IN THE COURT OF APPEAL OF NEW ZEALAND

CA678/2014
[2015] NZCA 562

BETWEEN	CAMERON JOHN SLATER Appellant
AND	MATTHEW JOHN BLOMFIELD Respondent

Hearing:	9 November 2015
Court:	Wild, Miller and Cooper JJ
Counsel:	Appellant in person M G Beresford for Respondent J G Miles QC as Counsel assisting
Judgment:	19 November 2015 at 4 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is dismissed.

B The appellant must pay the respondent's costs calculated as for a standard application for leave to appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] The appellant, Mr Slater, operates a blog on the internet which he calls Whale Oil. The respondent, Mr Blomfield, has sued him in the Manukau District Court claiming he has been defamed by material published on the website.

[2] Judge Blackie in the District Court held in an interlocutory ruling that the blog was not a "news medium" as defined in s 68(5) of the Evidence Act 2006.[1] This had the consequence that Mr Slater would not be a "journalist", and s 68(1) of the Act would not apply.[2] Section 68(1) provides that a journalist who has promised not to disclose an informant's identity may not be compelled to do so.

[3] On appeal to the High Court at Auckland, Asher J determined that Whale Oil was a news medium and Mr Slater could properly claim to be a journalist.[3] However, the Judge ruled that the names of his sources should nevertheless be disclosed under s 68(2) of the Evidence Act. This provides:

> **68 Protection of journalists' sources**
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> …
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> (2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs—
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> (a) any likely adverse effect of the disclosure on the informant or any other person; and
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> (b) the public interest in the communication of facts and opinion to the public by the news media, and, accordingly also, in the ability of the news media to access sources of facts.

[4] Mr Slater has filed an appeal against the s 68(2) ruling. He now applies for an order under r 45 of the Court of Appeal (Civil) Rules 2005 for leave to adduce further evidence in that appeal.

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1 *Blomfield v Slater* DC Manukau CIV-2012-092-1969, 26 September 2013.

2 Section 68(5) of the Evidence Act 2006 provides that a "journalist" is a person who in the normal course of his or her work may be given information by an informant expecting it to be published in a news medium.

3 *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835 [judgment under appeal].

Background

[5] Mr Blomfield had provided marketing services to Hell Pizza until 2008 and had been a director of the company, Hell Zenjiro Limited (in liquidation) which had owned outlets in the Hell Pizza chain. The articles the subject of the defamation claim arose out of Hell Pizza's association with a charity called "KidsCan". The first allegedly defamatory article was published on the Whale Oil blog on 3 May 2012, under the headline, "Who really ripped off KidsCan?" On the same day, another article appeared making a number of statements about Mr Blomfield. Asher J noted that between 3 May and 6 June 2012 Mr Slater wrote and published 13 articles referring to Mr Blomfield.[4]

[6] Mr Blomfield's defamation proceeding claimed that the articles accused him of dishonesty, theft, bribery, deceit, perjury and other criminal conduct. The statements on the blog included assertions that Mr Blomfield is a "psychopath", that he loves extortion and is a pathological liar. Another statement said he had "conspired to steal a cheque". Another allegedly said "Drugs, fraud, extortion, bullying, corruption, collusion, compromises, perjury, deception, hydraulic-ing..it is all there". There was reference to "a network of crooks". In his statement of defence, Mr Slater admitted publishing the articles containing the allegedly defamatory material. However, he denied that the words conveyed or were capable of conveying the alleged defamatory meanings and raised the affirmative defences of truth and honest opinion in respect of each of the statements forming the basis of Mr Blomfield's claim.

[7] Much of the material to which the claim relates contains extracts of emails to which Mr Blomfield is alleged to be a party. They refer to electronic files which Mr Blomfield said came from the hard drive of his computer and other sources including a filing cabinet. He claims that this material was unlawfully taken.

[8] Asher J noted that Mr Slater admitted in his statement of defence that he had in his possession copies of emails, databases and electronic files relating to Mr Blomfield's affairs. Mr Slater acknowledged that around February 2012 he had

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4 At [6].

been provided with a hard drive that included approximately one terabyte of computer files previously belonging to Mr Blomfield.

[9] Mr Blomfield sought discovery, and that interrogatories be answered. The former referred to "all email correspondence between" Mr Slater and other persons who were allegedly involved in the supply of material to Mr Slater. Those persons were Mr Powell, Mr Spring, Ms Easterbrook, Mr Price and Mr Neil. The notice to answer interrogatories included a question about the source of the alleged defamatory material published on Mr Slater's blog site. The question was:

> Who supplied [Mr Slater] with the hard drive and other information referred to on the Whale Oil website?

[10] Mr Slater refused to give discovery or answer the interrogatories, claiming that the information sought was privileged under s 68(1) of the Evidence Act.

[11] As has been seen, the High Court made an order on Mr Blomfield's application under s 68(2). The Judge's reasons for making that order may be summarised as:

(a) There was a public interest in the disclosure of evidence of the identity of the informants. That public interest had two aspects. First, and as a general proposition, where a journalist presents to the public "extreme and vitriolic statements" about another alleging serious crimes, there is a public interest in the "fair airing" of those statements and the circumstances of their making when the issues are traversed in defamation proceedings.[5] Second, there is a public interest in the fair working of the court process. In this respect, the identity of sources might in some cases assist in assessing whether the allegations were correct and in this case, as to whether Mr Blomfield's claim that the opinions expressed were not Mr Slater's genuine belief.[6]

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5 At [114].

6 At [115]–[116]. Mr Blomfield had served a notice under s 39 of the Defamation Act 1997 in response to Mr Slater relying on the defence of honest opinion.

(b) There were no likely adverse effects of disclosure on the informants except the possibility of civil action against them by Mr Blomfield, which the Judge considered was not a significant factor.[7]

(c) There was no relevant wider or public interest favouring confidentiality arising from the public importance of the issues or persons involved in what was essentially a private dispute. Disclosure was unlikely to have a chilling effect on other "whistleblowers and informants".[8] The disclosures were "extreme and vindictive" having the hallmarks of a private feud.[9] Further, the documents disclosed by the sources appeared to have been obtained illegitimately: this diminished the importance of protecting the informants.[10]

[12] The Judge found that on balance the public interest in disclosure outweighed any adverse effects on the informants and the ability of the media to freely receive information and access sources.[11]

[13] In relation to the issue of adverse effects on the informants, the Judge noted that Mr Slater had claimed Mr Blomfield was capable of physical violence. There was also an affidavit from Mr Spring claiming that he had been threatened by Mr Blomfield on numerous occasions. However, the only details provided were that Mr Spring had been sent text messages about his being run out of New Zealand and threatening a "public relations nightmare" if Mr Spring did not stop pursuing Mr Blomfield for money.[12] There was reference also to Mr Blomfield's brother, claimed to be a criminal convicted of assaults, who had also threatened Mr Spring. Mr Slater claimed that on this basis that Mr Blomfield might seek to "bully and intimidate" his sources if they were disclosed.[13]

[14] However, the Judge considered there was no evidence that Mr Blomfield had endeavoured to bully and intimidate Mr Spring, or others who had already been

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7 At [126] and [149(b)].
8 At [149(c)].
9 At [149(c)].
10 At [134] and [149(c)].
11 At [150].
12 At [122].
13 At [122].

disclosed as sources of information given to Mr Slater. The email exchange between Mr Blomfield and Mr Spring indicated that Mr Spring appeared "to be sending Mr Blomfield aggressive and abusive texts", with Mr Blomfield taking a "relatively defensive position".[14] Mr Blomfield has no convictions for violent offending, and the Judge rejected Mr Slater's suggestion that he was a person to be feared.[15] He found there was nothing to suggest Mr Blomfield would resort to intimidatory tactics.

The additional evidence

[15] Mr Slater's application for leave to adduce further evidence was initially based on three affidavits. These were his own affidavit sworn on 14 August 2015, to which was attached an affidavit of Mr Spring sworn on 25 March 2015, and an affidavit of one Mr Mattu, sworn on 28 August 2015. Mr Mattu swore a further affidavit on 5 November 2015. Notwithstanding its late provision, Mr Beresford did not oppose it being read for the purposes of the present application.

[16] Mr Slater relied on the affidavits as showing that Asher J reached wrong factual conclusions in two important respects. First, that Mr Blomfield did not pose a threat to the informants if their names were disclosed, and that he would not resort to intimidatory tactics against them. Second, he submitted they show that Mr Blomfield's hard drive was not stolen and that the relevant information had not been obtained illegally.

[17] The Court's approach to applications under r 45 is settled. The position was explained in *Erceg v Balenia Ltd*:[16]

> [The] requirements are that the evidence be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial …

[18] This approach reflects observations made by the Court in other cases to the effect that litigants have a duty to adduce at trial all their evidence, which is

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14 At [123].

15 A charge of common assault in 2008 was dealt with by diversion.

16 *Erceg v Balenia Ltd* [2008] NZCA 535 at [15] citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192.

reasonably discoverable and evidence which is not fresh should only be admitted in exceptional and compelling circumstances and where it is credible and cogent.[17] As with any other evidence, the evidence must be admissible and relevant; this is part of the cogency test.

[19] Before dealing with particular aspects of the affidavits, some general observations are appropriate. First, it is often not possible to tell from the content of the affidavits whether they are addressing matters that have arisen since the judgment in the High Court. It is Mr Slater who has the onus of establishing that the evidence is fresh or could not with reasonable diligence have been discovered so as to be adduced at the trial. Failure to discharge that onus means the evidence cannot be adduced. Second, the affidavits are full of hearsay statements which cannot be admitted. To give one example, Mr Slater deposes at para 18 of his affidavit as follows:

> A source related that Mr John Price [who had been a liquidator of Mr Blomfield's companies] refused to undetake [sic] the liquidation of Plan Z Investments Limited because he was concerned for his safety given that he used to go home concerned that he would be attacked in his drive way, or as he exited his vehicle. Mr Price confirmed to my source that he financed measures around his home to ensure his improved safety. Mr Price reconfirmed that he acted in this manner because of the direct and indirect threats that he had received from the Plaintiff and his brother Dan Blomfield.
> …

[20] This passage contains double hearsay and therefore inadmissible. It is also unspecified as to the time when Mr Price is alleged to have had the concerns referred to and so the evidence is not cogent. Nor is any explanation provided as to whether or not the evidence could have been provided at the hearing in the High Court, and so it is not clear whether or not the evidence is fresh.

[21] Numerous other examples of similar difficulties with the proposed evidence could be quoted from the affidavits on which Mr Slater seeks to rely, but that is unnecessary. It will be sufficient if we focus on the principal points that he now seeks to derive from particular passages in the affidavits.

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[17] *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*, above n 16.

Intimidation

[22] As one example of intimidatory conduct by Mr Blomfield arising since the hearing in the High Court Mr Slater relied on a complaint of harassment made by Mr Blomfield against Mr Spring. Mr Blomfield's application for a restraining order against Mr Spring was successful in the Auckland District Court.[18] In delivering judgment, Judge Dawson noted that the relationship between the two was "toxic".[19] The Judge proceeded to find that text messages sent to Mr Blomfield by Mr Spring constituted harassment under the Harassment Act 1997. A restraining order was accordingly made against Mr Spring and remains in force until 9 April 2016.

[23] Mr Slater was critical of Mr Blomfield for having waited to make the application until after the High Court judgment was delivered, when he had given a verbal undertaking in that Court "that no witness was at risk".

[24] We note that the text messages on which Mr Blomfield's application was based had various dates between 13 August 2013 and 20 September 2014. Mr Beresford claimed that the application was only taken at a point when Mr Blomfield was not prepared to continue receiving the text messages having earlier requested that they desist. In any event, many of the text messages were before Asher J, and addressed by him in his judgment, which was delivered on 12 September 2014. As we have said above, Asher J characterised them as involving Mr Spring sending Mr Blomfield aggressive and abusive text messages to which Mr Blomfield adopted a relatively defensive position.

[25] The fact that Mr Blomfield chose to apply to the District Court under the Harassment Act does not in our view amount to cogent evidence in relation to any finding made in the judgment under appeal.

[26] Next, Mr Slater referred to intimidatory acts against Mr Price. He alleges at para 14 of his affidavit that he holds "contemporaneous emails" (unspecified as to date) relating that Mr Price was threatened with being "done over" by Mr Blomfield's "gang associates". He refers to Mr Price stating that he believes that

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18 *Blomfield v Spring* [2015] NZDC 5882.
19 At [1].

Mr Blomfield is a psychopath, and also asserts that Mr Price related to another person that he (Mr Price) had been unlawfully detained and then assaulted by Mr Blomfield. These allegations are backed up by a police report mentioning that Mr Blomfield had coerced Mr Price into swearing an affidavit by "threats of being sued for defamation". This evidence is all hearsay, and inadmissible.

[27] It also fails to meet the cogency test. Mr Price swore an affidavit in the defamation proceeding on 23 August 2012. In that affidavit, Mr Price recorded that he had met Mr Slater and Ms Easterbrook through Mr Spring in May 2012, when he was informed that they had obtained and were in possession of a hard drive containing significant information about Mr Blomfield. It is unnecessary for us to record the detail of the affidavit, but it contains material which is adverse to Mr Slater's position in the current litigation. There is nothing about the affidavit which suggests that it was obtained by any kind of coercion. The hearsay assertions in Mr Slater's affidavit cannot be persuasive in respect of any suggestion that Mr Price swore the affidavit as a result of intimidation or threats.

[28] The other evidence on which Mr Slater relies under this heading is that provided by Mr Mattu in his two affidavits. We note that it is not suggested that Mr Mattu was one of the sources for the allegedly defamatory remarks which are the subject of the claim.

[29] In his first affidavit, sworn on 28 August 2015, Mr Mattu gives what he describes as a "blow-by-blow account" of his involvement with Mr Blomfield and his associates Mr Hare, Mr Johnson and Mr Sherriff in relation to a company called SAI Distributions Ltd owned by Mr Mattu, of which he was the sole director. Most of this affidavit is irrelevant for present purposes. At one stage in the affidavit, Mr Mattu refers to a payment of $27,000 that he gave to Mr Blomfield which he described as "bribe money". It appears that this money was apparently to be used to make payments to a liquidator and in connection with settling issues concerning Mr Mattu's tax liability, although the precise purpose of the payment is not clearly defined. However, later in the affidavit, Mr Mattu referred to Mr Blomfield telling him that if he mentioned what had gone on that he would "lose everything". According to Mr Mattu, this was said in a menacing tone. He also referred to

Mr Blomfield making it very clear that he is "out to get" him. He said Mr Blomfield is a man "without conscience", who "stops at nothing to get what he wants". He describes himself as living in a "remote part of New Zealand" but knowing that, if Mr Blomfield finds him, there is a "very real chance he will harm [Mr Mattu] physically". The affidavit also refers to Mr Blomfield's warnings that he has a brother who has been to prison and has gang connections.

[30] We do not regard this evidence as cogent. While Mr Mattu says he is fearful, he gives no evidence of any direct or particular threat of physical violence and the evidence about Mr Blomfield telling him to "keep [his] mouth shut" may have had a number of explanations if the commercial context of the relationship between Mr Mattu and Mr Blomfield is taken into account.

[31] Mr Mattu's second affidavit of 5 November 2015 attached a statement which he says he had made to the police and signed on 16 December 2014. In it, he makes allegations principally against Mr Hare. He says that he handed Mr Blomfield $27,000 in instalments of $15,000 and $12,000 for the purpose of making payment to his "friends in the IRD and liquidation company". Later in the statement he referred to a phone call from Mr Blomfield stating that if he ever opened his mouth about the $27,000 he would put the liquidators after him and he would lose everything. We infer this is the same statement mentioned in the earlier affidavit.

[32] Mr Mattu also gives evidence in the second affidavit that Mr Blomfield had threatened him over the phone, in person and in front of Mr Hare, and told him that "his brothers are connected to the gangs". Later in the affidavit, he refers to his relationship with Mr Slater, recording his understanding that Mr Slater and his team are gathering evidence to bring Mr Blomfield, Mr Hare, Mr Johnson and Mr Sherriff to justice. Mr Mattu says he is "doing the same".

[33] In his submissions, the main emphasis Mr Slater gave this second affidavit related to the fact that Mr Blomfield had telephoned Mr Mattu on Monday 5 October 2015. Mr Mattu recognised the caller's number as that of Mr Blomfield and decided not to take the call. Instead, he telephoned Mr Slater to seek his advice. Mr Slater was unavailable, but an associate, Mr Nottingham, advised him to take the next call

from Mr Blomfield and to record it. It was then arranged that instead Mr Mattu would telephone Mr Blomfield while Mr Nottingham remained on the line and both would record what was said. That then ensued, the discussion lasting for some 26 minutes. A little over an hour later, Mr Mattu again telephoned Mr Blomfield while Mr Nottingham was on the line. This time, the conversation lasted a little under four minutes.

[34] Transcripts of the discussion were then drawn up and attached to Mr Mattu's affidavit. The presiding Judge in this Court asked Mr Slater to identify the parts of the transcripts of the phone discussions which were of most concern. Mr Slater referred to the following passages attributed to Mr Blomfield:

> (a) Your affidavit wasn't even written by you Shiv. I, the affidavit … I've matched it up with the previous stuff that [Mr Slater] and [Mr Nottingham] have written. Those guys wrote this affidavit for you, and what's going to happen when you have to stand up in Court, and the first question the lawyer's going to ask you when they cross-examine you is "Who wrote this affidavit?"
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> (b) But what you've gone and done with these boys, and getting involved with them, I wanted to ring you and make it clear to you that I have no issue with you, and I wish you all the best, and I'm sorry for what happened. But I'm not going to talk to you again, and I'm not going to have anything to do with any of this, for as long as I possibly can. If I'm forced to be involved, I'll be involved, but I want to stay right away from this, the people you're involved with, everything to do with it. I'm going to stay as far away as …
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> (c) As far as I'm concerned, you've gone and partnered up with the devil, and you're asking me … I want to stay as far away from you and these people as possible. All I wanted to do was make it clear to you that I am not going to do anything mean to you. I feel sorry for you for what's happened, and I'm sorry that things haven't turned out.

[35] Mr Slater invited us to infer from the language used that these comments by Mr Blomfield were in fact veiled threats, that the observations were intimidatory and effectively asking Mr Mattu not to stand by his affidavit. We are not prepared to draw those inferences. As Mr Miles QC pointed out, Mr Mattu's claims of intimidation have not prevented him from swearing detailed and damaging affidavits, including a claim that Mr Blomfield, together with Messrs Hare, Johnson and Sherriff are "members of an organised and sophisticated criminal gang". Mr Mattu has also provided details of his address and place of work in the affidavits.

It seems that, even if he is concerned, Mr Mattu has not been deterred from making serious allegations against Mr Blomfield by anything Mr Blomfield has said or done.

[36] We do not consider any of this evidence cogent in relation to the relevant findings made by Asher J.

Unlawfully obtained material

[37] Asher J referred to Mr Blomfield's allegation that his filing drawers and hard drive had been stolen. The Judge noted that that issue had not been addressed by Mr Slater in any detail, Mr Slater having confirmed that he had the items in his possession but denying they were stolen.[20] The Judge thought that even if Mr Slater had not been party to any illegality, it was likely that the information had been obtained illegally by the sources. He reasoned that in the ordinary course of events persons do not legitimately come by the personal hard drive and filing cabinets of others.[21]

[38] Mr Slater now seeks to adduce evidence in the form of police reports showing that the question of whether the information had been stolen has been investigated by the police who have reached the view that there was insufficient evidence of criminal conduct "on the part of the appellant or any source or alleged source". The reports attached to Mr Slater's affidavit have dates between January and May 2013. Mr Slater has made no attempt to explain why he could not have obtained this information earlier and in time to adduce it at the trial. He would have been aware from the statement of claim that Mr Blomfield complained that the material was taken from him unlawfully, and asserted that it contained a large number of "copyrighted, privileged and confidential items belonging to the plaintiff, his clients and his family". The evidence on which he now seeks to rely could have been called in the High Court, but Mr Slater chose not to do so. It is not fresh.

[39] The material is in any event hearsay and inadmissible for that reason. The same applies in relation to a letter of the Independent Police Conduct Authority dated 13 June 2014. Mr Slater seeks to rely on that letter for its statement that the

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20 Judgment under appeal, above n 3, at [133].
21 At [134].

police investigation had found the missing hard drive "to have never been stolen". He says that he endeavoured to produce the letter in the High Court "from the bar" but it was successfully opposed. Again, it is a hearsay statement which ought not to be admitted at this point.

[40] In summary, we are not satisfied that the evidence which Mr Slater seeks to adduce under this heading is fresh or admissible.

Result

[41] The application for leave to adduce further evidence is dismissed.

[42] The appellant must pay the respondent's costs calculated as for a standard application for leave to appeal on a band A basis and usual disbursements.

Solicitors:
Central Park Legal, Auckland for Respondent