rights for confidential ADR outweighed the public interest in open justice, and found that the attainment of justice prevailed over open justice.<sup>58</sup> Further, Brereton J noted that the public interest in open justice may attract less weight where private issues are concerned.<sup>59</sup>

### B *Lifting of the Suppression Order due to the Failed Stay*

By notices of motion dated 16 September 2011 and 6 October 2011 respectively, Gina Rinehart (and her youngest child, Ginia Rinehart) applied to have the substantive proceedings stayed.<sup>60</sup> The basis for their application was that the dispute was one arising under the settlement deed and the parties were required to resolve their dispute by confidential ADR. The application for a stay was dismissed on the basis that the children’s proceedings did not involve a dispute under the settlement deed,<sup>61</sup> and even if they were disputes under the deed, judicial discretion was not to be exercised to order a stay because of the viability of the potential defences that could be raised by Gina Rinehart under the settlement deed.<sup>62</sup> Brereton J also declined to refer the dispute to mediation because the matter was not ‘ripe’ for it, since further disclosure

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*Rinehart (No 6)* [2012] NSWSC 160 (6 March 2012) (Ball J) she only sought a non- publication order.

<sup>53</sup> A contradiction in this litigation is that at the same time that Gina Rinehart sought suppression orders she was receiving significant publicity because she was acquiring a substantial quantity of media shares in Fairfax and Channel 10 at a fast rate.

<sup>54</sup> *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).

<sup>55</sup> *Welker & Ors v Rinehart* [2011] NSWSC 1094 (13 September 2011), [16] (Brereton J).

<sup>56</sup> *Ibid* [25] (Brereton J) applying *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(e).

<sup>57</sup> *Ibid* [25] (Brereton J).

<sup>58</sup> *Ibid* [14] (Brereton J).

<sup>59</sup> *Ibid* [17] (Brereton J).

<sup>60</sup> The application for a stay was made pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) which provides that a ‘court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day’.

<sup>61</sup> *Welker & Ors v Rinehart & Anor (No. 2)* [2011] NSWSC 1238 (7 October 2011) (Brereton J).

<sup>62</sup> *Ibid* [50] (Brereton J).

of information between the parties was required first.<sup>63</sup> However, Brereton J did order interim suppression pending an appeal.

### C *Appeal Commences and an Urgent Suppression Order Follows*

Gina Rinehart filed an appeal against the refusal of a stay decision and applied for a suppression order in respect of that appeal. An application was made before a single justice of the Court of Appeal (Tobias AJA) for a suppression and non-publication order. Both the media and plaintiffs objected to the order. Tobias AJA granted the order on the same ground as Brereton J<sup>64</sup> and suppressed information about the relief claimed or any pleading, the summary of argument, submissions, the draft notice of appeal, evidence or argument filed, read or given in these proceedings, and including the contents of the appeal books.<sup>65</sup> Tobias AJA found that if the order was not made then it would 'negate the purpose of the confidentiality provisions in the Deed and would circumvent the rights of the applicants to have such disputes resolved by confidential mediation or arbitration in the event the leave to appeal was granted and the appeal succeeded'<sup>66</sup> and would render the appeal 'nugatory'.<sup>67</sup> The basis of the suppression was that the confidentiality clause in a deed had the effect of suppressing court proceedings. Tobias AJA dealt with the principle of open justice by observing:

...that the public interest in open justice is not said by s 6 to be either **the** primary objective of the administration of justice or the only objective thereof. It is **a** primary objective, meaning that there are other primary objectives of the administration of justice, or may well be, which should be taken into account. One of these is that parties should be held to their bargain.<sup>68</sup>

This above paragraph demonstrates that Tobias AJA did not view the open justice principle as the primary objective of court process. Rather, like Brereton J, he valued the private right of contract and the substantive justice to the parties as more important, in this particular case, than open justice. Tobias AJA did not give any weight to the public interest in the misconduct of a trustee.<sup>69</sup>

### D *Review to the Court of Appeal – Lifting of Suppression Order*

The media companies and plaintiffs successfully sought review of Tobias AJA's order in the Court of Appeal.<sup>70</sup> The plurality (Bathurst CJ and McColl JA) followed *Hogan v Hinch* and construed the CSPO Act with the least adverse impact on open justice.<sup>71</sup> They found that Tobias AJA erred in failing to construct the statute in that manner.<sup>72</sup>

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<sup>63</sup> Ibid [51] (Brereton J).

<sup>64</sup> *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).

<sup>65</sup> *Rinehart v Welker & Ors* [2011] NSWCA 345 (31 October 2011) (Tobias AJA).

<sup>66</sup> Ibid [25] (Tobias AJA).

<sup>67</sup> Ibid [26] (Tobias AJA).

<sup>68</sup> Ibid [38] (Tobias AJA).

<sup>69</sup> Ibid [30] (Tobias AJA).

<sup>70</sup> *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) (Bathurst CJ and McColl JA, Young JA).

<sup>71</sup> Ibid [26] (Bathurst CJ and McColl JA). This was applied in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) [49] (Bathurst CJ, Basten JA and Whealy JA) where suppression orders were made to prevent public access to existing material, including a publication on a website, to ensure the fairness of a forthcoming trial.

<sup>72</sup> *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [49] (Bathurst CJ and McColl JA).

The plurality held that ‘necessary’<sup>73</sup> was a strong word and suppression orders should only be made in exceptional circumstances.<sup>74</sup> The plurality found that none of the exceptions to the principle of open justice in the common law applied to Gina Rinehart’s application.<sup>75</sup> Like the common law, the CSPO viewed open justice as fundamental.<sup>76</sup> The plurality found that it was not necessary for the proper administration of justice to give effect to a confidentiality clause in a deed. Further, they found that the conduct of trustees did warrant close public scrutiny.<sup>77</sup> They observed that the ‘price of open justice was that allegations about individuals are aired in open court’.<sup>78</sup> The plurality highlighted the errors in Brereton J and Tobias AJA’s approach by concluding:

In our view, having regard to the nature of the proceedings it was neither "necessary to prevent prejudice to the administration of justice" and, further contrary to the requirement to treat open justice as "a primary objective" referred to in s 6 of the Act for the Court to exercise its power under s 8 to suppress information of the nature of that caught by Tobias AJA's orders. Suppression of such information would undermine, rather than ensure, public confidence in the administration of justice.<sup>79</sup>

### E      *Application for a Stay Pending High Court Proceedings*

Two days after the Court of Appeal’s lifting of the suppression orders, an application was made before a single justice of the Court of Appeal for a stay to seek special leave to appeal to the High Court of Australia. A short stay was granted taking into account the time of the year.<sup>80</sup> Later, the Court of Appeal reconvened and refused a stay.<sup>81</sup> Significantly, the Court of Appeal considered whether it would apply the strict approach to granting stays taken by the High Court<sup>82</sup> or follow the less stringent approach in New South Wales.<sup>83</sup> The High Court’s approach is that the jurisdiction to grant a stay is ‘extraordinary’ jurisdiction and ‘exceptional’ circumstances must be shown before its exercise is warranted.<sup>84</sup> Prior to the Rinehart litigation, the NSW

<sup>73</sup> ‘Necessary for the administration of justice’: *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).

<sup>74</sup> *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [27] (Bathurst CJ and McColl JA). In a subsequent case, the Court of Appeal has held that ‘necessary’ should not be given a narrow construction and it will depend on the purpose for the order: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) (Bathurst CJ, Basten JA and Whealy JA), see in particular [8] (Bathurst CJ), [46]-[48] (Basten JA).

<sup>75</sup> *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [38] (Bathurst CJ and McColl JA). Young JA agreed that the orders should not have been made but he agreed with Tobias AJA that the CSPO Act would not necessarily conform to the exceptions at common law.

<sup>76</sup> *Ibid* [32] (Bathurst CJ and McColl JA), referring to *Court Suppression and Non-publication Orders Act 2010* (NSW) s 6.

<sup>77</sup> *Ibid* [52] (Bathurst CJ and McColl JA).

<sup>78</sup> *Ibid* [54] (Bathurst CJ and McColl JA).

<sup>79</sup> *Ibid* [55] (Bathurst CJ and McColl JA).

<sup>80</sup> *Ibid* (Beazley JA). It was vacation time.

<sup>81</sup> *Ibid* (Bathurst CJ, Beazley JA, McColl JA).

<sup>82</sup> *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* [1986] HCA 84; (1986) 161 CLR 681

<sup>83</sup> *John Fairfax & Sons Ltd v Kelly (No 2)* (1987) 8 NSWLR 510

<sup>84</sup> *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* (1986) 161 CLR 681, 684 (Brennan J). The Court of Appeal cited further authorities to support the High Court approach: *Edelsten v Ward (No 2)* (1988) 63 ALJR 346; *Gerah Imports Pty Ltd v The Duke Group (in liq)* (1994) 119 ALR 401; *Haydon v Chivell* (1999) 165 ALR 1; *Comandate Marine*

approach was to normally grant a stay to permit an application for special leave to appeal to the High Court until the leave application and/or appeal were dealt with.<sup>85</sup> The Court of Appeal noted that an approach that ‘normally’ grants a stay is not an approach that recognises that the jurisdiction is exceptional and granted in extraordinary circumstances.<sup>86</sup> The Court of Appeal departed from its earlier authority and followed the High Court approach to applications for stays pending an appeal to the High Court.<sup>87</sup> The Court reviewed the special leave grounds and found that Gina Rinehart did not have substantial prospects of obtaining special leave. In particular, the court observed that the High Court considered open justice in its case of *Hogan v Australian Crime Commission* and this case provided a barrier to Rinehart’s prospects of success.<sup>88</sup> Further, any point about the effect of the *Commercial Arbitration Act* and the CSPO Act was not raised before the primary judge or in the Court of Appeal.<sup>89</sup> Finally, the fact that the legislation was ‘new and potential model legislation’ did not warrant special leave being granted, as leave was more likely if there were a divergence of views or problems in the construction of the statute.<sup>90</sup>

However, a short stay was granted to early February 2012. Shortly before the stay was due to expire an application was made to a single justice of the High Court (Crennan J) seeking a stay until the special leave application was determined. That application succeeded.<sup>91</sup> Crennan J found that the circumstance that a refusal to grant a stay would have the result that the confidentiality based on the deed will be lost forever, and the special leave applications rendered nugatory, to be an exceptional circumstance that warranted the exercise of extraordinary jurisdiction.<sup>92</sup>

#### F *Fresh Suppression Applications Based on Security Risks*

The desperation of Gina Rinehart’s quest for secrecy is demonstrated by two further fresh applications in the Supreme Court for suppression. The first application was for a suppression order based on the need to protect the safety of the Rinehart family. This application relied on evidence to establish a security risk. The application failed<sup>93</sup> and one consequence was that the evidence adduced in support of Rinehart’s application came into the public domain, and was in fact posted on the website of the *Daily Telegraph*. A second attempt was made based on another ‘security risk’ argument. Again, that application failed.<sup>94</sup>

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<sup>85</sup> *Corp v Pan Australia Shipping Pty Ltd* [2006] HCATrans 353; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 2)* (1998) 72 ALJR 869.

<sup>86</sup> *John Fairfax & Sons Ltd v Kelly (No 2)* (1987) 8 NSWLR 510, 512 (Kirby P, Mahoney and McHugh JJA).

<sup>87</sup> *Rinehart v Welker* [2012] NSWCA 1 (13 January 2012) [22].

<sup>88</sup> *Ibid* [47].

<sup>89</sup> *Ibid* [54].

<sup>90</sup> *Ibid* [61].

<sup>91</sup> *Ibid* [68].

<sup>92</sup> Transcript of Proceedings, *Rinehart v Welker* [2012] HCA Trans 7 (1 February 2012) (Crennan J).

<sup>93</sup> *Ibid* 1610, 1680 (Crennan J). It seems that a very relevant matter was that the special leave application was listed in March and the stay was therefore for a short period.

<sup>94</sup> *Welker v Rinehart (No 5)* [2012] NSWSC 45 (2 February 2012) (Ball J).

<sup>94</sup> *Welker v Rinehart (No 6)* [2012] NSWSC 160 (6 March 2012) (Ball J). This application sought a non-publication order.

Gina Rinehart applied to reopen her case to adduce evidence of a threat from an anonymous source. Ball J refused her application to reopen her case ‘as the threat or so-called threat simply came from an anonymous person who Mr Francis (a security expert) met in the street and it was no different from any sort of threat or adverse comment that may be made against or about a person on a website or a blog or similar social media sites’.<sup>95</sup> Further, Ball J found that the evidence did not establish any connection between the threat and the need to make an order.<sup>96</sup>

### G *Special Leave to Appeal to the High Court on the Suppression Order*

Gina Rinehart sought special leave to appeal to the High Court of Australia against the Court of Appeal’s lifting of the suppression orders that Tobias AJA had ordered in respect of her appeal against the refusal of a stay of her children’s substantive claim. The special leave application was heard on 9 March 2012 – only 6 months after the commencement of proceedings, after seven applications before single justices of the Supreme Court, four applications/appeals before the Court of Appeal sitting as one or three justices and one application before a single justice of the High Court. Gina Rinehart sought special leave to appeal two errors. The first error was that the Court of Appeal erred in its application of the CSPO Act. The second error was that the Court of Appeal did not give legislative recognition to party autonomy in the *Commercial Arbitration Act 2010* (NSW).<sup>97</sup>

The first point contended that the Court of Appeal erred in approaching the CSPO Act by equating it with the common law power to make suppression orders, that is by viewing that a suppression order is made in ‘exceptional circumstances’ and taking the view that it is not subject to judicial discretion.<sup>98</sup> In support of this approach, it was submitted that s 7 does not contain the words ‘if it appears necessary’.<sup>99</sup> French CJ and Gummow J, hearing the special leave application, responded to this submission by commenting that Rinehart’s application would be aided if she could argue that a suppression order would be granted at common law.<sup>100</sup> Interestingly, Gummow J raised a future constitutional issue with the CSPO Act and cautioned that Chapter III questions should not be ‘rushed into’.<sup>101</sup> French CJ observed that Rinehart’s argument in respect of the effect of the confidentiality provision in the settlement deed could be a powerful factor in her application for a stay, but he commented that it would be difficult to apply it so that it has the effect of applying in the context of curial proceedings.<sup>102</sup>

The second error identified by Rinehart was that the *Commercial Arbitration Act* required that the matter be referred to arbitration by the court because Rinehart’s

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<sup>95</sup> *Welker & Ors v Rinehart & Anor (No 7)* [2012] NSWSC 222 (6 March 2012) [6] (Ball J).

<sup>96</sup> *Ibid* [6] (Ball J).

<sup>97</sup> Transcript of Proceedings, *Rinehart v Welker & Ors* [2012] HCATrans 57 5 (9 March 2012) (Holmes SC).

<sup>98</sup> *Ibid* 100-120 (Holmes SC).

<sup>99</sup> *Ibid* 305 (Holmes SC).

<sup>100</sup> *Ibid* 141 (Gummow J).

<sup>101</sup> *Ibid* 154 (Gummow J). This issue would raise the institutional integrity argument that was raised in *BUSB v R* (2011) 248 FLR 368, see above n 15.

<sup>102</sup> Transcript of Proceedings, *Rinehart v Welker & Ors* [2012] HCATrans 57 (9 March 2012) 233 (French CJ).

application for a stay constituted a request under that Act.<sup>103</sup> This argument was not run before the primary judge or in the Court of Appeal.<sup>104</sup> This special leave point was that the Court of Appeal had misinformed itself by failing to give proper weight to the clear legislative intent of the *Commercial Arbitration Act* which required that courts give effect to domestic arbitration agreements.<sup>105</sup> Questions from the High Court bench focused on whether there was a commercial arbitration.<sup>106</sup> Gummow J observed that if Rinehart was seeking to hold her children to their agreement then the better course would have been to seek an injunction rather than a stay.<sup>107</sup>

Counsel for the media highlighted the ‘contingency’ aspects of the special leave application, as the case would only arise if Rinehart was successful in seeking the stay in the Court of Appeal.<sup>108</sup> In reference to the test of necessity, Counsel for the media asked, “How can it be necessary to do something that may never be required?”<sup>109</sup> If the application for a stay failed, then the suppression orders would be futile. In respect of the *Commercial Arbitration Act* point, Counsel for the media submitted that there was no application under that Act and that the High Court did not have material before it to determine the question.<sup>110</sup> Counsel rebutted the discretion argument as ‘absurd’ and submitted:

Is it imaginable that a court says “it is necessary to do this for the administration of justice, but we have got a discretion not to and we will not?” It is an absurd proposition and in our submission there goes away the one thing that might at first sight have seemed to be of that substantial general importance for the doctrine of the law such as to attract a grant of special leave. It disappears and one comes back then to what is particular about these cases, and what is particular about these cases is their great degree of contingency, their pervasive character of being hypothetical, and therefore the great risk that this Court will be seized of something which is nothing but moot.<sup>111</sup>

Counsel for the plaintiffs disagreed that the matter was a commercial dispute and that it was a dispute under a deed that was entered into almost 20 years after the trust was settled.<sup>112</sup> The children also resisted the constraints of a suppression order and submitted:

When one asks the question, given what is already known, why is it necessary to prevent prejudice, how is the administration of justice in New South Wales prejudiced ... such that it is necessary that this order be granted. In light of everything which is already known, we say the case is, with the greatest respect, a hopeless one.<sup>113</sup>

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<sup>103</sup> Section 8 of the *Commercial Arbitration Act 2010* (NSW) provides that a matter can be referred to arbitration.

<sup>104</sup> Transcript of Proceedings, *Rinehart v Welker & Ors* [2012] HCATrans 57 (9 March 2012) 355-365. That there had been an application was contested by the respondents, especially at such a late stage in the proceedings: Ibid 656, 684.

<sup>105</sup> Ibid 450 (Walton SC).

<sup>106</sup> Ibid 454 (French CJ). Rinehart’s Counsel submitted that the trust involved a business: 465 (Walton SC).

<sup>107</sup> Ibid 494 (Gummow J).

<sup>108</sup> Ibid 615 (Walker SC).

<sup>109</sup> Ibid 729 (Walker SC).

<sup>110</sup> Ibid 633, 705 (Walker SC).

<sup>111</sup> Ibid 825 (Walker SC).

<sup>112</sup> Ibid 865 (Bell SC).

<sup>113</sup> Ibid 1062 (Bell SC).

The High Court refused special leave and asserted the primacy of the open justice principle. It found that the Court of Appeal correctly found that the primary judge had failed to approach the question of whether a suppression order should be granted on a basis that would have the least impact upon the open justice principle.<sup>114</sup> The Court of Appeal approach gave ‘appropriate weight’ to that principle in its approach to the construction of the CSPO Act.<sup>115</sup> Further, the proper conduct of trustees warranted close public scrutiny.<sup>116</sup> French CJ noted that the interaction between the CSPO Act and the *Commercial Arbitration Act* was not raised in the court below and this rendered it an inappropriate vehicle for leave.<sup>117</sup>

#### H *Appeal on the Stay to the Court of Appeal*

Gina Rinehart’s appeal from the refusal of Brereton J’s dismissal of the stay was determined by the Court of Appeal in April this year. The Court of Appeal found that the children’s claim was not a dispute ‘under this deed’ and there was no error in refusing to stay the proceedings. While Gina Rinehart’s potential defences rely on the settlement deed in answer to the children’s claim, those defences will not determine the outcome of the proceedings.<sup>118</sup> They found that the primary judge correctly exercised his discretion by refusing the stay,<sup>119</sup> and that he did not err in declining to refer the proceedings to mediation.<sup>120</sup>

One issue which divided the Court of Appeal was whether the children’s claim was arbitrable. There was no legal authority on the question of whether a claim to remove a trustee was arbitrable.<sup>121</sup> Bathurst CJ held it was and said:

...it is my opinion that at least in circumstances where the trustee and each beneficiary have expressly agreed to their disputes being referred to arbitration, a court should give effect to that agreement. The supervisory jurisdiction of the court is not ousted. It continues to have the supervisory role conferred upon it by the relevant legislation, in this case the Commercial Arbitration Act. There may be powerful commercial or domestic reasons for parties to have disputes between a trustee and beneficiary settled privately. It does not seem to me that the matters to which I have referred above should preclude a court from giving effect to such an agreement provided the jurisdiction of the court is not ousted entirely.<sup>122</sup>

McCull JA agreed with the Chief Justice.<sup>123</sup> In contrast, Young JA found that a claim for the removal of a trustee was not arbitrable and it was undesirable for such disputes to be referred to arbitration because of the difficulties in a court enforcing any decision of the arbitrator.<sup>124</sup>

<sup>114</sup> Ibid 1193 (French CJ).

<sup>115</sup> Ibid 1196 (French CJ).

<sup>116</sup> Ibid 1200 (French CJ).

<sup>117</sup> Ibid 1205 (French CJ).

<sup>118</sup> *Rinehart v Welker* [2012] NSWCA 95 (20 April 2012) [132]. *Hancock Prospecting Pty Ltd v Welker* [2012] NSWCA 104 (20 April 2012) joined the proceedings.

<sup>119</sup> *Rinehart v Welker* [2012] NSWCA 95 (20 April 2012) [184]-[192]. Brereton J refused to stay the proceedings as Gina Rinehart had failed to demonstrate that the conduct of the plaintiffs in commencing the proceedings were in breach of a valid and enforceable arbitration agreement: Ibid [100].

<sup>120</sup> Ibid [193] - [194].

<sup>121</sup> Ibid [173], [226].

<sup>122</sup> Ibid [175].

<sup>123</sup> Ibid [210].

<sup>124</sup> Ibid [226].

This decision contains a schedule that contains the pleadings for the breach of trust together with the pleaded defences. This permits one to appreciate the type of material that was the subject of the initial suppression orders.<sup>125</sup> After viewing this material, one thing is clear: it is difficult to see the basis for suppression in the first place, that is, how the suppression orders were necessary to prevent prejudice to the administration of justice.

#### IV ISSUES FROM THE RINEHART LITIGATION

##### A *Fundamental Nature of Open Justice*

The application of the statutory tests by the full bench of the Court of Appeal in the Rinehart litigation shows that the CSPO Act is being construed consistently with the common law. Further, the Court of Appeal's reference to the common law exceptions to the principle of open justice indicates that these are the categories where necessity could possibly be established. The Court of Appeal's interpretation of the CSPO Act places central importance on the principle of open justice. This follows High Court authority that requires statutory construction that favours the open justice principle.<sup>126</sup> The facts of the Rinehart dispute show the tension between privacy rights and the role of a public hearing. However, the Court of Appeal's decision demonstrates that the open justice principle is paramount. The primary judges who initially granted suppression orders erred by placing importance on the private rights of the litigants, rather than considering that departures from the open justice principle must be necessary and are exceptional orders. The Court of Appeal found that there is a public interest in the disclosure of the affairs of a trustee. In a subsequent consideration of the CSPO Act, the Court of Appeal has emphasised that 'necessity' should not be narrowly construed and will depend on the circumstances of the particular case.<sup>127</sup> After a period of operation of the CSPO Act, empirical research will be beneficial so that consideration can be given to whether the statute has made it easier to depart from the open justice principle. An assessment of the legislation could be undertaken from data collection about the frequency and types of orders made pursuant to the legislation. When the Senate Committee Report on the Federal Bill heard evidence about the operation of the NSW Act, there was evidence from the NSW Attorney-General's Department that there was an increase in the orders granted after the introduction of the Act.<sup>128</sup> However, it could not point to a reason for the increase; one reason submitted by the organisation *Australia's Right to Know* was that the judiciary views the provisions as a licence to make orders.<sup>129</sup>

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<sup>125</sup> The allegations made by the plaintiff are that Gina Rinehart, to not disclose trust information, falsely represented that the beneficiaries needed to execute a Deed Poll to extend the vesting date of the trust, breached her duty to act honestly and in good faith, acted with gross dishonesty in her dealings with the beneficiaries of the trust; acted deceitfully in her dealings with the beneficiaries of the Trust: Schedule to *Rinehart v Welker* [2012] NSWCA 95 (20 April 2012).

<sup>126</sup> *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664.

<sup>127</sup> *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) [8] (Bathurst CJ, Basten JA and Whealy JA).

<sup>128</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 2, 6.

<sup>129</sup> *Ibid* 5.

Another question to consider is the frequency of orders for a ‘super-injunction’. This is an injunction which restrains a person from publishing information which is confidential or private and also restrains publication of the existence of the non-disclosure order and the proceedings. Recent questions were asked in New South Wales’ Parliament about their existence.<sup>130</sup> Of course, information about this type of injunction is difficult to obtain and could also be the subject of data collection by the courts. Of note is the situation in the United Kingdom where the issue has been litigated<sup>131</sup> and where it was the subject of a Parliamentary Enquiry chaired by Lord Neuberger, which recommended a data collection system for all interim non-disclosure orders including super-injunctions.<sup>132</sup>

Another issue is the effectiveness of orders when information has already been issued in circumstances where information has already been made public (which is done at rapid speed due to social media in the courtroom such as Twitter). The Court of Appeal has recently held that the CSPO Act could support an order directing an internet host to remove material from a website, but the Act could not support an order addressed to the world at large which could cover material on internet sites of which the hosts were unaware.<sup>133</sup> Future issues may arise due to the fast pace of technology. One issue is whether courts should monitor or prohibit text-based communications inside the courtroom.

### B      *Meaning of ‘Suppression’*

What is the meaning of ‘suppression’? While this definition has not been contentious in the Rinehart litigation, it is an important question as it determines whether the CSPO Act applies. One writer has suggested that the term ‘suppression’ includes orders to close the courtroom, prohibit publication of the matter and provide the use of pseudonyms.<sup>134</sup> In contrast to this wide definition, another writer defines suppression orders as non-publication orders.<sup>135</sup> This difference highlights the difficulty in using a legislative term that was and is not utilised in the common law. Prior to the statute, the usual orders to depart from the open justice principle were non-publication orders, closed court orders and orders for the non-disclosure of certain types of information (for example, the identity of undercover officers).

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<sup>130</sup> In the estimates hearing on 26 October 2011, David Shoebridge MLC requested that the Attorney-General estimate the number of super injunctions issued under the new legislation: Transcript, Attorney General, Justice, *Budget Estimates 2011-2012*, 26 October 2011, 7.

<sup>131</sup> See for example, *Terry v Persons Unknown* [2010] EWHC 119 (QB); *Ntuli v Donald* [2010] EWCA Civ 1276; *DFT v TFD* [2010] EWHC 2335 (QB). An anonymised injunction restrains the publication of the names of either or both of parties: *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42.

<sup>132</sup> Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>>. Also see Master of the Rolls, *Practice Guidance: Interim Non-Disclosure Orders* (2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/practice-guidance-civil-non-disclosure-orders-july2011.pdf>> .

<sup>133</sup> *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) [94]-[95] (Basten JA, Bathurst CJ and Whealey JA agreeing).

<sup>134</sup> Melissa Woodroffe, ‘Closed courts: open door to justice’ (2011) 49 *Law Society Journal* 51, 52.

<sup>135</sup> Lisa Grindley, ‘Closing the courts without closing the doors – what are suppression orders?’ (2007) 78 *Precedent* 26.

One issue that may require clarification is whether closed court orders are covered by the CSPO Act. Obviously, an order closing the court is not a ‘non-publication order’. The question is whether it falls within the definition of ‘suppression order’.<sup>136</sup> A better view is that the definition in the CSPO Act applies to an order restricting the disclosure of information rather than preventing physical access to a courtroom. On the other hand, one method to restrict the disclosure of information is to prevent the public from physically accessing the court. If an application for a closed court is a ‘suppression order’ then the formal procedure under the CSPO Act will need to be adopted. In particular, the media will need to be informed of the application and have standing at it (presently, the media can only intervene in closed court applications if they happen to have notice of them).

The CSPO Act would also appear to cover pseudonym orders. Such orders were sought in great number in a recent murder trial involving accused who were members of the Comanchero and Hells Angels Motorcycle Clubs. In *R v Hawi & Ors (No 2)*, the NSW Commissioner of Police sought orders that 149 ‘innocent bystander’ witnesses be described by pseudonym in the trial. This application did not succeed as the Commissioner had not adduced evidence to justify that the orders were necessary to secure the administration of justice.<sup>137</sup> The application was made before the commencement of the CSPO Act and it is likely that the same result would occur under the Act even though such orders can be made to ‘protect the safety of a person’.

### C *Role of the Media*

The Rinehart litigation demonstrates the pivotal role of representation by the media. Initially, media companies were the sole objector to the suppression orders (the plaintiffs joined in the application once the proceedings were in the Court of Appeal). This litigation proves that it may be in both parties’ interests to have proceedings suppressed and thus the active involvement in the media ensures that the principle of open justice is given its primary status in court proceedings. A question remains as to the lack of similar standing in respect of applications to physically close the court to the public (such orders do not appear to be within the ambit of the CSPO Act). Another point is that the involvement of the media can result in cost orders against the party that fails in its application for a non-disclosure order under the CSPO Act.<sup>138</sup>

### D *Mechanism for Seeking Review*

One difference between the Federal Bill and the NSW Act is that the Federal Bill does not allow for review of suppression and non-publication orders.<sup>139</sup> The Senate report

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<sup>136</sup> Section 3 of the CPSO Act provides that ‘suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise)’.

<sup>137</sup> [2011] NSWSC 1648 (29 April 2011) [115] (RA Hulme J).

<sup>138</sup> Gina Rinehart and Ginia Rinehart were ordered to pay the costs of the plaintiffs and the media companies in respect of the review of the orders made under the CSPO Act by the Court of Appeal: *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) (Bathurst CJ and McColl JA, Young JA). They also had to pay the plaintiffs and media companies costs of the High Court special leave application: *Rinehart v Welker (No 3)* [2012] NSWCA 228 (30 July 2012) (Bathurst CJ, Beazley JA and McColl JA).

<sup>139</sup> *Court Suppression and Non-publication Orders Act 2010 (NSW)* s 13 permits review of orders

notes that as suppression orders are interlocutory in nature, there is power to vary them and, further, that an appeal could be brought so long as leave was obtained first.<sup>140</sup> The lack of a power to review orders under the Federal Bill could have the effect of delaying Federal proceedings due to the appeal process. It is noted that the suppression order made by the High Court (Crennan J) had the effect of suppressing publicity of the litigation in respect of the appeal against the stay in the Court of Appeal. It has been observed that the ‘temporal relationship between the progress of the trial’ and the ‘resolution of the appeal on publication bans has concerning implications for open justice’.<sup>141</sup> Rodrick notes that the delay means there is a risk that the media’s interest in reporting the material will be diminished and may not spark public debate.<sup>142</sup> Consideration ought to be given to amending the Federal Bill so that it adopts the NSW system of review.

#### E *New Test for Granting a Stay Pending High Court Proceedings*

An applicant for a stay, so that he or she can apply for special leave to appeal to the High Court, must now prove exceptional and extraordinary circumstances in order to justify the granting of a stay. This will now involve the Court of Appeal reviewing the proposed special leave grounds. Such a procedure recognises that the likelihood of a grant of special leave is low and the decision in this case brings NSW in line with other Federal and State jurisdictions.<sup>143</sup>

#### F *Implications for ADR Processes*

The Rinehart litigation raised a new issue in ADR that may signal further legal development is yet to come. This is the question of whether trustee disputes are arbitrable. While Bathurst CJ and McColl JA separately agreed that they were, Young JA was firmly of the view that such disputes were not. In addition, Brereton J declined to refer the matter to mediation as there had not been sufficient disclosure on information between the parties. This position may seem incongruous to the amendments to the *Civil Procedure Act* that enact pre-litigation protocols in civil litigation because such protocols would require mediation before litigation commences.<sup>144</sup>

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by the same court that made the order. See also *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) [20] (Bathurst CJ, Basten JA and Whealy JA).

<sup>140</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 2, 9.

<sup>141</sup> Sharon Rodrick, ‘Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia’ (2007) 31 *Melbourne University Law Review* 172, 199.

<sup>142</sup> *Ibid*, 200. Rodrick was writing about the suppression of the crime boss scenario technique and how the impact of delay between the trial and appeal of the publication ban could risk the level of the media interest and the public debate about the use of the particular police method, in this case. Rodrick was writing about the failed suppression orders in Canada and Victoria to ban publication about this particular police method. It is also noted that NSW failed in suppressing the method: *Attorney-General for NSW v Nationwide News Pty Ltd & Anor* [2007] NSWCCA 307 (5 November 2011), special leave to the High Court refused.

<sup>143</sup> See *Rinehart v Welker* [2012] NSWCA 1 (13 January 2012) [9]-[18] and [31]-[36] (Bathurst CJ, Beazley and McColl JJA).

<sup>144</sup> *Civil Procedure Act 2005* (NSW) ss 18A-18O. These provisions are enacted but have not yet commenced. It is noted that the protocol would also require the appropriate exchange of information: s 18C.

## V CONCLUSION

The Rinehart litigation offers a plethora of issues on civil procedure and shows the multitude of points that can be litigated when litigation funding is not an issue. The litigation has all the ingredients of a soap opera: wealth, commercial sensitivities, private family matters. However, one point is clear: the litigation shows that these reasons are not a basis to close justice. This case demonstrates that the new statutory framework for making suppression and non-publication orders will mirror the common law's reverence for the principle of open justice. The exceptions to open justice are well known categories where the necessity of such orders depends on the type of information involved, for example, the protection of the identity of an informer or information that may harm national security. In the case of suppression orders sought by Gina Rinehart, it could be argued that a party has used their wealth to keep information from the public by testing the limits of the CSPO Act. In this battle, openness is the victor. Rinehart's enormous wealth was not able to keep the proceedings private or bind her children to ADR.

Just before Mother's Day 2012, the Rinehart family dispute took a twist as Gina Rinehart brought the vesting date of the trust forward from 2068 to April 2012.<sup>145</sup> This affects the children's claim that their mother extended the expiry of the family trust. However, it has been reported that the plaintiffs will continue their claim to have their mother removed as trustee and they will press for disclosure of financial records in respect of the trust. Of course, an obvious solution to ensure privacy of these matters is for Gina Rinehart to reach settlement with her three children. However, after so many pre-trial battles that appears quite unlikely.

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<sup>145</sup> The claim was before the court on 9 May 2012 when it was announced that Gina Rinehart had changed the vesting date which meant that the children had immediate access to trust funds.