

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

**CIV-2010-404-005021
[2012] NZHC 887**

BETWEEN JOSEPH FRANCIS KARAM
 Plaintiff

AND FAIRFAX NEW ZEALAND LIMITED
 Defendant

Hearing: 19 and 20 March
 (with additional written submissions 5 April 2012 and 18 April 2012)
 (Heard at Auckland)

Counsel: P A Morten and M A Karam for Plaintiff
 R K P Stewart and S B Kellett for Defendant

Judgment: 10 May 2012

**JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to plaintiff's strike out application and both parties'
applications for further discovery]**

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[1] Mr Karam sues Fairfax in defamation.

[2] Fairfax pleads a number of affirmative defences, including honest opinion. Mr Karam applies to strike out that defence.

[3] Each party also seeks orders for further and better discovery.

[4] At the same time as hearing these applications, I heard one other interlocutory application pursued by Mr Karam. That is the subject of a separate judgment also issued today.

The background

[5] Five members of the Bain family – Robin and Margaret and three of their children – died in their Dunedin home in June 1994. A son, David Bain, (“Mr Bain”) was found guilty of their murder and served 13 years in prison. There were numerous challenges to the conviction. Mr Bain was eventually re-tried in June 2009. He was acquitted. Mr Bain then intended to pursue compensation from the Crown.

[6] Mr Karam’s claims in this case relate to four articles published by Fairfax from August 2009 to December 2009. The articles made reference to two websites:

- A Facebook site, “Justice for Robin Bain”; and
- the Counterspin website.

[7] The Facebook site was established in 2009. It was initially called “David Bain is Guilty” before its name was changed to “Justice for Robin Bain”. It includes a forum where people can leave comments. Mr Karam alleges that 40 such comments were defamatory of him, giving rise to nine defamatory meanings.

[8] The Counterspin website was also established in 2009. It includes articles, commentary and analysis of Mr Bain’s trials and their subject matter. It also includes a forum where people can leave comments. Mr Karam alleges that 111

comments on the site are defamatory of him, giving rise to 12 defamatory meanings. There is no allegation that Fairfax contributed any content to either the Facebook site or the Counterspin site. There is no allegation that Fairfax had any control over the content of either site.

The articles

[9] Mr Karam's four causes of action relate to the four articles. I now summarise them chronologically.

Facebook article (second cause of action)

[10] The Facebook article (second cause of action) was published on the Stuff website, www.stuff.co.nz, on 22 August 2009. It was sourced from the New Zealand Press Association (NZPA). It referred to David Bain's intended application for compensation. It referred to the Facebook site in these terms:

But Justice For Robin Bain, formed from the Facebook group David Bain Is Guilty, is lobbying to prevent this happening.

Spokesman Kent Parker said a website had been set up and a petition would be started.

Dominion Post article (third cause of action)

[11] The Dominion Post article was published on 25 November 2009 in The Dominion Post newspaper and on the Dominion Post website, www.dompost.co.nz.

[12] A Fairfax employee, Kerry William, was the author. The Dominion Post article included the following passage:

Vic Perkiss said several people wanted to place the advertisements as they stepped up their lobbying against compensation for Mr Bain.

"We don't want to go down without a fight," he said. "We don't want it [compensation] to just sneak through."

Mr Perkiss is a member of **Facebook site Justice for Robin Bain**, formerly called David Bain is Guilty.

The site, which has 676 members and is linked to an online petition signed by 307 people, claims the jury in Mr Bain's second trial was wrong.

Law experts say the site, and any proposed advertisements, could be defamatory.

It is linked to another website – **David Bain: Counterspin**.

The Dominion Post decided against running the advertisement.

(passages appearing in bold as in the statement of claim)

Compensation article (first cause of action)

[13] The Compensation article (first cause of action) was published on 4 December 2009 on the Press website, www.thepress.co.nz. It was sourced from the NZPA. It included the following passage:

A group of Robin Bain supporters has launched a petition calling on Justice Minister Simon Power to deny his son David Bain's application for compensation.

Advertisements were placed in major papers today, calling for people to sign up to the petition at <http://davidbain.counterspin.co.nz>. By midday, just over 300 people had signed up.

(I quote from the original article which has slightly different wording to what is quoted in the statement of claim).

[14] Within the hyperlink is the "http" – an acronym for Hyper Text Transfer Protocol. Hyperlinks come in two broad forms. A distinction can be drawn between "shallow" and "deep" hyperlinks.¹ A "shallow" or ordinary link involves a simple hyperlink from one webpage to another. A "deep link" transports the user to some page on another website other than its home page.

[15] The hyperlink in the Compensation article was a deep hyperlink in the sense that it took the user directly to four of the statements alleged by Mr Karam to be defamatory.

¹ Matthew Collins *The Law of Defamation and the Internet* (3rd ed, Oxford University Press, Oxford, 2010) at [2.48] p 28.

Sunday Star-Times article (fourth cause of action)

[16] The Sunday Star-Times' article (fourth cause of action) was published on 20 December 2009 in The Sunday Star-Times newspaper and online. A Fairfax employee, Tony Wall, was the author. The article included the following:

Why Bain is being fought again in cyberspace

By Tony Wall

More than 1000 people have signed an online petition aimed at denying David Bain compensation for the 13 years he spent in jail. Who are the campaigners who believe the wrong decision was reached at Bain's retrial on charges of killing his family? Tony Wall investigates.

Vic Perkiss, a 57-year-old Coromandel liquor store manager, reckons he has invented a new word: Karamelise.

It is the process by which Perkiss believes David Bain supporter Joe Karam has influenced public opinion on the case. Perkiss describes himself as a "soldier" in the campaign to prevent Bain from receiving compensation.

A full six months after Bain's acquittal, the trial of the decade rages on in cyberspace. It is not prosecuted by men and women in funny gowns with plummy voices, but by anyone with a keyboard and an opinion, **and there are plenty of those joining Facebook groups such as Justice for Robin Bain and the website David Bain: Counterspin, which hosts the petition.**

Hundreds of people of all ages and from all parts of the country have got involved, including a pensioner who bought his first computer so he could join in the discussion and an 18-year-old Otago school student who set up a pro-Robin Bain group on Facebook because he wanted to make the legal point that David's acquittal does not equal Robin's guilt.

Like others who have joined the anti-David Bain cause, Perkiss directs much of his anger at Karam, whom he believes influenced public opinion to such an extent that not guilty was the only verdict that was ever going to be returned.

He is not alone. In online discussion threads Karam's actions are picked apart, from the way he ran his media campaign to his appearance as a kind of celebrity court assistant helping an expert witness physically prove the Robin Bain murder-suicide theory.

...

He and others involved in the campaign are jittery about Karam's intentions, knowing that he has a reputation for being litigious. Karam himself was sued by two police officers for allegations he made in his book *David and Goliath*.

...

Forrest has written a book, Muddied Waters, so far published only online on the Counterspin site, critiquing Karam's books and writings.

...

In Hastings, web developer Kent Parker, 47, is also concerned with legal issues. The creator of the Counterspin site and one of the administrators of Justice for Robin Bain, Parker, who is interested in "online democracy", is worried that he will say or write something that will open himself up to legal action.

...

Parker ... makes no apologies.

It won't go away, and Karam is going to have to live with what he's done. Counterspin will be on the net ad infinitum. It can create a thorn."

(passages appearing in bold as in the statement of claim)

Fairfax's defence

[17] At the time of the hearing, Fairfax's pleaded defence was contained in an amended statement of defence. For the purposes of this hearing, Mr Stewart provided a draft second amended statement of defence and has since finalised and filed that document. The amendment was primarily to re-plead Fairfax's honest opinion defence to meet criticisms made of it.

[18] The essential facts of Fairfax's publication of the four articles are not significantly disputed. Fairfax pleads five alternative defences:

- No publication
- No defamatory meaning
- Qualified privilege
- Neutral reportage
- Honest opinion

[19] A defence of innocent dissemination, initially pleaded by Fairfax, was abandoned through the amended statement of defence.

[20] Mr Karam has served notices under s 39 of the Defamation Act 1992 (that opinions expressed in the material complained of were not the genuine opinions of the persons expressing the opinions) and s 41 (responding to Fairfax's qualified privilege defence, alleging that Fairfax was predominantly motivated by ill-will towards Mr Karam or otherwise took improper advantage of the occasion of publication). Mr Karam has also filed a reply to the Fairfax defences. Each is denied.

Plaintiff's application for discovery

The object of the application

[21] Mr Karam's application for discovery, filed in May 2011, was in response to the second defendant's affidavit of documents in which claims of privilege and confidentiality were made in relation to Fairfax's "sources of information". Fairfax had invoked the so-called "newspaper rule" by which a (defamation) defendant's sources of information and grounds of relief are protected.

The object of the application largely falls away

[22] In the event, by the time Fairfax filed its opposition it did so by reference to a supplementary affidavit of documents sworn in June 2011 through which Fairfax disclosed a number of documents in the categories sought. Fairfax's opposition was mainly on the basis that discovery had become unnecessary. Mr Karam filed an amended application for better discovery in August 2011. The amended application targeted a number of types of documents including source documentation. In September 2011, Fairfax filed a notice of opposition to the amended application, asserting that the orders sought were unnecessary having regard to the supplementary affidavit of documents. Fairfax abandoned its reliance on the newspaper rules. In October 2011 it provided disclosure of 28 additional documents

in relation to sources which it had identified, but maintained reliance on the newspaper rule to the extent that sources had not been named in the articles.

[23] For the purposes of this hearing two updating affidavits were filed. First, Mr Karam filed an updating affidavit setting out in some more detail the above history and concluding that there are still further documents to discover. He sought explanation as to what documents, if any, relating to the Sunday Star-Times article had been destroyed. Anthony Wall, the reporter who wrote the Sunday Star-Times article, filed the second updating affidavit. He said that no further documents exist. He explained that in the course of his job he periodically purges notebooks and tapes, usually six months after creation. He deposed that in this case such documents would have been destroyed before the plaintiff filed proceedings (the statement of claim, filed on 3 August 2010, being filed approximately one year after the first article and approximately nine months after the fourth article).

[24] More history than that is unnecessary for the purposes of this judgment. The consequence of the history is that the substance of the original application and amended application has all but fallen away. Counsel responsibly accepted, given the unequivocal assurance of Mr Wall in his affidavit, that the Court does not have a sufficient basis to order further and better discovery of documents of the kind which Mr Karam asserted must exist.

Should some discovery orders yet be made?

[25] Counsel for Mr Karam accepted that, having regard to Mr Wall's updating affidavit, the sole focus of the order which the Court might now properly make in relation to the Fairfax discovery is to ensure formal compliance with the Rules. In particular, counsel pointed to a failure by Fairfax (through its deponent) to identify in its affidavit of documents precisely what documents or categories of documents, once held by Fairfax or its employees or agents, no longer exist or are no longer held by Fairfax. In the absence of such identification there is also no disclosure of when each document ceased to be in Fairfax's control and who now has any such document disposed of.

[26] Identification of “missing” documents is required by r 8.21(1)(d) High Court Rules. A suggested form of disclosure is that contained in Part 4 of the sample affidavit of documents provided by r 8.16 and form G 37 in Schedule 1 of the High Court Rules. The combined effect of rr 8.15 and 8.16 is to require a party to deal with “missing” documents in a schedule to its affidavit. Rule 8.16(1)(d) in terms requires disclosure only of those documents “that have been” in the control of the party giving discovery.

[27] Mr Wall’s evidence is that he does not recall whether he made any other notes or tape recordings. He asserts that if such had been made they would have been destroyed in the meantime. Given Mr Wall’s evidence that he is unaware of whether other notes were made, the omission of any reference in the Fairfax affidavit to possible notes is understandable. To the extent that the possibility was not covered in Fairfax’s initial discovery, Mr Wall’s updating affidavit adequately deals with the matter. In these circumstances it would be inappropriate to order that a further affidavit be filed to cover the Schedule 4 requirements.

[28] Criticism was directed towards Fairfax and its employees in relation to the possible disposal of documents in the period leading to litigation. The suggestion for Mr Karam was that Fairfax, during the relevant period, was effectively on notice that litigation was in prospect. Mr Stewart, by reference to the correspondence sent to Fairfax, submitted that Fairfax was not on notice that litigation was in prospect. In the event, the Court is not called upon to reach a determination on a contention which was not directly an issue. The new rules which came into force (after the event) on 1 February 2012, and particularly r 8.3, expressly create a preservation obligation where “a proceeding is reasonably contemplated”. In a letter sent by Mr Karam to Fairfax on 23 December 2009, Mr Karam recorded that he considered the Sunday Star-Times article to have been defamatory. He called on Fairfax to discontinue such publication. He expressly reserved all rights and remedies to seek redress against Fairfax, noting that he was unable to take formal legal advice until the New Year. It is at least arguable that this letter would have created the reasonable contemplation of a proceeding referred to in the new rules but I do not determine the point.

Order

[29] I dismiss Mr Karam's application for further and better discovery by Fairfax.

[30] Costs are reserved. As some of the history of this discovery application was relevant to costs only and not to the issues which remained alive, those considerations are not dealt with here. They will be relevant in the context of costs should the parties not resolve those matters directly. The costs issues in relation to all the applications heard also need to be comprehensively considered.

Plaintiff's application for order striking out defence of honest opinion

The defence of honest opinion as pleaded

[31] In its pleading, Fairfax refers to the words identified by Mr Karam on the Facebook site and on the Counterspin website under the collective description "the Website Words".

[32] Fairfax pleads its defence of honest opinion in these terms:

Honest opinion

59. If the Website Words were published by the defendant (which is denied) and if the Website Words have any of the meanings alleged in paragraphs [14] and [20] of the statement of claim (which is denied) such meaning or meanings were conveyed by the publications as expressions of opinion.
60. Such opinions were based on true facts generally known at the time including:
 - 60.1 the trials of David Bain;
 - 60.2 the plaintiff's role as an advocate and supporter of David Bain; and
 - 60.3 the facts particularised in Schedule A to this statement of defence.

61. Such opinions did not purport to be the opinions of the defendant and the defendant had no reasonable cause to believe that the opinions were not the genuine opinions of the respective authors.

[33] Schedule A, as referred to in paragraph 60.3 of the Fairfax Defence is a schedule containing 59 statements. It appears also as Schedule A to this judgment.

Plaintiff's application for order striking out defence

[34] Mr Karam's application for an order striking out the defence of honest opinion specified four grounds:

- (a) The amended statement of defence dated 20 May 2011 does not specify how the "facts" relied upon by the second defendant support a defence of honest opinion to the defamatory meanings pleaded by the plaintiff.
- (b) The facts set out in Schedule A of the amended statement of defence are irrelevant to the issues in question in this proceeding.
- (c) The second defendant does not separately identify publication facts from other facts and circumstances capable of proving the publication facts.
- (d) The "facts" relied upon by the second defendant in Schedule A:
 - (i) were not set out on Counterspin or generally known, and so are not "publication facts"; and
 - (ii) are not "other facts and circumstances that are capable of proving the publication facts".

Defendant's grounds of opposition

[35] Fairfax posed the application on six stated grounds, namely:

- (a) The affirmative defence of honest opinion pleaded by the second defendant in its amended statement of defence dated 20 May 2011 discloses a reasonably arguable defence.
- (b) The second defendant is not required to specify how the facts set out in Schedule A are relied on to support a defence of honest opinion to the meanings pleaded by the plaintiff.
- (c) All of the facts set out in Schedule A of the amended statement of defence are relevant to the issues in question in this proceeding.
- (d) The second defendant is not required to separately identify publication facts from other facts and circumstances capable of proving the publication facts.
- (e) All of the facts set out in Schedule A of the amended statement of defence are either set out on Counterspin, generally known, or other facts and circumstances capable of proving publication facts.
- (f) In the event the second defendant's pleading of honest opinion is found to be defective, it is capable of repair by amendment.

Strike out application – the principles

[36] High Court Rule 15.1 makes provision for orders striking out all or part of a pleading. In this case the applicant invokes r 15.1(1)(a) (No reasonably arguable cause of action) and r 15.1(1)(d) (Abuse of the process of the court).

[37] I adopt the following as principles applicable to the consideration of this application:

- (a) The Court is to assume that the facts pleaded are true (unless they are entirely speculative and without foundation).

- (b) The pleading must be clearly untenable in the sense that the Court can be certain that it cannot succeed.
- (c) The jurisdiction is to be exercised sparingly and only in clear cases.
- (d) The jurisdiction is not excluded by the need to decide difficult questions of law, even if requiring extensive argument.
- (e) The Court should be slow to rule on novel categories of duty of care at the strike out stage. (See *Attorney General v Prince*.)²

The defence of honest opinion

The defence under s 10 Defamation Act 1982

[38] The statutory defence of honest opinion is created by s 10 of the Defamation Act. The Act does so under a heading “Opinion must be genuine”.

[39] Section 10(1) of the Act concerns publications by a defendant who is the author of the material.

[40] Section 10(2) deals with situations where the author of the material is someone other than the defendant.

[41] Section 10(2)(a) deals with the situation where the author of the material was an employee or agent of the defendant. Section 10(2)(b) of the Act deals with the situation, applicable in this case, where the author of the material was not an employee or agent of the defendant at the time of the publication of the material.

[42] Section 10(2)(b) provides:

- (2) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is not the author of the matter containing the opinion shall fail unless,—

² *Attorney General v Prince* [1998] 1 NZLR 262 (CA).

- (a)...
- (b) Where the author of the matter containing the opinion was not an employee or agent of the defendant at the time of the publication of that matter, the defendant proves that—
- (i) The opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and
- (ii) The defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion.

[43] The s 10 honest opinion defence, while similar to the common law defence of “fair comment on a matter of public interest” contains significant differences to what had come before. The new law followed generally the recommendations contained in the Report of the Committee on Defamation.³ That Committee had suggested that the concept of malice in the defence of fair comment had created difficulties. Section 10 as implemented accordingly included s 10(3) in the following terms:

- (3) A defence of honest opinion shall not fail because the defendant was motivated by malice.

The basis and ingredients of the defence of honest opinion

[44] The steps in an action for defamation, relevant to the present application, involve:⁴

- The plaintiff must first establish the publication (here assumed on the pleadings);
- The plaintiff must establish that the publication is capable of having the imputations pleaded (here assumed on the pleadings);
- The plaintiff must establish that the words used do have one or more of

³ Report of the Committee on Defamation *Recommendations on the Law of Defamation* (Wellington, December 1977) (also known as the “McKay Committee”).

⁴ *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) per Robertson J at [56].

the various imputations identified (here assumed on the pleadings).

In a trial before a Judge and jury, the Judge decides whether imputations are capable of being opinioned; the jury decides whether in the circumstances they were opinioned.⁵ The distinction which the jury is drawing is whether the imputations were conveyed by the publication as expressions of opinion or as statements of fact.⁶

[45] Where the defence is of honest opinion under the s 10(2)(b) limb, the defendant must prove that:

- (a) The opinion did not purport to be the opinion of the defendant; and
- (b) The defendant had no reasonable cause to believe that the opinion was not the genuine opinion of its author.

[46] Expressions of honest opinion must be based on true facts stated or referred to in the material complained of, or notorious, in the sense that they are generally known. The material identified by a defendant as the relevant facts will assist the Court in determining both whether the imputation is an opinion and in determining whether, under s 10(2)(b)(ii), there was reasonable cause to believe that the opinion was not the genuine opinion of the author.

[47] Extremely odd or biased views will be opinions covered by s 10(2)(b) provided the defendant has no reasonable cause to believe the opinions are not genuinely held. The correct position is summarised in the judgment of the Court of Appeal in *Mitchell v Sprott*:⁷

[24] Thirdly, the defendant must show that the opinion was genuinely held. It is not necessary, however, to show that the opinion was sound or even one which a reasonable person would hold. The test is the honesty of the opinion, not its reasonableness. A fair-minded person has been said to include even someone whose (honestly held) view may be prejudiced or obstinate (*Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743). The Defamation Act now provides that the defence of honest opinion does not fail because the defendant was motivated by malice (s 10(3)).

⁵ Ibid, at [90].

⁶ Ibid.

⁷ *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) per Blanchard J at [24]. To similar effect see *Telnikoff v Matusevitch* [1992] 2 AC 343 per Lord Keith at 354.

[48] In *Channel Seven Adelaide Pty Ltd v Manock*⁸ Gleeson CJ recognised the defence of fair and honest comment as protecting a wide range of views:⁹

Obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied.

The word “fair” refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.

[49] In *Spiller v Joseph*¹⁰ the President of the United Kingdom Supreme Court, Lord Phillips (delivering the leading judgment) referred with approval to a passage in the judgment of Eady J at first instance, where his Lordship had identified:¹¹

... the undoubted rule that people are free to express perverse and shocking opinions and may nevertheless succeed in a defence of fair comment without having to persuade reasonable readers, or the jurors who represent such persons, to concur with the opinions.

Television New Zealand v Haines

[50] In *Television New Zealand Ltd v Haines* the Court of Appeal gave as a “better re-pleading” of the honest opinion defence in that case:¹²

If the broadcasts have any of the meanings alleged by para 13 of the second amended statement of claim (which is denied) such meaning or meanings were conveyed by the publication as expressions of opinion.

[51] At the same point in its judgment, the Court notes the correct approach to the jury’s task, which is to look at how the imputations were conveyed by the publication, considering the context of the publication as a whole. The Court added further:¹³

It is not necessary for the jury – still less the judge, who is not the trier of fact - to isolate which passages in the broadcast are expressions of opinion and which are statements of fact. The jury is entitled to look at the entire broadcast in determining whether imputations which it has found to exist were conveyed by the publication as expressions of opinion.

⁸ *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 (HCA).

⁹ *Ibid*, at 252.

¹⁰ *Spiller v Joseph* [2010] UKSC 53; [2011] 1 All ER 947.

¹¹ *Ibid*, at [72].

¹² *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) per Robertson J at [96].

¹³ *Ibid*, at [104].

[52] In relation to more specific aspects of pleading, the Court identified the following requirements:

- (a) The defendant must identify in relation to which pleaded imputations the defence of honest opinion is maintained.¹⁴
- (b) Where a s 10(2) defence is pleaded, there may be a need for particulars as to whose opinion was being expressed and as to the status of that person.¹⁵
- (c) The defendant must plead the facts and circumstances on which it relies. This has been reaffirmed by the Court of Appeal in *Simunovich Fisheries Ltd v Television New Zealand Ltd*.¹⁶ In the judgment of the Court, delivered by Miller J, it was said:¹⁷

[118] We have held that a defendant who pleads honest opinion must comply with s 38 [Defamation Act]. It follows that under s 11 a defendant must plead the publication facts the truth of which it intends to prove: *Lowry v New Zealand Times Co Ltd* [1910] 29 NZLR 570 (SC). “Publication facts” is a convenient term for those facts that may sustain a

defence of honest opinion under s 11. They are facts that were alleged or referred to in the publication or generally known at the time. A defendant is not required to prove the truth of all such facts, but must prove sufficient of them to show that the opinion was genuine having regard to the facts that have been proved.

[53] In his submissions for Mr Karam, Mr Morten preferred to confine the expression “publication facts” to those facts which are identified (on the websites) in the publication itself. For consistency, and adopting the approach of the Court of Appeal in *Simunovich*,¹⁸ I find it more convenient to use the expression “publication facts” to apply both to the facts alleged or referred to on the websites and to those generally known at the time.

¹⁴ Ibid, at [98].

¹⁵ Ibid, at [99].

¹⁶ *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350.

¹⁷ Ibid, at [118].

¹⁸ Above, at [52].

[54] Beyond that category of publication facts, the Court of Appeal in *Simunovich* recognises a further category of facts, namely those facts and circumstances which are capable of proving the publication facts. The Court indicated that those facts should also be pleaded so that they are distinguished from publication facts.¹⁹

Fairfax's responses to the criticisms of its honest opinion pleading

Ground 1: Absence of pleading to the defamatory meanings

[55] The Fairfax defence of honest opinion was initially pleaded as a response to the alleged defamatory statements rather than to the meanings pleaded by Mr Karam. *Television New Zealand Ltd v Haines* indicates that the defendant must relate its pleading of honest opinion to the imputations (rather than the published statements themselves).²⁰

[56] Mr Karam's strike out application did not make reference to *Television New Zealand Ltd v Haines*. When counsel for Fairfax were subsequently alerted to the point, it was accepted that the pleading should be amended. The second amended statement of claim is now filed, and paragraph 59 in particular addresses the matter by reference to the imputations. Argument proceeded on other matters at the hearing on the basis that the amended pleading would deal with issues in this way.

[57] This ground of the strike out application accordingly fell away.

Ground 2: Failure to identify which defamatory meanings are opinions

[58] Fairfax initially pleaded its defence of honest opinion upon the basis that the "Website Words (or some of them)" were expressions of opinion.

[59] The pleading principles established in *Television New Zealand Ltd v Haines*²¹ require that, where only some of the imputations are defended on the basis of honest opinion, then identification of which imputations are defended on the basis of honest

¹⁹ *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [126](c).

²⁰ *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [54].

²¹ *Ibid*, at [56].

opinion is required. This aspect of the *Television New Zealand Ltd v Haines* decision was also not identified in Mr Karam's grounds of application. When it also came to the attention of counsel for Fairfax through the exchange of submissions, the amendment to Fairfax's pleading dealt with this point also. In particular the words "or some of them", which Mr Morten characterised as ambiguous, were removed.²² The pleading now unequivocally refers to all the website words so that that point in *Haines* does not arise.

[60] This ground of application accordingly also fell away.

Ground 3: Particularisation of opinion aspects (and factual aspects) of the publications

[61] In his submissions, Mr Morten identified the extent to which the amended statement of defence had provided particulars of alleged statements of opinion on the websites.

[62] Such particulars are inconsistent with the approach identified in *Television New Zealand Ltd v Haines* – it led in that case to an order for an amended defence which did not attempt to particularise the individual statements.

[63] It is clear from interlocutory exchanges, to which Mr Stewart referred in his submissions, that the pleading of the particulars in question had arisen from a criticism from counsel for the plaintiff that no particulars had been provided. Such were then provided in the amended statement of claim.

[64] In the event, consistently with the approach in *Television New Zealand Ltd v Haines*, Mr Stewart proposed to address the subsequent complaint as to particularisation through the filing of the second amended defence, which has now been filed without the particulars in question.

[65] This ground of complaint has also therefore fallen away.

²² Above at [32].

Ground 4: Defendant does not plead any publication facts

[66] By reference to the observations of the Court of Appeal in *Simunovich Fisheries Ltd v Television New Zealand Ltd*,²³ Mr Karam asserted that Fairfax had not separately identified “publication facts” from other facts and circumstances capable of proving publication facts. However, as Mr Morten developed his argument, he sought to draw a distinction between matters of facts identified or referred to in the material itself and those matters which were generally known at the time of publication (but were not referred to in it).

[67] I do not find anything to turn on the distinction which Mr Morten sought to draw. It is not a distinction on which the Court of Appeal would have made anything turn in *Simunovich*, since the Court used “publication facts” to refer to both facts alleged or referred to in the publication and facts generally known at the time.²⁴ Furthermore, the Fairfax pleading²⁵ is an express adoption of the “generally known at the time” limb. Fairfax particularises the facts relied on in its Schedule A. Fairfax has complied with its pleading obligations in relation to “publication facts” – paragraph 60 and Schedule A of the second amended statement of defence constitute that pleading.

Ground 5: Failure to particularise whose opinion is being expressed

[68] Mr Morten made the single submission in relation to the identification of the person who expressed the opinion:²⁶

I note that section 10(2) of the Act requires a defendant to particularise whose opinion was being expressed ... and the status of that person: *Haines* ... paragraph [99]. The defendant’s pleading fails to provide such particulars.

[69] Mr Morten did not suggest a manner of pleading, on the facts of this case, which would further assist the parties or the Court. It is common ground that the authors of the material on the websites were neither agents nor employees of Fairfax.

²³ *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350.

²⁴ *Ibid*, at [118].

²⁵ Amended statement of defence at [60]; see also [32] above.

²⁶ Synopsis of submissions by plaintiff in support of strike out application at [31].

The reality is that on the information commonly available to both plaintiff and defendant the best identification of the “author” of each entry on the website is that contained on the website itself, and pleaded by Mr Karam.

[70] There is nothing further that can appropriately be pleaded.

Ground 6: Inadmissibility of three items in Schedule A

[71] Without suggesting that the matter had been raised in Mr Karam’s notes of application, Mr Morten identified three items in Schedule A which he submitted were inadmissible.

[72] The single submission made in support of this proposition was:²⁷

In addition various paragraphs are inadmissible: paragraph 17 (an assertion, not a fact), 29 (bad for lack of particulars), 40 (the Court of Appeal’s conclusions are inadmissible: *APN New Zealand Ltd v Simunovich Fisheries Ltd and others* [2010] 1 NZLR 315 (SC)), 54 (inadmissible hearsay: see *APN New Zealand Ltd* above).

[73] Given that Mr Karam’s application was for the striking out of the entire defence of honest opinion it is unsurprising that there was no application for the strike out of three of the 59 Schedule A “facts”.

[74] In the circumstances I decline to determine the issues informally raised.

Ground 7: Defence of honest opinion not sustainable

[75] Mr Morten, in his written submissions, adopted the accepted position that in a strike out context the pleaded facts are assumed to be correct (so that an allegation that certain “facts” are “generally known” is to be accepted both as to the existence of the facts and as to the general knowledge). He submitted that the defence of honest opinion could nevertheless not succeed. He put his written submission very briefly in this way:²⁸

²⁷ Ibid, at [30].

²⁸ Ibid, at [28] – [29].

Finally, the “generally known facts” that the defendant sets out in schedule A cannot establish that the opinion (that is, any defamatory imputations pleaded by the plaintiff) by the authors is genuine.

...none of the paragraphs in schedule A respond to any of the defamatory imputations pleaded by the plaintiff. See *Jones v Lee*...²⁹ where a defence of honest opinion was struck out on the same basis.

[76] In his oral submissions, Mr Morten confirmed that his written propositions came together in the submission that, even assuming the defendant’s underlying pleaded facts, a defence of honest opinion is untenable.

[77] Mr Stewart grouped his submissions under the two heads used by Mr Morten in this way:³⁰

Facts generally known cannot establish that the opinion is genuine

33. The plaintiff complains that the “generally known” facts cannot establish that the author’s opinion is genuine: submission at [28].
34. Fairfax submits that the plaintiff has misunderstood the section 10(2)(b) defence. The first issue under that section is whether the defamatory imputation are [sic] expressions of opinion. That must be assessed in all the circumstances, including any facts stated in the matter or generally known.
35. Having established that the statement is “opinion”, the defendant must show three things:
 - 35.1 First that the author of the matter was not an agent of employee [sic]. That is common ground here.
 - 35.2 Second that the opinion does not purport to be that of an agent or employee.
 - 35.3 Third that the defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author. Whether the opinion actually was the genuine opinion of the author is irrelevant. What matters is whether the defendant had reasonable grounds to believe it was not.

The generally known facts do not respond to the alleged imputations

36. The plaintiff complains that generally known facts do not respond to any of the defamatory imputations pleaded. He cites *Jones v Lee* where a defence of honest opinion was struck out.

²⁹ *Jones v Lee* HC Wellington CIV-2007-485-001510, 18 May 2010.

³⁰ Defendant’s submissions in response to plaintiff’s application to strike out honest opinion defence.

37. *Jones v Lee* was quite different. There Mr Lee attempted to advance a lesser defamatory meaning, and contend that that was honestly held. Justice Clifford struck the defence out.
38. Here, the facts alleged to be generally known are relevant. For example:
- 38.1 The plaintiff identifies the following statement on the Facebook Site (ID 12, pg 4 and 5 of the SOC):
- “The system needs to pay Jurors quality \$ for their time to get decent folk. Instead of paying fat cats like JK to sit on their butts for \$300,000 for bad mouthing the dead.”
- 38.2 The plaintiff says the following defamatory imputations flow from this statement:
- 38.2.1 That the plaintiff has committed a fraud on the public of New Zealand; and
- 38.2.2 That the plaintiff has rorted or committed fraud on the Legal Services Agency or the New Zealand taxpayer.
- 38.3 The facts generally known relied on by Fairfax include:
- 38.3.1 That the plaintiff published allegations that Robin Bain committed the murders (para [32]).
- 38.3.2 That the Legal Services Agency made payments to plaintiff (para [43]); and
- 38.3.3 Various facts about the evidence adduced at David Bain’s trial on which a reasonable person could form the opinion that David Bain had committed the offences (paras [5] - [17]).
- 38.4 On the basis of the generally known facts, the imputations alleged by the plaintiff are clearly opinions.
- 38.5 In addition, given the generally known facts, there is was [sic] no reason for Fairfax to believe that the opinion was not the author’s genuine opinion.
39. As a consequence, it is clear that the pleaded facts are relevant.

[78] I will now examine whether the honest opinion defence is sustainable.

The “genuineness” of the opinion – discussion

The test under s 10(2)(b)

[79] Mr Morten’s submission (quoted above at [74]) did involve a mis-statement of the test under s 10(2)(b). Fairfax is not required by s 10(2)(b) to prove that opinions expressed by the authors of the material were the honest or genuine opinions of those authors. The requirement under s 10(2)(b)(ii) is that Fairfax prove that it had no reasonable cause to believe that the opinion was not the genuine opinion of the author. The Committee on Defamation in its 1977 report³¹ emphasised that the defendant, under its proposed provision, was not required to prove that the opinion expressed by the author was in fact the author’s genuine opinion.

[80] The assessment as to whether Fairfax has proved that it had no reasonable cause to believe that the opinions were not the genuine opinions of the author must have regard to the fundamental test of honesty and no reasonableness, as identified in *Mitchell v Sprott*.³² That will allow for the range of characteristics possessed by those who may be prejudiced, opinionated and obstinate. As a result the opinion, even though it is honest, may still be unusual, extreme or damaging.³³

Can the Schedule A items respond to the pleaded imputations?

[81] I turn then to the alleged imputations which Fairfax says are opinions. Fairfax relies upon the facts alleged in Schedule A as being relevant to the Court’s determination of the honest opinion defence, given that they were facts generally known at the time.

[82] In accordance with the principles relating to strike out applications, the Schedule A facts are taken to be correct. Mr Karam has admitted eight of them (18,

³¹ Report of the Committee on Defamation *Recommendations on the Law of Defamation* (Wellington, December 1977) (also known as the “McKay Committee”) at [153].

³² *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [24].

³³ Stephen Todd and John Burrows “Defamation” in Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) 731 at 777.

26, 27, 35, 49, 53, 57, and 58) but has denied the rest. For present purposes nothing turns on that denial.

[83] A pleading of the defence of honest opinion is amenable to the strike out jurisdiction. Mr Morten put his case for strike out upon the basis that none of the items in Schedule A responds to any of the defamatory meanings pleaded by the plaintiff. It is conceivable that a defence may be so pleaded that that is the case. I was not referred to a specific example of strike out of the defence of honest opinion. By the nature of the defence – one particular person’s opinion based on a potentially wide background of fact – it will often be very difficult to achieve the strike out test which in this context requires a Judge to be satisfied that no finder of fact could reasonably find a connection between the factual background and the opinion, such as to make it reasonably appear genuine.

[84] Mr Morten submitted that the decision of this Court in *Jones v Lee*³⁴ involved the striking out of a defence of honest opinion. *Jones v Lee* is not a decision involving an interlocutory strike out application. Clifford J had ruled at the close of the defence case at trial that the defence of honest opinion was not available. The published decision constitutes the reasons for the rulings given. Secondly, as Mr Stewart submitted, *Jones v Lee* involved a different scenario of facts failing to respond to a defamatory meaning. In *Jones v Lee* the defendant attempted to advance a meaning different to that alleged by the plaintiff and Mr Lee then alleged that he had an honest opinion as to that. This led Clifford J to rule that the defence of honest opinion was not available because:³⁵

... the honest opinion argued for by Mr Lee did not respond to all or any part of the allegedly defamatory sting of the article. It was, in effect, an alternative meaning.

[85] In this case, the issue is not as to the relationship between the opinion and the imputation. The attack on the defence of honest opinion is on the basis that the (alleged) generally known facts “do not respond” to the imputation.

³⁴ *Jones v Lee* HC Wellington CIV-2007-485-001510, 18 May 2010, Clifford J.

³⁵ *Ibid*, at [5].

[86] In his oral submissions Mr Morten drew my attention to the decision of this Court in *Ah Koy v Television New Zealand Ltd*.³⁶ The plaintiff sued for alleged defamation published in a television broadcast concerning the Fijian coup of 19 May 2000. The defendants pleaded truth. The alleged defamatory meanings pleaded to be true were:

- The police authorities in Fiji had good reason to believe or suspect that the plaintiff had committed [certain] crimes; and/or
- The plaintiff was under investigation by the police authorities in Fiji for committing such a crime or crimes.

[87] Anderson J found (as had Clifford J in *Jones v Lee*) that the defendants had a flawed pleading in that they had pleaded truth in response to a meaning different to that alleged by the plaintiff. But Anderson J also found that the particulars pleaded by the defendants in support of their defence of truth (that the police authorities in Fiji had good reason to believe or suspect that the plaintiff had committed such crimes) did not specify what information was actually in the possession of the police authorities in Fiji which was capable of amounting to such good reason.³⁷ In particular there was no specification of what particularised allegations and rumours were in the hands of the police. His Honour concluded:³⁸

Such particulars, if accepted as true, could not reasonably support a defence of truth to what the plaintiff actually alleges.

[88] *Ah Koy v Television New Zealand Ltd* accordingly illustrates the Court's strike out jurisdiction in play in relation to a defence of truth. The defence was struck out for two reasons, one being that even if the particulars of the defence of truth were accepted they were still not rationally capable of supporting the plea.³⁹ The defences of truth and honest opinion are, however, different in nature. The first deals with absolutes. The second, when pleaded under s 10(2)(b) of the Act deals with the dual concepts of reasonable cause to believe and of genuine opinion. (The

³⁶ *Ah Koy v Television New Zealand Ltd* HC Auckland M852/00, 15 March 2001.

³⁷ *Ibid*, at [24].

³⁸ *Ibid*.

³⁹ *Ibid*, at [27][b].

fact that one of the alleged defamatory meanings in *Ah Koy* involved the concept of “good reason to believe” is entirely coincidental – there remain different features and considerations when a defence of truth is involved, compared to one of honest opinion.)

[89] In response to the brief written submissions presented by Mr Morten (above at [75]), Mr Stewart, in his written submissions, did not endeavour to deal with the relevance of all facts alleged in Schedule A or to deal with each of the imputations (nine in relation to the Facebook site and 12 in relation to the Counterspin website) alleged by Mr Karam.

[90] Instead, Mr Stewart took as an example two alleged imputations arising from a statement on the Facebook site. His submission was this:⁴⁰

- 38.1 The plaintiff identifies the following statement on the Facebook Site ...
- 38.2. The plaintiff says the following defamatory imputations flow from this statement:
 - 3.8.2.1 That the plaintiff has committed a fraud on the public of New Zealand; and
 - 3.8.2.2 That the plaintiff has rorted or committed fraud on the Legal Services Agency or the New Zealand taxpayer.
- 38.3 The facts generally known relied [sic] on by Fairfax include:
 - 38.3.1 That the plaintiff published allegations that Robin Bain committed the murders (para [32]).
 - 38.3.2 That the Legal Services Agency made payments to plaintiff (para [43]); and
 - 38.3.3 Various facts about the evidence adduced at David Bain’s trial on which a reasonable person could form the opinion that David Bain had committed the offences (paras [5] – [17]).
- 38.4 On the basis of the generally known facts, the imputations alleged by the plaintiff are clearly opinions.
- 38.5 In addition, given the generally known facts, there is was [sic] no reason for Fairfax to believe that the opinion was not the author’s genuine opinion.

⁴⁰ Defendant’s submissions in response to plaintiff’s application to strike out honest opinion defence.

[91] As a consequence of this example, Mr Stewart submitted that it is clear that the pleaded facts are relevant (or to use Mr Morten's expression, the pleaded facts respond to the imputations).

[92] Mr Morten developed his submissions before me by referring seriatim to the items in Fairfax's Schedule A. Some he described as "background facts only", and some he dealt with by a rhetorical, "so what?" At three points he linked certain Schedule A items back to one or other of Mr Karam's pleaded imputations, and proceeded to dismiss the link as not tenable. It is convenient to deal with those examples first.

Mr Morten's first developed example: Schedule A item 29

[93] In item 29, Fairfax pleads as fact:

The plaintiff entered into an agreement with David Bain in January 1996 whereby the plaintiff and David Bain were to share equally in the proceeds from any books, magazine articles and the like.

[94] Mr Morten submitted that it is difficult to see how this item responds to any of the pleaded defamatory imputations.⁴¹ He recognised that Fairfax may say that the item 29 fact could lead to opinions as to Mr Karam being involved in Bain matters for money, fame or honour and glory. Mr Morten submitted that such does not establish justification (or truth) or that it is the honest opinion of the author of the opinion. He submitted, turning to the test under s 10(2)(b) that the item 29 fact could not in a reasonable person's mind sustain the allegations made against Mr Karam.

[95] It is necessary that the Court considers the imputations or opinions which could conceivably arise from the item 29 fact. First and most obviously is the third imputation alleged in relation to each website:⁴²

That the plaintiff has misrepresented to the public his real motives for supporting David Bain which are money and/or fame and/or power and/or glory.

⁴¹ Ibid.

⁴² Statement of claim at [20](c).

[96] Mr Morten may have implicitly recognised the possibility of a connection between item 29 and the “money, fame, power or glory” imputation by recognising in his submissions that the defendants may say that item 29 responds at least to that imputation. Mr Morten however sought to reject the relevance of any such connection through his submission that item 29 “facts” do not establish justification or the honest opinion of the person who made the statement. The defence of justification or truth is not pleaded in this case.

[97] Equally the s 10(2)(b) defence does not require Fairfax to prove that the opinion was the genuine opinion of the author. When one focuses on the actual test under s 10(2)(b)(ii) – whether the defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author – there is at least arguably a sufficient connection between item 29 “facts” and the “money, fame, power or glory” imputation to enable Fairfax to prove what it is required to under s 10(2)(b)(ii). The contributors to the websites, who may in this context have the prejudiced, opinionated, obstinate or unreasonable positions which the law envisages,⁴³ at least arguably might on the basis of the item 29 “facts” come to a genuine opinion as to motivations of money, fame, power or glory.

[98] Such I find arguable in relation to the item 29 “facts” alone but, as Mr Stewart submitted, the defendant is not restricted to having any opinion supported by a single proposition in Schedule A. Fairfax is entitled to rely on a combination of Schedule A propositions. In the example which Mr Stewart developed in relation to the “fraud on the public” and the Legal Services “roting” imputations, the matters of what may be considered alleged background fact contained in items 5 – 17 of Schedule A might at least arguably lead a person (having the various characteristics I have referred to) to form the opinion that David Bain had committed the murders. That person would then reach their opinion based on the item 29 “facts” against those conclusions as to the background and in particular the identity of the murderer.

⁴³ Above, at [80].

Mr Morten's second developed example: Schedule A item 41

[99] A second example chosen by Mr Morten to illustrate Schedule A facts which did not respond to the pleaded imputations related to item 41, which reads:⁴⁴

In March 2003 the plaintiff issued defamation proceedings against the publisher of "North & South" magazine in respect of an article titled "Joe Karam's Magnificent Obsession" which concerned the plaintiff's campaign to free David Bain; and subsequently joined the author of that story as a defendant.

[100] Mr Morten again seemed to impliedly accept the possibility of this responding to a pleaded imputation, by referring the Court to the fourth imputation pleaded by Mr Karam in relation to both websites:⁴⁵

That the plaintiff makes improper threats to anyone who disagrees with or opposes him.

[101] Mr Morten recognised that two additional Schedule A items might be put in a similar category:

57. In 2010 the plaintiff issued defamation proceedings against Mr Purkiss and Mr Parker.

58. In 2010 the plaintiff issued defamation proceedings against the operator of the TradeMe website.⁴⁶

[102] Again, Fairfax is not required to relate Schedule A propositions on a stand-alone basis to the pleaded imputations. It is entitled to put particular propositions in the context of other Schedule A propositions. If a person with the characteristics I have described could on an arguable basis have brought those propositions together to form an opinion of the kind captured by the pleaded imputation, then the combination of those Schedule A propositions arguably responds to the pleaded imputations.

[103] I return below to the separate question as to the timing of some of the events in Schedule A (after the dates of the publications on which Mr Karam sues).

⁴⁴ Defendant's submissions in response to plaintiff's application to strike out honest opinion defence.

⁴⁵ Statement of claim at [20](d).

⁴⁶ Defendant's submissions in response to plaintiff's application to strike out honest opinion defence.

[104] The third example developed by Mr Morten drew on two items in Schedule A, which read:⁴⁷

42. In 2006 the plaintiff was appointed as an assistant to Mr Bain's legal team.
43. The Legal Services Agency made legal aid payments to the plaintiff in respect of his attendances as a member of Mr Bain's legal team.

[105] Mr Morten identified the pleaded imputation which relates to legal aid matters, namely the seventh imputation in relation to each website, being an alleged imputation:⁴⁸

That the plaintiff has “rorted” and/or committed fraud on the Legal Service Agency and the NZ taxpayer.

[106] Mr Morten submitted in relation to items 42 and 43 that it was “simply untenable” to suggest that they responded to the “rorting” imputation. As with other examples chosen by Mr Morten to develop his submissions, the focus on one or two particular items is too restrictive. People will usually form opinions on the basis of a much broader factual background than one or two matters. Matters of fact tending to indicate that David Bain was guilty, which were there for both the bystander and Mr Karam to observe, are matters which would go towards the formation of opinion. Fairfax is entitled to the benefit of the defence of honest opinion under s 10(2)(b) even if the only person holding a particular opinion was prejudiced or unreasonable in arriving at that opinion.

[107] Mr Morten in the examples he developed referred in particular to the three pleaded imputations to which I have referred (above [90], [100], and [105]). He did not develop particular submissions in relation to the other imputations. I have considered all the pleaded imputations and their relationship to the Schedule A “facts”. That includes in relation to the example developed by Mr Stewart in his submissions (the fifth imputation, that the plaintiff had committed a fraud on the

⁴⁷ Ibid.

⁴⁸ Statement of claim at [20](g).

public of New Zealand). The plaintiff has not satisfied me that Fairfax could not reasonably have had cause to believe that the opinion (as to a fraud on the New Zealand public) was not the genuine opinion of its author.

[108] The remaining imputations, which neither counsel addressed directly, all follow the same pattern as those to which I was taken and which I have discussed.

[109] The first pleaded imputation:⁴⁹

That the plaintiff lacks integrity.

is closely related to several of the discussed imputations. It represents a conclusion about Mr Karam's character. Fairfax, against the background of the Schedule A "facts" may be able to prove that it had no reasonable cause to believe that that opinion was not the genuine opinion of its author. Similar observations must apply to imputations or opinions as to behaviour which is tyrannical, obsessive and deceitful as contained in one or more of the imputations. Allegations of criminal behaviour, such as fraud, illegality and impropriety are by their nature more extreme imputations. However, they may be the opinions which prejudiced or unreasonable people might arguably arrive at. And addressing the matter at the correct level in terms of s 10(2)(b)(ii), this is a situation in which Fairfax might arguably prove that it had no reasonable cause to believe that the opinions were not the genuine opinions of their authors.

The post-2009 Schedule A facts

[110] The facts which a defendant particularises as constituting the basis of an opinion must have been known to the defendant at the time the opinion was published: *APN New Zealand Ltd v Simunovich Fisheries Ltd*.⁵⁰

[111] Mr Morten submitted that the matters particularised by Fairfax in Schedule A as items 56, 57, 58 and 59 cannot, in application of the settled law as stated by

⁴⁹ Statement of claim at [20](a).

⁵⁰ *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2010] 1 NZLR 315 (SC) per Tipping & Wilson JJ at [36].

Tipping & Wilson JJ in *Simunovich*, be relied upon as facts which supported or might allegedly support the opinion of the author.

[112] Fairfax's own pleading implicitly adopts the law as stated in *Simunovich*. Paragraph 60 of the second amended statement of defence introduces Schedule A by stating:

60. Such opinions were based on true facts generally known at the time (emphasis added) including:

60.1 ...

60.2 ...

60.3 the facts particularised in Schedule A to this statement of defence.

[113] Fairfax is not entitled in s 10(2)(b) to support conclusions as to "the genuine opinion" through reference to post-publication events. The four events referred to in items 56 – 59 of Schedule A fall within that category.

Remaining Schedule A "facts" – items 1 - 55

[114] I am not persuaded in relation to the 55 remaining items in Schedule A that particular items ought to be struck out. The focus of the plaintiff's application was that the defence of honest opinion should be struck out. Fairfax was not on notice through the interlocutory application that it was required to meet an argument which would be developed at the hearing that individual items of Schedule A were untenable in the sense that they could not relevantly contribute to the s 10(2)(b) honest opinion defence. The emphasis on a general attack on the honest opinion defence rather than an attack on the particulars was also reflected in the written submissions filed for Mr Karam, where no analysis was undertaken of individual particulars. It was only in Mr Morten's oral submissions at the hearing that counsel went individually through the particulars.

[115] It may be that that was done partly in response to the Fairfax application for further and better discovery in relation to Schedule A facts, which I deal with below. There are appropriate ways to deal with Mr Karam's concerns as to the potential

extent of discovery in relation to Schedule A facts through that application itself. Insofar as Mr Karam applied to strike out the defence of honest opinion, however, I do not find that to be a properly articulated vehicle for Mr Morten's endeavour at the hearing to have the Court strike out individual particulars from items 1 – 55 in Schedule A.

[116] Had I considered there to be a proper application before the Court for the striking out of individual items in Schedule A, I would not have been inclined to strike out any, other than items 56 – 59. Much of Mr Morten's attack in relation to particulars was upon the basis that the particulars did not individually respond to pleaded imputations. Mr Stewart fairly characterised (and Mr Morten accepted) that a significant number of the items (particularly the early ones), are matters of background. In relation to the particular facts of this case I would not find it appropriate to rule in an interlocutory context that particulars which might seem to be mere background should be struck out so that Fairfax would be disentitled from referring to them in support of the s 10(2)(b) honest opinion defence.

[117] Mr Morten attacked other items upon the basis that they contained inadmissible material. The submissions which I received in relation to the allegation of inadmissibility were not greatly developed on either side, which is unsurprising given the fact that issues of admissibility had not been raised in the interlocutory application. In the circumstances the more appropriate occasion for issues of the admissibility of the evidence to be dealt with are either at trial or in a pre-trial hearing with the trial Judge. The issues are more complex than they might at first appear. For instance, the Schedule A items 40 and 45 references to conclusions of the Court of Appeal and of the Privy Council have the potential to be relied on not to prove the existence of a fact in issue in the proceeding (precluded as Mr Morten submitted by s 50(1) Evidence Act 2006⁵¹ but instead may be of assistance to Fairfax simply as factual occurrences in themselves, and matters which the author of the expressed opinion would have been aware. The precise way in which reliance is to be placed on such material is a matter properly to be developed and if necessary ruled upon at trial.

⁵¹ See *APN NZ Ltd v Simunovich Fisheries Ltd* [2010] 1 NZLR 315 (SC) per Tipping and Wilson JJ at [33].

Conclusion as to the honest opinion defence

[118] Section 10(2)(b)(ii) of the Act requires Fairfax at trial to prove that it had no reasonable cause to believe that the matters which it says were opinions were not the genuine opinions of the authors. Mr Karam succeeds in his strike out application only if he establishes that the s 10(2)(b) defence is clearly untenable in the sense that I can be certain that it cannot succeed. The above analysis does not lead me to find that the s 10(2)(b) defence clearly cannot succeed.

[119] It is clear that items 56 - 59 of Schedule A cannot assist Fairfax in its honest opinion defence, because the facts particularised post-date the publications. The plaintiff should not have to respond to those particulars.

Orders

[120] I order –

- (a) Items 56, 57, 58 and 59 of Schedule A of the second amended statement of defence are struck out.
- (b) The plaintiff's application to strike out the defence of honest opinion is otherwise dismissed.
- (c) Costs are reserved for determination in the light of the outcome of the four applications which were heard together.

Defendant's application for discovery

The object of the application

[121] Fairfax seeks discovery of all documents relating to the matters set out in items 1 – 59 of Fairfax's Schedule A. The application is opposed.

Background to the discovery application

[122] Mr Karam initially issued the proceeding against both Fairfax and APN New Zealand Limited. At the first case management conference the Court made the orders for discovery and inspection which were usual under the High Court Rules as they then stood. Mr Karam filed his affidavit of documents in March 2011.

[123] In April 2011 APN made an application for further and better discovery by Mr Karam – in particular it identified as documents for further discovery those listed in a schedule (Schedule B to this judgment). Shortly afterwards, Fairfax adopted the APN application for further and better discovery. Fairfax also filed its first amended statement of defence in which for the first time Fairfax set out in Schedule A 59 facts on which opinions were based. By his pleading in response, Mr Karam put 51 of the Schedule A facts in issue.

[124] Accordingly, by the time of this hearing the focus of Fairfax's discovery application was upon further and better discovery in relation to most of the Schedule A facts.

Cases for Fairfax

[125] I summarise Mr Stewart's submissions for Fairfax:

- i) The application for further and better discovery ought to be dealt with in terms of the October 2010 discovery order, with the *Peruvian Guano*⁵² test applying. A more restrictive approach under the discovery rules in place from 1 February 2012 ought not to be adopted.
- ii) The approach for particular discovery under the new r 8.19 should be the same as that under the former r 8.24, namely that Fairfax has the onus to:

⁵² *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA).

- identify sufficient grounds for believing that additional documents exist;
 - specify the documents; and
 - satisfy the Court that the documents are relevant.
- iii) The applicant must establish that the documents are reasonably necessary, which is not the same as “necessary”: see *Krone (New Zealand) Technique Ltd v Connector System Ltd*.⁵³
- iv) An application may be declined if the further discovery sought would be oppressive, a concept which involves balancing the cost and time of making discovery against the potential value of discovery: *Mao-Che v Armstrong Murray*.⁵⁴
- v) There is no rule of law or procedure limiting discovery to matters alleged in particulars of truth, and therefore to the defence of truth. Orders for discovery may equally be made in cases involving honest opinion or other affirmative defences.

Case for Mr Karam

[126] In Mr Karam’s case the grounds pleaded by Mr Karam in his notice of opposition were:

- (a) In defamation proceedings a defendant may only obtain discovery in respect of the matters alleged in its particulars of truth;
- (b) The first defendant has not pleaded the defence of truth and is therefore not entitled to discovery of the documentation sought, a view that was conveyed to the first defendant by the plaintiff’s solicitor by letter dated 15 April 2011 (copy annexed to this notice of opposition);
- (c) The application by the first defendant is an application to conduct a fishing expedition, and is vexatious, frivolous and oppressive;

⁵³ *Krone (New Zealand) Technique Ltd v Connector System Ltd* (1998) 2 PRNZ 627 (HC) per Eichelbaum J at 635.

⁵⁴ *Mao-Che v Armstrong Murray* (1992) 6 PRNZ 371 (HC) per Wallace J at 377.

- (d) In the circumstances the plaintiff has complied with his discovery obligations and the application should be declined.

[127] In his written submissions for Mr Karam, counsel summarised the more developed submissions in this way:

- 56.1 The documents sought are not relevant to the matters in issue between the parties as defined by the pleadings, because any additional material uncovered in discovery would not have been known to the defendant at the time of publication, which is a prerequisite for a fact supporting an honest opinion defence;
- 56.2 Accordingly, the defendant is simply seeking access to documents in the plaintiff's possession that are not relevant to the matters in issue in order to "fish" for a new case that has not been pleaded to date (such as truth);
- 56.3 The "facts" set out in Schedule A to the amended statement of defence are deficient in that they do not respond to the imputations pleaded by the plaintiff, and are accordingly not relevant to the matters at issue between the parties as defined in the pleadings;
- 56.4 The defendant has not described the documents sought with requisite specificity, and consequently the discovery sought is oppressive and disproportionate.

Discussion – discovery under the new High Court Rules

[128] As I have concluded that the provisions and the spirit of the Rules in place since 1 February 2012 should be embraced as particularly appropriate to the circumstances of this case, I begin with a consideration of the transition from the former Rules to the current Rules.

[129] The former Rules in relation to discovery were in place at the time (August 2010) this litigation commenced.

[130] In its first consultation paper concerning the reform of the discovery rules in September 2009, the Rules Committee had commented that there was "widespread dissatisfaction" in New Zealand and other common law countries with traditional discovery procedures. The Committee identified two consistently raised issues:

- (a) discovery is too costly and time-consuming; and

- (b) discovery is used inappropriately for tactical advantage.

[131] The discovery rules which came into effect on 1 February 2012⁵⁵ were designed to reduce disproportionate cost and delays caused by discovery and to reduce the tactical use of discovery. They do that in a number of ways. Particularly relevant to this case are the duties to:

- (a) co-operate to ensure that the processes of discovery and inspection are proportionate and facilitated by agreement on practical arrangements (r 8.2)(i); and
- (b) to consider options to reduce the scope and burden of discovery (r 8.2(2)), such as by standard discovery under r 8.7 (involving an adverse documents regime) or by tailored discovery under r 8.8 (tailoring discovery to meet the interests of justice).

[132] The new discovery rules contained no transitional provisions. The High Court Amendment Rules (No 2) provided simply:

2 Commencement

These rules come into force on 1 February 2012.

[133] It may be assumed, having regard to the constitution of the Rules Committee, that the intention of the Rules was that the Court would immediately have from 1 February 2012 to apply the full range of powers to cases at present before it. The present application was made under the former r 8.24. As that rule, along with the former Part 8, was revoked with effect from and including 1 February 2012, this application falls to be dealt with under the new r 8.19. (The new rule is materially identical – it simply adds r 8.19(c) which allows a Judge to order documents covered by an order for particular discovery to be made available for inspection.)

[134] In their own ways, counsel for both parties invited the Court to return to the approach or spirit of the former Rules. Mr Stewart, for Fairfax, invited an approach which would have seen the old discovery order running on, with the *Peruvian Guano*

⁵⁵ High Court Amendment Rules (No 2) 2011.

test applying “rather than the more restrictive approach under the new rules”. Counsel for Mr Karam submitted that the determination of the present application must be made on the basis of the discovery regime in force at the time the applications were made. Counsel noted that the present application was for particular discovery and not for variation of a discovery order. Counsel referred to the new r 8.17 (replacing the former r 8.22, expressed in identical terms), which upon application by the parties would have permitted a Judge to vary an existing discovery order. Counsel submitted that the Court should not effectively make a variation of the existing discovery order without any application, since there is no such application before the Court.

[135] Notwithstanding the submissions of counsel to the contrary, there is nothing in (the new) r 8.19, which applies to this application, to require the Court to automatically apply the assumptions which underpinned discovery rules up to January 2012. While, for instance, the *Peruvian Guano* approach may still form the basis of an order of the Court after 1 February 2012, that will be because the Court finds it to be the appropriate order even in the new discovery climate. If further discovery is appropriate, and a different approach to the additional documents such as standard discovery under r 8.7 is appropriate, then such an order is within the Court’s armoury. It would be illogical, verging on absurd, to suggest, in relation to applications before the Court, that the Court was somehow caught in a time-warp. I am reinforced in this view by the fact that r 8.2 (as to co-operation between the parties) is expressed in terms that apply equally to the carrying out of discovery and inspection flowing from past orders as they do to orders yet to be made.

[136] Accordingly, the discovery Rules in effect from 1 February 2012 permit the Court to adopt, in relation to an order for particular discovery under r 8.19, an approach based either on standard discovery or tailored discovery. The Court has also under r 8.22 the new discretion, based on the concept of manifest injustice, to order a shifting of the burden of the costs of discovery.

[137] Even under the old Rules, a recognised ground for refusing an order of discovery was that the order would, in the circumstances of the case, be oppressive if granted.⁵⁶

[138] The Court's approach to oppression was identified by Chilwell J in *Australian Mutual Provident Society v Architectural Windows Ltd.*⁵⁷ His Honour found:

What is oppressive will depend upon the facts of a particular case 13 *Halsbury's Laws of England* (4th ed) para 95. In the *Securitibank* case Barker J said:

"The circumstances must be relevant to deciding on oppression. What might be oppressive ... in a simple action involving a small sum of money may not be considered oppressive in an action by a liquidator acting on behalf of numerous unsecured creditors, attempting to reconstruct something years after the event."

In his book *Discovery* Bernard Cairns makes a similar point:⁵⁸

Production of documents may be oppressive when a large bulk has to be produced and the work is not justified by the benefit that will be derived.

[139] Consistently with opinions such as those, counsel for the plaintiff contended that oppression must be determined with regard to the reasonableness of the imposition of the burden of discovery in the circumstances of the case. I accept that proposition. In deciding whether the burden is reasonable the Court should have regard to the likely probative value of the documents sought by the applicant.

[140] The application before Chilwell J was an application for third party discovery. The observations are equally applicable to discovery as between parties.

[141] To the exposition contained in the judgment of Chilwell J may be added a test adopted by Wallace J in *Mao-Che*:⁵⁹

⁵⁶ The position was similar in the United Kingdom as between the old Rules (1965 Rules of the Supreme Court) and the new Rules (1998 Civil Procedure Rules): see Paul Matthews and Hodge M Malek *Disclosure* (3rd ed, Sweet and Maxwell, London, 2007) at 8.20.

⁵⁷ *Australian Mutual Provident Society v Architectural Windows Ltd* (1986) 2 PRNZ 510 (HC) at 516.

⁵⁸ Bernard Cairns *The Law of Discovery in Australia* (The Law Book Company, Sydney, 1984) at 131.

⁵⁹ *Mao-Che v Armstrong Murray* (1992) 6 PRNZ 371 (HC) per Wallace J at 377.

In the end questions of oppression involve balancing considerations of cost and time against the potential value of discovery.

[142] The Court's duty today to consider the concept of oppression is directly reinforced by the focus in the new Rules upon proportionality. In this, New Zealand has joined a club whose existing members include Australian, English, Canadian and American jurisdictions.

[143] I return below to Mr Karam's specific objections to the discovery sought. For the purposes of this immediate discussion, I treat the documents sought as relevant to the issues in the proceeding. Fairfax has pleaded them as matters which may assist Fairfax in its honest opinion defence under s 10(2)(b) of the Act and Mr Karam has denied all but eight of the items.

[144] I turn to the circumstances of this case. The circumstances include:

- (i) From the time members of the Bain family died in their home at Dunedin in June 1994, those events and the trials and hearings flowing from them have had repeated and substantial coverage in the national media.
- (ii) The coverage has involved both straightforward news reporting and significant work of investigative journalism.
- (iii) Fairfax is a major publisher of newspapers both in print and online, with circulation and estimated readership on its own pleading of approximately:

Circulation	Estimated readership	
Sunday Star-Times	167,500	554,000
Christchurch Press	83,000	223,000
Dominion Post	88,100	234,000

www.stuff.co.nz 1,838,000 unique browsers,
of which approximately 1,101,000 were
from New Zealand

- (iv) It was Fairfax which chose, through its publications, to refer to the websites.
- (v) It is Fairfax which (in relation to its affirmative defence of honest opinion) asserts that the Schedule A facts were generally known at the time.
- (vi) If one excludes the events after December 2009 (as referred to in items 56-59 of Schedule A) the events in Schedule A cover a period of more than 15 years, and relating to Mr Karam's involvement, beginning 16 years ago.

[145] The documents sought by Fairfax are all those which relate to matters set out in Schedule A. The sheer breadth of that request is in my view self-evident when one reads Schedule A. I take but one example. In Schedule A, item 36, Fairfax alleges:

In 2000 the plaintiff published a book entitled "Bain and Beyond".

[146] That is not one of the items which is admitted by Mr Karam. Understandably, therefore, Fairfax will wish to prove the publication through appropriate evidence. One would expect that the book itself, or one or two additional documents, might suffice. Instead of identifying documents of a particular nature which would be adequate for the purpose of proving the item 36 proposition, the order for particular discovery, if granted, would require Mr Karam to give discovery of any documents relating to the matters set out in that item. The scope of discovery on that item alone could be very substantial. That is but one item in Schedule A, and by no means the most obviously large in terms of its likely surrounding documentation. The giving of interviews, appearing on television and campaigning on behalf of David Bain (item 28) would be likely to involve a much greater volume of documentation.

[147] The circumstances of this case, given Fairfax's position as a media organisation, points to Fairfax itself having records of and access to much material pertaining to these very issues. Fairfax's affidavit of documents is dated 18 February 2011 and appears focussed on the period around the publications on which Mr Karam sues. It is not immediately clear whether Fairfax, in raising complaints as to the extent of Mr Karam's discovery, has itself sought to identify and discover the documents which it already possesses relevant to the matters asserted in Schedule A.

[148] Fairfax has the protection of r 8.31 (the equivalent of the former r 8.37) which effectively precludes Mr Karam from producing in evidence a document which he says is relevant to the Schedule A issues but which he did not produce through discovery (in response to a discovery order put in place under the *Peruvian Guano* regime). Fairfax chose not to seek to define more narrowly the categories of documents which it sought. Equally, Fairfax chose not to re-cast the breadth of its application by adopting a formula based on documents which adversely affect Mr Karam's case, as would apply in standard discovery under the new Rules. It is not for this Court to seek to re-cast into something proportionate an application which I find wholly disproportionate, having regard to all the circumstances of the case.

[149] I also add this. There was nothing in the material put before me at the hearing to suggest that, in relation to this application, counsel ensured that the parties had discharged their obligation under the new r 8.2 (which came into operation six weeks before the hearing) to co-operate to ensure that the process of discovery and inspection in this case was proportionate and facilitated by agreement on practical arrangements. For the reason I have previously stated in this judgment, parties are not entitled to look to the Court to make sweeping discovery orders as if the new rules had not come into force, particularly when the parties themselves have not put any evidence before the Court as to endeavours to reduce the scope and burden of discovery. The potential discovery of all material relevant to the Schedule A propositions was a matter which cried out for such co-operation.

Conclusion

[150] Fairfax's application for particular discovery must fail.

Orders

[151] I order:

- (a) The application by the defendant for particular discovery is dismissed.
- (b) Costs are reserved for determination in the light of the outcome of the four applications which were heard together.



Associate Judge Osborne

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Schedule A

1. Robin, Margaret, Arawa, Laniet and Stephen Bain were murdered in their home at 65 Every Street Dunedin in June 1994.
2. On the morning of the murders the computer at 65 Every Street had been switched on.
3. On the morning of the murders David Bain had undertaken his newspaper round following which he had returned home.
4. The murder weapon and ammunition belonged to David Bain.
5. According to David Bain only he knew of the existence and whereabouts of the spare key for the trigger lock on the murder weapon which was used by the killer to unlock the weapon.
6. David Bain's fingerprints were on the murder weapon.
7. David Bain's bloodstained gloves were found in Stephen Bain's room.
8. The spare magazine for the murder weapon was found standing upright on its narrow edge almost touching Robin Bain's outstretched right hand.
9. Stephen Bain's blood was on David Bain's black shorts.
10. David Bain had fresh injuries to his head and knee.
11. Sock prints were identified in the house using the chemical Luminol which under certain conditions reacts with blood.
12. Green fibres were found under Stephen Bain's fingernails.
13. David Bain had washed bloodstained clothing including a green jersey with fibres matching those found under Stephen Bain's fingernails.
14. A broken pair of glasses and detached right hand lens were found in David Bain's room, and the detached left hand lens was found in Stephen Bain's room.
15. David Bain gave evidence that he heard his sister Laniet gurgling.
16. Robin Bain died with a full bladder.
17. Robin Bain's head appeared to have been moved subsequent to his death.
18. David Bain was arrested and charged with the murders of Robin, Margaret, Arawa, Laniet and Stephen Bain.
19. A key issue at the trial was whether the deaths were caused by Robin Bain who then committed suicide, or by David Bain who then arranged for the circumstances to appear as if Robin Bain was the perpetrator.

20. No evidence as to Robin Bain's mental state or motive was presented at the trial, the evidence of Mr Cottle having been ruled unreliable, and the evidence of Mr McKenzie, Mr Wilden and Ms Pease not having been available to the defence at the time.
21. David Bain was found guilty, convicted of the murders of Robin, Margaret, Arawa, Laniet and Stephen Bain, and sentenced to a minimum period of imprisonment of 16 years in 1994.
22. David Bain appealed against conviction in 1995 on the ground that the trial Judge had been in error in excluding as hearsay certain proposed evidence to be given on his behalf.
23. That appeal was unsuccessful.
24. The plaintiff is a well-known former sportsman having played rugby for Wellington and the All Blacks and rugby league for Glenora and Auckland.
25. At the conclusion of his sporting career the plaintiff became a successful businessman.
26. The plaintiff has a high standing in the community.
27. The plaintiff has no legal qualifications.
28. In 1996 the plaintiff took an interest in the Bain case, became a spokesman for David Bain, began giving interviews, appeared on television, and began campaigning on behalf of David Bain.
29. The plaintiff entered into an agreement with David Bain in January 1996 whereby the plaintiff and David Bain were to share equally in the proceeds from any books, magazine articles and the like.
30. In 1997 the plaintiff published a book entitled "David and Goliath, the Bain family murders".
31. In "David and Goliath" the plaintiff discussed evidence relating to the murders and expressed the conclusion that David Bain is innocent.
32. In "David and Goliath" the plaintiff published allegations that Robin Bain had an incestuous relationship with his daughter Laniet.
33. In "David and Goliath" the plaintiff asserted that the police had acted unprofessionally, had reached incorrect conclusions and have given evidence at David Bain's trial that was untruthful.
34. In 1998 the Solicitor-General brought a prosecution against the plaintiff for breach of a suppression order in respect of the name of a witness at David Bain's trial which was disclosed in the plaintiff's book "David and Goliath", in relation to which the plaintiff was convicted and fined.
35. In 1998 David Bain petitioned the Governor-General to grant him a pardon.

36. In 2000 the plaintiff published a book entitled "Bain and Beyond".
37. In that book the plaintiff discussed evidence relating to the murders and expressed the conclusion that David Bain is innocent.
38. In 2001 the plaintiff published a book entitled "Innocent!" which was subtitled "Seven Critical Flaws in the Wrongful Conviction of David Bain".
39. In that book the plaintiff discussed evidence relating to the murders and expressed the view that David Bain is innocent.
40. In February 2003 the Governor-General referred to the Court of Appeal the question of the five convictions of David Bain for the murder of his family members. The Court of Appeal considered new evidence not called at the trial, and concluded that:
 - a. Any reasonable jury must have seen the case against David Bain proved beyond reasonable doubt notwithstanding the new evidence.
 - b. No reasonable jury could find that there was a reasonable possibility that Robin Bain committed suicide after killing the other family members.
 - c. All of the evidence, including the new evidence, when viewed as a whole, did not persuade the Court that there had been a miscarriage of justice.
41. In March 2003 the plaintiff issued defamation proceedings against the publisher of "North & South" magazine in respect of an article titled "Joe Karam's Magnificent Obsession" which concerned the plaintiff's campaign to free David Bain; and subsequently joined the author of that story as a defendant.
42. In 2006 the plaintiff was appointed as an assistant to Mr Bain's legal team.
43. The Legal Services Agency made legal aid payments to the plaintiff in respect of his attendances as a member of Mr Bain's legal team.
44. The plaintiff funded David Bain's appeal to the Privy Council.
45. In 2007 the Judicial Committee of the Privy Council:
 - a. held that fresh evidence adduced in relation to Robin Bain's mental state, motive, sock prints, the computer switch-on time, the time of David Bain's return home, the glasses found after the killings, the left hand lens, David Bain's bloodied fingerprints on the rifle and Laniet's gurgling, taken together, meant that a substantial miscarriage of justice had occurred;
 - b. allowed David Bain's appeal;
 - c. quashed the convictions; and

- d. ordered a retrial.
46. In 2007 the Solicitor-General issued a directive to the plaintiff not to discuss the case publicly.
 47. In pre-trial decisions prior to the re-trial various evidence was on David Bain's application ruled inadmissible, including "false alibi" evidence in relation to David Bain's paper round, and the tape recording of the call made by David Bain to the emergency services.
 48. David Bain's defence team engaged a number of expert witnesses to give evidence on technical aspects of the case.
 49. David Bain was retried in 2009 for the murders of Robin, Margaret, Arawa, Laniet and Stephen Bain.
 50. David Bain did not give evidence at his retrial.
 51. Dean Cottle did not give evidence at David Bain's retrial.
 52. At David Bain's retrial evidence was given on behalf of the defence to the effect that Robin Bain was depressed, and that it would have been possible for Robin Bain to have shot himself.
 53. At the retrial David Bain was acquitted of murdering Robin, Margaret, Arawa, Laniet and Stephen Bain.
 54. The plaintiff was publicly described by his friend Paul Holmes as having been obsessed with David Bain's case.
 55. In 2009 the plaintiff and Mr Bain visited Arthur Allan Thomas to mark the 30th anniversary of Mr Thomas's pardon.
 56. In March 2010 David Bain commenced a claim for compensation for wrongful conviction and imprisonment.
 57. In 2010 the plaintiff issued defamation proceedings against Mr Purkiss and Mr Parker.
 58. In 2010 the plaintiff issued defamation proceedings against the operator of the TradeMe website.
 59. In 2010 David Bain's legal team attempted to stop the broadcast of the documentary "Why Robin Is Innocent".

Schedule B

1. Documents relating to the approval by the Legal Services Agency of the plaintiff's appointment as an assistant to Mr Bain's legal team in 2006; the plaintiff's hourly rate, and records of the hours he worked on Mr Bain's case.
2. Records of the payments received by the plaintiff from the Legal Services Agency.
3. Documents relating to the plaintiff's campaigning on behalf of Mr Bain.
4. Any documents relating to the plaintiff's knowledge of Mr Bain's guilt or innocence.
5. Documents relating to any agreement between the plaintiff and Mr Bain regarding the income or profits from any books, magazine articles or otherwise derived from Mr Bain's case.
6. The plaintiff's books "David and Goliath", "Innocent!" and "Bain and Beyond".
7. Records of the application of any profits made from those books, including but not limited to any sharing of the profits with Mr Bain.
8. Documents relating to the preparation of an application for compensation for Mr Bain.
9. Documents relating to the proceedings brought by the Solicitor-General against the plaintiff.
10. Correspondence from or on behalf of the plaintiff to any parties who expressed views about the Bain case or the plaintiff's involvement in it with which the plaintiff took issue, including but not limited to letters to journalists, media organisations, and/or members of the Police.
11. Documents relating to any seeking of witnesses by the plaintiff for Mr Bain's defence.
12. The various legal proceedings taken by the plaintiff against other parties for defamation in respect of the publication of matters relating to Mr Bain and/or the plaintiff's role in relation to Mr Bain.