IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000309
[2018] NZHC 1604

UNDER	the Defamation Act 1992
BETWEEN	BRYAN DOUGLAS STAPLES First Plaintiff
	CLAIMS RESOLUTION SERVICE LIMITED Second Plaintiff
AND	RICHARD LOGAN FREEMAN First Defendant
	MEDIAWORKS TV LIMITED Second Defendant
	KATE MCCALLUM Third Defendant
	TRISTRAM CLAYTON Fourth Defendant

Hearing:	19 June 2018
Appearances:	P A Morten for Plaintiffs First Defendant in person T F Cleary and L C Bercovitch for Second to Fourth Defendants
Judgment:	2 July 2018

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

Introduction

[1] The first plaintiff (Mr Staples) is a director of the second plaintiff, Claims Resolution Service Limited, (CRS). At all material times, CRS, under the direction of Mr Staples, carried on business assisting claimants against the Earthquake Commission in relation to damage to properties in the earthquake sequences in 2010 and 2011.

[2] The first defendant (Mr Freeman) was a director of Ironclad Securities Limited (Ironclad) at various times before Ironclad was removed from the Companies Register in March 2016. Ironclad operated a Facebook page at relevant times (the Facebook page). It is said that Mr Freeman was the administrator of that Facebook page.

[3] The second defendant (Mediaworks) carries on business as a television programmer of the national television channel, TV3.

[4] The third defendant (Ms McCallum) was employed at relevant times by Mediaworks as a television producer. The fourth defendant (Mr Clayton) was also employed at relevant times by Mediaworks, as a journalist or reporter.

[5] Mr Staples and CRS sue the defendants in defamation. Certain alleged defamatory statements were made on the Facebook page on three occasions, the first on 8 April 2014, and the second and third on 10 April 2014.

[6] On 11 April Mr Staples issued defamation proceedings in the District Court at Christchurch in which he sought an interim injunction. On 15 April 2014 that Court granted an interim injunction on specified terms. In May 2014 Mr Freeman, as manager of Ironclad, filed a statement of defence and affidavits. In these documents further allegations were made against Mr Staples which are also said to be defamatory.

[7] The terms of the interim injunction granted by the District Court are these:

> (a) Requiring Ironclad and Messrs Richardson, Smith and Smith to remove immediately all statements and material in any way related to Mr Staples and his associated companies from the web page on Facebook operated by Ironclad and Messrs Richardson, Smith and Smith at the Internet address www.facebook.com/ironcladsecurities.

(b) Restraining Ironclad and Messrs Richardson, Smith and Smith or their employees or associates from publicising any information in any way relating to the proceeding pending further order of the Court.

The persons named in paragraph (b) were associated with Ironclad.

[8] In the present case, Mr Staples and CRS plead that a third party whose identity is not known to the plaintiffs supplied to Mediaworks and Ms McCallum copies of "the District Court documents". Mediaworks then broadcast a programme called "Campbell Live" on TV3. It is said that in this programme certain statements were made which were also defamatory of Mr Staples. This followed statements in Parliament made by the Leader of New Zealand First, the Hon Winston Peters, in relation to the matters which are said to have been referred to in some of the documents filed in the District Court proceeding, which Mr Staples and CRS say were given to Mr Peters by Mediaworks and Ms McCallum.

[9] Publication of defamatory statements on the Campbell Live programme is said to have occurred on two occasions.

[10] Mediaworks is also said to operate a website. It is alleged that material posted on the Mediaworks website is also defamatory of Mr Staples.

[11] After pleadings of admissions and denials in the statement of defence filed by Mediaworks to the second amended statement of claim, various affirmative defences are pleaded, including, of present relevance, qualified privilege and honest opinion. Statements of defence by Ms McCallum and Mr Clayton also plead these defences, in the same terms.

[12] There are two applications before the Court:

(a) By the plaintiffs for an order directing the second, third and fourth defendants to file and serve an amended statement of defence giving further particulars in relation to their defence of honest opinion. In particular, the Court is asked to order that the defendants:

(i) particularise the statements they allege are statements of fact in the second Campbell Live programme, pursuant to s 38(a) Defamation Act 1992, which are known as "the publication facts", and

(ii) give proper particulars of the facts and circumstances on which they rely to support the allegations made that those statements are true (s 38(b) of the Act).

(b) By the plaintiffs, for orders that each of the second, third and fourth defendants file an affidavit of documents:

(i) which properly identifies each of the documents which is claimed in Part 3 of the schedule to their affidavits to be confidential;

(ii) which properly identifies documents in Part 4 of their affidavits which are no longer in their possession or control and the precise dates on which they disposed of each document.

[13] Both applications are opposed.

First application

[14] Mr Staples and CRS rely on r 5.48(5) of the High Court Rules, and s 38 of the Defamation Act 1992.

[15] Rule 5.48(5) provides:

> The statement of defence must give particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances sufficient to inform the court, the plaintiff, and any other parties of the defendant's defence.

[16] Section 38 of the Defamation Act provides:

> **Particulars in defence of truth** – In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give particulars specifying –
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> (a) The statements that the defendant alleges are statements of fact; and

(b) The statements and circumstances on which the defendant relies in support of the allegation that those statements are true.

[17] In each of the statements of defence to the second amended statement of claim, honest opinion is pleaded as an alternative defence in relation to some of the statements made during broadcasts by Mediaworks. Each defendant says that if the words relied on by the plaintiffs as being defamatory had the meanings they are alleged to have had in the second amended statement of claim, then in relation to words used by Mr Clayton on the Campbell Live programme in question, any such meaning was conveyed as an expression of the defendant's genuine opinion.[1] In relation to words of other persons (Messrs Potter, Pearl and Haggerty) whose interviews were broadcast on the programme, it is pleaded that the opinions expressed did not purport to be the opinion of the second defendant and the second defendant had no reasonable cause to believe that the opinion was not the genuine opinion of each maker of the statements in question.

[18] Mediaworks pleads:[2]

> The facts and circumstances upon which the second defendant relies for the defence of honest opinion are set out in Schedule A to this statement of defence.

[19] Schedule A has the heading "Facts and circumstances relied on in respect of fifth alternative defence – honest opinion".[3] Schedule A contains 33 statements which are said to be factual.

[20] The issue on this application is whether Schedule A sufficiently complies with r 5.48(5), and s 38.

[21] The sufficiency of particulars in a pleading in a defamation case was discussed in *Television New Zealand Ltd v Ah Koy*. Reference in the following passage to truth is equally applicable to a defence of honest opinion, as can be seen from s 38. The Court of Appeal said:[4]

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1 Paragraphs 86 to 89, statements of defence to Second Amended Statement of Claim.
2 At paragraph 90.
3 There is a minor error, in that honest opinion is actually pleaded as a sixth alternative defence.
4 *Television New Zealand Ltd v Ah Koy* [2002] NZLR 2 616 at [17].

> One of the purposes of particulars is to enable the plaintiff to check the veracity of what is alleged; another is to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth; yet another is to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on. It can be seen that against each of these three purposes the particulars provided by TVNZ fall well short of being sufficient. It should be mentioned that a further purpose of particulars is that a defendant at trial is not usually permitted to lead evidence of facts and circumstances beyond those referred to in the particulars. In *Zierenberg v Labouchere* [1893] 2 Q.B. 183, 186 Lord Esher MR said that a plea of justification (now of truth) without sufficient particulars was invalid and that this had been the law "from the earliest times". As *Gatley* says at 27.10, it is arguable that in these circumstances there is no plea of justification on the record. On that basis a plea of truth without sufficient particulars would be at risk of being struck out.

[22] In *APN New Zealand Ltd v Simunovich Fisheries Ltd*, the Supreme Court cited this passage from *Ah Koy* and then stated:[5]

> These observations, which the parties accepted as an accurate statement of the law, apply with equal force to particulars of the facts relied on in support of a defence of honest opinion. The defendant is required to identify a sufficient factual basis for its opinion, so that readers or viewers may assess the validity of the opinion for themselves against the relevant facts truly stated.

[23] Mr Cleary, for the second to fourth defendants, does not take issue with these principles. His argument is that the particulars as pleaded provide sufficient information for the plaintiffs to understand the basis for the defence of honest opinion and enable them to plead to the asserted basis. He says that the pleadings properly particularise the facts and circumstances relied on to support the honest opinion defence, setting out the facts in the publication and other facts and circumstances that prove that the defendants had no reasonable cause to believe that the opinion was not the genuine opinion of the author. He says that they provide sufficient information to enable the plaintiffs to check the veracity of what is alleged as honest opinion.

[24] In support of this position he relies on this passage from *Price Waterhouse v Fortex Group Ltd*:[6]

> What is required is an assessment based on the principle that a pleading must, in the individual circumstances of the case, state the issue and inform the

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5 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93 at [18]. This was an appeal by the second respondent from the decision of the Court of Appeal in *Simunovich Fisheries Ltd v Television New Zealand* [2008] NZCA 350 referred to below.

6 *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November at 19.

> opposite party of the case to be met. As so often is the case in procedural matters, in the end a common-sense and balanced judgment based on experience as to how cases are prepared and trials work is required. It is not an area for mechanical approaches or pedantry.

[25] The facts which may sustain a defence of honest opinion under s 11 of the Defamation Act are known as publication facts. In *Simunovich Fisheries Ltd v Television New Zealand Ltd*, the Court of Appeal said:[7]

> We have held that a defendant who pleads honest opinion must comply with s 38. 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.

[26] The Court of Appeal also provided a non-exhaustive list of principles applicable to the defence of honest opinion. This is in the following terms:[8]

> (a) Each respondent must identify those parts of the defamatory publications that are said to be honest opinion, and the person to whom such opinion is attributed;
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> (b) The respondent must identify publication facts by reference to the truth of which it alleges that those defamatory publications were honest opinion;
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> (c) The respondents may plead other facts and circumstances that are capable of proving the publication facts. They should be separately pleaded so that they are distinguished from the publication facts;
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> (d) It may be necessary to portray something of the relevant background, and to set out by way of context material that connects the main facts relied on. But the respondents may not seek to prove the truth of publication facts by reference to the opinions or assertions of others.

[27] Based on this statement Mr Cleary says that each defendant has pleaded facts and circumstances relied on in respect of the honest opinion defence, in Schedule A. Mr Cleary argues that it is not necessary to separately plead supporting facts and circumstances. He relies on *Karam v Fairfax New Zealand Ltd*.[9] In that case the

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7 *Simunovich Fisheries Ltd v Television New Zealand Ltd*, above n 5, at [118].
8 At [126].
9 *Karam v Fairfax New Zealand Ltd* [2012] NZHC 887.

learned Judge observed that the wide definition of publication facts in *Simunovich* allows for these facts to be pleaded together in the same schedule. Mr Cleary says that applying this approach to the present application shows there is no deficiency in the format of the defendant's honest opinion pleading. Each defendant has provided sufficient information to inform the plaintiffs of their defence, and to enable the plaintiffs to take steps to respond. There is no real risk of a trial by ambush. The level of detail requested by the plaintiffs is an unreasonable burden.

Discussion

[28] In considering Schedule A it must be remembered that it is to be assessed in its context, which is whether it provides particulars complying with s 38 which are required for a defence of honest opinion. The plain purpose of the requirements of this section is that sufficient particulars of the basis upon which the defendant asserts that a statement is one of honest opinion must be given in two categories: first, statements that the defendant alleges are statements of fact, and, secondly, the facts and circumstances on which the defendant relies in support of its position that those statements are true.

[29] I therefore consider the terms of Schedule A. In it the defendants plead 33 facts. These seem to be intended to be statements of fact complying with s 38(a). Missing though, as far as I can see, are statements of facts and circumstances on which each defendant relies in support of the allegations in each of paragraphs 86 to 89 summarised above.[10] I am unable to discern from Schedule A which of the stated facts are intended to be statements of facts in terms of s 38(a), and which are intended to be facts and circumstances relied on in support of the allegation that those statements are true, in terms of s 38(b). The intention of s 38 is that there should be two sets of facts, those which are relied on as a foundation for the defence of honest opinion, and those which are relied upon to substantiate each such assertion.

[30] It is a matter for judgment in individual cases whether these two materially different sets of particulars can be combined in one schedule. On the facts of *Karam*, the Court was satisfied this was satisfactory. I think it unlikely this will often be the

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10 At [17].

case and, in any event, I cannot discern any reason why the separate classes of pleadings required by s 38 might advantageously be combined in one schedule. The differences between the classes of particulars is clearly enunciated in the list of principles set out by the Court of Appeal in *Simunovich*, for the purposes of that case, as is the need to plead the two sets of facts separately so that they are distinct.[11]

[31] In argument, Mr Cleary accepted that repleading the particulars required by s 38 may be useful, whilst maintaining that it is not required. I cannot accept this assertion. My consideration of Schedule A leaves me with no clear picture of the pleadings of fact which are relied upon for s 38(a) and those relied on for s 38(b). As in *Simunovich*, therefore, it follows that the pleading of each defendant requires extensive revision.

[32] In undertaking this exercise each defendant will need to note that reliance cannot be put on the opinions of others, when seeking to establish a defence of honest opinion. In *Simunovich*, the Court of Appeal noted:[12]

> The respondents wish to show that the opinions they plead were genuine by proving that the person speaking based it on reliable sources, such as the Court decisions, Mr Peters' statements, affidavits, or Ministry documents.

[33] In respect of this, the Court said:[13]

> We accept that, as a factual matter, those whose opinions are relied upon may well have chosen to comment on the opinions or allegations of others about Simunovich. But the defence of fair comment comes into play at the point where the plaintiff has proved the publications are capable of bearing the defamatory imputations that it pleads. At that point, the defendant may show that what it said was true, insofar as it comprised statements of fact, or honest opinion, insofar as it comprised comments on proved publication facts. Those publication facts cannot include the fact that someone else has said something about Simunovich. Rather, the defence must be established by reference to underlying or primary facts.

[34] For these reasons the plaintiffs' application succeeds.

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11 *Simunovich Fisheries Ltd v Television New Zealand Ltd*, above n 7, at [126].
12 At [120].
13 At [122].

Second application: confidentiality

Part 3 of the schedule to an affidavit of documents sworn by Mr T E G Turton, legal counsel for Mediaworks, and affidavits sworn by each of Ms McCallum and Mr Clayton, contains a list of documents that are in the possession of the second, third and fourth defendants for which they claim confidentiality.

[35] In Part 4 of the schedule to the same affidavits, documents are described which are said to be no longer in the possession of the second, third and fourth defendants.

[36] Mr Staples and CRS take issue with each of these schedules. I deal with them separately.

Part 3 of the schedule

[37] In this schedule there are 11 documents which remain subject to claims of confidentiality. The issues in relation to the remaining 14 documents listed in this schedule have been resolved by agreement. The 11 documents in question are described in Part 3 thus:

Document ID	Parent Document ID	Date	Description	From	To
MED_STA_100.00012		21/07/2014	Email	Mediaworks	Mediaworks
MED_STA_100.00013	MED_STA_100.00012	12/05/1998	Court Document		
MED_STA_100.00014	MED_STA_100.00012	5/05/2014	Court Document		
MED_STA_100.00015	MED_STA_100.00012	25/07/2013	Court Document		
MED_STA_100.00016	MED_STA_100.00012	5/06/2014	Email	Confidential	Confidential
MED_STA_100.00046		21/07/2014	Email	Mediaworks	Mediaworks
MED_STA_100.00047	MED_STA_100.00046	12/05/1998	Court Document		

MED_STA_100.00048	MED_STA_100.00046	5/05/2014	Court Document		
MED_STA_100.00049	MED_STA_100.00046	25/06/2013	Court Document		
MED_STA_100.00050	MED_STA_100.00046	10/03/2013	Email	Confidential	Confidential
MED_STA_100.00051		21/07/2014	Email	Mediaworks	Mediaworks

[38] The application by Mr Staples and CRS is directed at obtaining further identification of each of the 11 documents in question. The limited nature of the descriptions of the 11 documents is clearly evident from such entries as emails being from "Mediaworks to Mediaworks" and from the term "court document". In two cases both the sender and recipient of emails are said to be confidential, so no details are supplied.

[39] The explanation given by Mr Turton on behalf of Mediaworks for the way in which these documents are listed is this:

> In Part 3 of the Schedule, I list documents that are in the second, third and fourth defendants' control and for which the second, third and fourth defendants claim confidentiality. Parts of the documents identified at Part 3 of the Schedule are subject to binding undertakings of confidentiality given by the second, third and/or fourth defendants. The second, third and fourth defendants propose not to disclose those parts of the documents identified which would cause them to breach their undertakings of confidentiality, and if necessary will seek an order that they not be required to do so. The second, third and fourth defendants propose to discover those parts of the documents identified at Part 3 which would not cause them to breach their undertakings of confidentiality.

[40] By this evidence, Mr Turton invokes s 68(1) of the Evidence Act 2006:

> **68 Protection of journalists' sources**
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> (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.

[41] Conversely, Mr Staples and CRS rely on s 68(2):

> (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.

[42] The principle enunciated in s 68(1) is of sufficient importance to be enshrined in statute, and is also the subject of numerous judicial observations. As an example, in *Police v Campbell*, Randerson J said:[14]

> The court should approach its task from the starting point that the journalist's protection is established by s 68(1) and that any order under s 68(2) is therefore a departure or exception from this initial position. The presumptive right to the protection should not be departed from lightly and only after a careful weighing of each of the statutory considerations.

[43] His Honour then considered the submission that a high threshold should be set for departure from the principle in s 68(1), but declined to set any such threshold.[15]

[44] Considering an issue such as that presently before the Court is to be approached this way:[16]

> … the use of the word "outweighs" clearly requires the court to undertake a balancing exercise. The court must weigh the public interest in the disclosure of evidence of the identity of the informant against any likely adverse effect of the disclosure on the informant or any other person and against the public interest in the communication of facts and opinion to the public by the news media as well as the related issue of the ability of the news media to access sources of facts. The court may only make an order under s 68(2) if it is satisfied that the public interest in the disclosure of evidence of the identity of the informant outweighs both the matters in s 68(2)(a) and (b).
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> I accept, however, that the required balancing exercise is more in the nature of an evaluative judgment of fact and degree than the exercise of a discretion in the conventional sense. (*Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [17]).

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14 *Police v Campbell* [2010] 1 NZLR 483 at [93].
15 At [94].
16 At [89] – [91].

> Mr Miles submitted that if the journalist's protection conferred by s 68(1) is to be adequately protected then it should not be overridden except in unusual or exceptional circumstances. To support that submission, he relied on the English and European authorities already discussed. I do not accept that submission. To do so would require a gloss to be applied to the words the legislature has chosen to use. If Parliament had intended that disclosure of the identity of an informant should only occur in truly exceptional or compelling circumstances, it could easily have said so. It could also, for example, used the expression "substantially" outweighs in s 68(2). Parliament did not use any such expression.

[45] His Honour went on to note that:[17]

> the trend of authority, both in New Zealand and the United Kingdom, is to attach substantial weight to freedom of expression in a broad sense as well as in the narrow sense of encouraging the free flow of information and the protection of journalists' sources.

[46] In relation to the documents at issue, to which I refer by the final two digits in their numbers, Mr Morten says there is insufficient identification for these reasons:

(a) Document 12 – Mr Morten says the identical description of the sender and recipient of this email is not a proper description complying with the High Court Rules.

(b) Document 13 – Mr Morten says the description of this document as a court document is inadequate. He says the defendants filed four affidavits in the District Court proceedings. Three of them were sworn on 5 May, and an exhibit to one of them, sworn by a Mr Craig, is a Court of Appeal judgment dated 12 May 1998, the same date as attributed to document 13.

(c) Document 14 – This court document bears the same date as the three affidavits sworn in opposition to Mr Staples' District Court case.

(d) Document 15 – Mr Morten says the description is inadequate, and notes that the date (25/07/2013) matches the date on a letter produced as exhibit H to Mr Craig's affidavit.

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[17] At [92].

(e) Document 16 – Mr Morten observes that neither the sender nor recipient is disclosed and he says the plaintiffs do not, therefore, know anything about this document.

(f) Document 46 – again the sender and recipient of this email is described as Mediaworks. Mr Morten says the date is the same as that on an email under cover of which three court documents were supplied to Mediaworks by the unidentified source.

(g) Document 47 – again Mr Morten takes issue with the description of the document and notes that the date matches the date on document 13.

(h) Document 48 – Mr Morten makes the same point in relation to the description of the document and notes that the date given is the date of the three affidavits filed in opposition to the injunction (by Mr Craig, Mr Pearl or Mr Wilson).

(i) Document 49 – This again bears the court document description. Like documents 47, 48 and 50 its parent document is the email of 21 July 2014, document 46. Mr Morten says it appears to match the description of document 15, though the date is wrong by one month which may be a typographical error.

(j) Document 50 – Mr Morten says nothing is disclosed about this document apart from its date and the fact that its source is document 46.

[47] So far as the court documents are concerned Mr Morten says that these appear to match affidavits filed by the defendants in the District Court, and that it is inherently improbable that disclosure of these documents would lead to identification of their source unless they have been marked-up in some way, a point on which there is no evidence. Even if they have been marked up, he surmises that it is likely that they could be redacted and on that basis alone should be disclosed.

[48] Mr Cleary says that there is sufficient detail in Part 3 in relation to most of the documents and where that is not the case, further detail is withheld as a matter of source protection under s 68(1) of the Evidence Act. He notes that, in affidavits filed

in opposition to this application, Mr Turton, Ms McCallum and Mr Clayton have each deposed that the documents in issue, along with other information, were provided to the defendants on the basis of promises by the defendants not to disclose the source(s)' identity. Each says that if the identity of particular documents, including the "Court documents" is disclosed, the fact that they were in their control could disclose the identities of the source(s).

[49] Mr Cleary says the application for greater detail to be provided about what the court documents are is an attempt to circumvent s 68(1). He notes the suggestions made about what the court documents might be, and who the sources of those documents might be, but says those are merely suggestions and are not facts. Mr Cleary relies on s 68(2), and a five step process for considering this issue set out by Asher J in *Slater v Blomfield*. The following passages set out his Honour's views:[18]

> A Court in considering an order under s 68(2) having determined that s 68(1) is engaged, must then carry out the weighing of the public interest factors identified in the section. Randerson J helpfully set out the process to be adopted in applying s 68(2), which I gratefully apply and adapt for the purposes of this exercise. In carrying out this exercise I will follow a five step process considering:
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> (a) the issues to be determined in the proceeding;
>
> (b) the public interest in the disclosure of the identity of the source in the light of the issues to be determined, if any;
>
> (c) the likely adverse effects of disclosure on the informant or any other person, if any;
>
> (d) the public interest in the protection of communication of facts and opinion to the public by the news media and the ability of the news media to assess sources of facts, if any; and
>
> (e) whether factor (b), if it exists, outweighs factors (c) and (d).
>
> In carrying out this process, a court has to consider and weigh matters of fact. This arises in an interlocutory context, where there is limited ability to test and explore factual assertions. A court has no alternative but to assess the facts as presented, and make robust findings in a manner akin to dealing with facts in interim injunction and freezing order applications, and other interlocutory and pre-trial processes. In doing so it must be sensitive to the fact that the evidence has not been tested as in a trial.
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> The Court must also be sensitive to the view, expressed by some commentators, that fair trial rights particularly in a civil contest should not always prevail over journalistic protection.

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[18] *Slater v Blomfield* [2014] NZHC 2221 at [106] – [108].

[50] It is appropriate to consider the issue now before the Court on this basis.

(a) The issues to be determined in the proceeding

[51] The trial issue of relevance to the present application is whether the opinion expressed was a genuine opinion. It is on this issue that Mr Morten focusses his case. He accepts that s 39 requires his clients to serve on the defendants a notice to the effect that they intend to allege that the opinions asserted were not genuine, and that in doing so they will be required to include particulars specifying the facts and circumstances they rely on for that contention. He says this step has not been taken yet (despite the time limit in s 39(3)) but will be when the current applications have been determined and discovery thus resolved.

[52] Mr Morten says, first, that each of the defendants admits to being aware of the existence of the injunction issued by the District Court before the first Campbell Live programme went to air. He notes that Mr Staples has produced to the Court, as exhibits to an affidavit, a screenshot of Mr Clayton in the second Campbell Live programme holding court documents in his hand, which must mean that Mediaworks was supplied with at least some of the documents on the District Court file. Mr Morten notes that, in an affidavit filed in the District Court, Mr James Elliott, an in-house counsel with Mediaworks, with authority of that company to swear an affidavit on its behalf, stated:

> I am able to indicate to the Court that none of the persons named as defendants in this proceeding was or were the person or persons who provided the statements, emails and affidavits referred to by Mr Clayton in the Campbell Live story.

[53] Further, in a second affidavit sworn on that proceeding on 23 June 2015 Mr Elliott said:

> I confirm that Mediaworks received, from a confidential source, copies of documents that included material detailed in clause 1(a) of the plaintiffs' application for non party discovery dated 5 February 2015.
>
> The best recollection is that the physical documents supplied by the confidential source were copies of statements, emails and affidavits.

[54] Further, Mr Staples deposes to Mr Freeman having admitted to him that he and Mr Craig supplied copies of court documents to Mediaworks, and to Mr Peters.

[55] Mr Morten says that on the basis of this evidence it is established that Mediaworks and Mr Clayton did receive, and used for the purposes of the Campbell Live programmes, documents from the District Court proceedings. Prima facie this is a breach of the District Court injunction.

[56] The next point made by Mr Morten is that the information published by Mediaworks in the second Campbell Live programme alleges criminal acts by Mr Staples, theft and fraud.

[57] Thirdly, Mr Morten notes that the programme was based on four affidavits filed in the District Court each of which presented what he describes as extreme views about Mr Staples. He notes that Mr Craig, Mr Pearl and Mr Wilson, three of the deponents, were ex business colleagues of Mr Staples who had fallen out with him and, as he puts it, had an axe to grind. Two of the interviewees on the second Campbell Live programme, Mr Potter and Mr Haggerty, were personally aggrieved about Mr Staples' companies, with the former alleging that he could not extract himself from a contract and the other alleging he was owed money.

[58] In relation to his second and third points, Mr Morten asks the Court to take into account the following passages from the decision in *Slater v Blomfield*:[19]

> As a general proposition, when a journalist such as Mr Slater has presented to the public extreme and vitriolic statements about a person such as Mr Blomfield alleging, as he has, serious crimes by him, 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. The vitriolic remarks indicate that Mr Blomfield is a danger to society. The remarks being deliberately put in the public domain by Mr Slater show there is a public interest in all the circumstances relevant to Mr Blomfield's challenge.
>
> Moreover, it is in the public interest that court processes work fairly. The identity of sources may in some cases not assist in relation to assessing whether the statements were true, but in others in assessing the truth of the allegations the identity of the sources may be relevant. Here, a source, such as Mr Spring, had a direct business involvement with Mr Blomfield. It is alleged by Mr Blomfield in his s 39 notice that Mr Spring and other alleged sources were part of a plan to make pejorative comments about Mr Blomfield. The role of those persons as a source, deliberately planning to hurt Mr Blomfield, could be relevant to their credibility and thus to the defence of truth. Disclosure of the source is required for the fair working of the court process.

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[19] *Slater v Blomfield*, above n 16 at [114] – [115].

[59] Mr Morten acknowledges that those observations were made in the context of a defence of truth, but he says they are equally applicable in relation to the defence of honest opinion. He also acknowledges that the statements made by Mr Slater about Mr Blomfield were more extreme than those in issue in this case, though without detracting from his criticism of the nature of the statements in issue in this case.

[60] In *Slater v Blomfield*, Asher J then discussed disclosure of sources in the context of honest opinion, noting that disclosure may well assist in relation to that defence. His Honour referred to the need to show that the opinion expressed was the defendant's genuine opinion. He noted that the test is the honesty of the opinion not its reasonableness, and the opinion must be based on facts which are true or not materially different from the truth.[20] His Honour then continued:[21]

> Therefore to sustain this defence Mr Slater will need to demonstrate that he genuinely held the views that he expressed. In this regard, the identity of those who provided information to Mr Slater may be relevant. While malice is irrelevant, if a source is known to be angry and biased, it may be less likely that the journalist had a genuine (that is honest) opinion about a vilifying statement. Conversely, if the information originated from an apparently reliable source, that fact could make it more likely that the opinion subsequently based on that source was genuine. In *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* it was held in relation to the newspaper rule to be well settled that where the defendant in defamation proceedings pleads fair comment or privilege and the plaintiff raises express malice in answer to the pleas, the identity of the informant is relevant and material to the plaintiff's case. Fair comment is now honest opinion, and express malice has ceased to be an answer, but the concept that the identity of the informant could have been relevant to malice applies equally in my view to the new defence of honest opinion, when there is a challenge of this type. The identity of the informant can be relevant to whether the opinion is genuine.

[61] I respectfully agree with these observations. Given that the pleaded defamatory meanings effectively allege that criminal conduct has occurred, and the sources of the statements in issue were persons holding adverse issues with Mr Staples and entities associated with him, I find that the identity of the informants of Mediaworks, Ms McCallum and Mr Clayton is relevant to the issue of whether the defence of honest opinion is available to each of them.

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20 At [116].
21 At [117].

(b) Is there a public interest in the disclosure of the identity of the source, in light of this issue?

[62] The passages from *Slater v Blomfield* cited at [60] above are equally relevant to this issue. The public interest identified applies in the present case. There is also a public interest in ascertaining whether the supply of the documents was in breach of the injunction issued by the District Court, which on the material presently before this Court appears may have been the case.

(c) The likely adverse effects of disclosure on the informant or any other person

[63] This criterion is recorded in s 68(2)(a) of the Evidence Act.

[64] In the present case there is no suggestion in the evidence of any specific adverse effect on the unknown informant, or on any other person. The source of the information received by Mediaworks, Ms McCallum and Mr Clayton is unknown. In *Slater v Blomfield*, there were alleged sources and the Judge noted that there was no question about their losing or being damaged in their jobs, or otherwise suffering economic or reputation consequences, and there were no delicate family relationships or friendships at stake. The Court in this case is not in a position to make similar or indeed any observations or findings in relation to adverse effects of disclosure on the informant or any other person.

(d) The public interest in the protection of communication of facts and opinion to the public by the news media and the ability of the news media to assess sources of facts

[65] In *Slater v Blomfield*, Asher J made the following observation in relation to the way in which the informant had come by the information in question:[22]

> In the ordinary course of events persons do not legitimately come by the personal hard drive and filing cabinets of other persons. Even if Mr Slater was not a party to any illegality, it seems likely that the information was obtained illegally by the sources, and this diminishes the importance of protecting the source. There is less public interest in encouraging persons who are in a private dispute with others from going to the media with unlawfully

[22] *Slater v Blomfield*, above n 18, at [134].

> obtained confidential material to hurt them. This material prima facie is in that category. This is a factor which supports a public interest in disclosure and that further diminishes the public interest in protecting the source.

[66] In the present case it is not suggested that the documents in question were obtained illegally, but it seems clear that they were distributed or passed over to the media in breach of an injunction of a court. In that event, the passing over of the documents was unlawful. In my opinion this is a factor which supports a public interest in disclosure and diminishes the public interest in protecting the source of the information.

(e) Weighing the factors

[67] In *Slater v Blomfield*, Asher J said that in undertaking this exercise it is appropriate to bear in mind the policy reason behind the protection provided by s 68, to promote the free flow of information, a vital component of any democracy. He found, however, that this did not arise in a significant way in that case, which had developed from a private disagreement between business associates, and involved allegations involving private actions which did not appear to give rise to any significant public interest.

[68] The present issues between Mr Staples and CRS on one hand, and those who participated in the programmes aired by Mediaworks on the other, might be similarly described and I do not discern any significant public interest in those disputes. In my view, however, there is a public interest in the airing of issues which are relevant to the very substantial exercise of resolving people's claims or cover by EQC and by private insurers. That is the service offered by Mr Staples and CRS at material times. Relevantly, though, the criticisms levelled at them were only directed in part at that activity. More wide-sweeping accusations of inappropriate conduct were focussed on other alleged activities of Mr Staples and others associated with him, in other contexts. The truth of the various alleged statements which form the basis of the present claims, and which relate to the provision of services relating to earthquake damage claims, and whether those views were honestly or genuinely held, carries with it an element of public interest. Statements not directed at those issues, in my opinion, do not.

Apparent breach of the injunction is a further element of public interest, as I have already discussed.

[69] These factors weigh in favour of the identity of the informant being disclosed.

[70] In the present case the public interest in the free disclosure of information to the news media by protecting sources is not a major factor, given the nature of the claims that are made which involve dishonesty and potentially criminal conduct, and the unsatisfactory prior relationships between those interviewed in the programme and Mr Staples and his associates, derived from private feuds of no public interest. Although it cannot confidentily be said that a personal vendetta appears to have driven the disclosure of documents to the media in this case, as in *Slater v Blomfield*, it appears that personal vendettas form the basis for casting aspersions on Mr Staples and CRS in the publications in issue. The airing of issues relating to earthquake recovery claims has some public interest, but the statements made raised that issue partly by reference to the matters just referred to.

[71] In my view, for all the above reasons, the public interest in the disclosure of evidence of the identity of the informant outweighs the public interests in the communication of facts and opinions to the public by the news media, and thus the ability of the news media to assess sources of fact.

[72] Therefore s 68(1) does not apply in this case.

Part 4 of the schedule

[73] Part 4 lists documents that are no longer in the second, third and fourth defendants' control, but once were. The generality of the information in the schedule is challenged by Mr Morten.

[74] In *Blomfield v Slater*,[23] Heath J was required to consider this issue in the context of a defamation claim. The starting point is r 8.19 of the High Court Rules,

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23 *Blomfield v Slater* [2017] NZHC 1654.

the relevant parts of which provide for a Judge to order a party to file an affidavit stating:

> if [documents] have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them.

[75] In that case Mr Slater had deposed that he had begun to delete documents in response to a hack of his website, and accordingly, documents that had been deleted by the time the affidavit of documents was sworn may not have been included. His Honour considered whether there was any need for Mr Slater to file and serve a further affidavit clarifying the existing position. He assumed that the documents disclosed in the affidavit which had been filed represented documents over which Mr Slater had possession or control at the date he swore the affidavit, but said there was a need to go further when documents had been in the possession of a party but were no longer. Given that there had been an acknowledgement by Mr Slater that some electronic communications had been irretrievably deleted, his Honour considered a further affidavit was required to provide greater clarity as to the present position.

[76] The Judge directed Mr Slater to file and serve a further affidavit which was to contain information on the date on which the hack of the website had occurred, clarified the period over which text messages and other forms of communications on Mr Slater's cellphone and computers were permanently erased, provided a list by group of those documents which were sought by Mr Blomfield which had been permanently erased, and provided a list by group of documents which were out of Mr Slater's possession, but which had been in his control and which he knew would be discoverable if he still had control of them. In essence that reflects Mr Morten's position in this case.

[77] It is necessary to reproduce the five paragraphs of descriptions of documents which are contained in Part 4 of the Schedule:

> **Documents that are no longer in the Second, Third and Fourth Defendants' control.**
>
> The following documents were, but are not now, in the control of the second, third and fourth defendants:

(a) Documents which were in the control of the second, third and fourth defendants for the purposes of investigation and reporting for the Campbell Live program which were disposed of immediately following the broadcast of the Campbell Live program, in accordance with the second, third and fourth defendants' standard journalistic practice.

(b) Documents which were in control of the second, third and fourth defendants for the purposes of investigation and reporting of the Campbell Live program which were received in hard copy, and returned back to the confidential source shortly after the Campbell Live program went to air.

(c) Documents which were in control of the second, third and fourth defendants for the purposes of investigation and reporting for the Campbell Live program and which were destroyed as a consequence of the following:

    (i) A decision by first defendant to cease production of the Campbell Live program, resulting in the destruction of documents sourced for the purposes of investigation and reporting in Campbell Live programs;

    (ii) The relocation of the newsroom of the first defendant, resulting in the destruction of remaining Campbell Live records; and

    (iii) The resignation of the fourth defendant from the employment of the second defendant, resulting in the destruction of remaining Campbell Live records held by the fourth defendant.

(d) The originals of correspondence originating from the second, third and fourth defendants and their legal advisors where only copies have been discovered were last in the possession or power of the second, third and fourth defendants on or about the respective dates of those documents. The originals of these documents should now be in the hands of the addressees.

(e) The originals of all court documents in this proceeding should have been filed in Court.

[78] Mr Cleary's objection to providing an affidavit with further detail in Part 4 of the Schedule was also based on protection of the source of the documents in question, as well as a lack of recollection by the defendants of what those documents were. He notes that it is now four years since the relevant events took place.

[79] In my view Part 4 of the Schedule does not comply with the obligation on each of the defendants to disclose details of documents which are no longer in their possession or under their control. Paragraph (a) relates to documents which were disposed of. These documents are to be identified with as much precision as can now be given. Paragraph (b) refers to documents received in hard copy which were

returned to the confidential source. The same applies. I note, too, that as this paragraph refers to documents received in hard copy, there is an implication that those referred to in paragraph (a) may have been received in electronic format, and therefore, for clarity, the form in which the documents were received is to be stated in all paragraphs.

[80] Paragraph (c) is to provide detail of when the decision to cease production of Campbell Live was taken, and how this resulted in the destruction of documents given that in paragraph (a) the destruction is said to have been in accordance with standard journalistic practice. The date on which the relocation of the newsroom occurred and the date of the resignation of Mr Clayton from Mediaworks are to be given. Again, information is yet to be provided on why either of these events resulted in destruction of documents. In this context I note that four different reasons are given in paragraphs (a) and (c) for documents having been destroyed. If, as the Court must presently assume, there were four different reasons and those reasons arose at different dates (as appears to have been the case), there is to be full disclosure of the documents which were destroyed on each occasion, and how those documents came to be destroyed then, while other documents were destroyed on the other occasions.

[81] Counsel referred to an email from Mr Moss, then counsel for the plaintiffs, dated 22 August 2014, in which he wrote to Mr Campbell, Ms McCallum and Mr Clayton, as well as a Mr Jennings, with a copy to Mr Staples and the then lawyer for Mr Staples and CRS, Mr Shand. In this email Mr Moss referred to an earlier email of 31 July. In both he took issue with the publications now in issue in this case. Mr Morten argues that at least by the dates of those two emails all of the defendants were on notice that litigation would ensue and were therefore under a duty to retain documents. Rule 8.3 provides that as soon as a proceeding is reasonably contemplated a party or prospective party must take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding. Mr Cleary says neither email was sufficient to trigger this role.

[82] Whilst I acknowledge that this may be a live issue at trial, depending on the final outcome of discovery of documents resulting from this judgment, I am not assisted in resolving the issues presently before the Court by this principle. What is

now required is the provision of an affidavit with considerably more detail than that presently provided, as discussed above. When that has occurred that may or may not provide a basis for cross-examination or submissions in relation to r 8.3, in a different context.

Outcome

[83] The Court makes orders in favour of the plaintiffs on their amended application dated 5 June 2018.

[84] So far as the application in paragraph 1.1 is concerned, the particulars will be given in such form as shall clearly distinguish between the facts relied on for s 38(a) and those relied on for s 38(b).

[85] So far as the application in paragraph 1.2 is concerned:

(a) I reserve leave to seek a supplementary order if there is disagreement about whether disclosure and identification is sufficient.

(b) The order relates only to documents 12 to 16 inclusive and 46 to 51 inclusive in Part 3.

[86] Costs are reserved, but will be awarded to the plaintiffs as successful party. If not agreed, memoranda may be filed by the plaintiffs and the defendants in successive 10 working day periods.

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J G Matthews
Associate Judge

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