IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA436/2018
[2019] NZCA 133

BETWEEN	MEDIAWORKS TV LIMITED First Appellant
	KATE MCCALLUM Second Appellant
	TRISTRAM CLAYTON Third Appellant
AND	BRYAN DOUGLAS STAPLES First Respondent
	CLAIMS RESOLUTION SERVICE LIMITED Second Respondent

Hearing:	21 February 2019 (further submissions received on 8 April 2019)
Court:	Miller, Asher and Clifford JJ
Counsel:	J G Miles QC and T F Cleary for Appellants P A Morten and J Moss for Respondents
Judgment:	3 May 2019 at 10 am

JUDGMENT OF MILLER, ASHER AND CLIFFORD JJ

A The application for an extension of time to apply for a review of the Associate Judge's decision is granted.

B We determine the review sitting as a full court of the High Court.

C The application to file a memorandum supporting the judgment on other grounds is granted.

D The review is allowed.

E The High Court order to direct disclosure without redactions is quashed.

F The effect of allowing this review is that the part of the High Court judgment directing the disclosure of each of the documents in part 3 of the schedule to their affidavits without redactions is declined, but only to the extent that the documents or parts of them identify the informants who have provided the documents to Mediaworks.

G In all other respects issues of the adequacy of discovery remain open and are not determined by this review. It is open to the respondents to seek a further hearing in relation to the discovery issues that have not been determined, or to bring another application in relation to discovery. In particular, the issue of whether the documents do in fact fall into the category of protected documents under s 68(1) remains open.

H The respondents are jointly and severally liable to pay one set of costs to the appellants on a 2B basis under the High Court Rules 2016 and usual disbursements.

I The costs orders made by the Associate Judge in the High Court are quashed. If the parties cannot agree on those High Court costs, the issue should be determined in the High Court in accordance with this judgment.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The issue that is raised before us is whether the appellants as journalists are entitled to invoke the statutory protection of sources provided for in s 68(1) of the Evidence Act 2006. The appellants are the media company, Mediaworks TV Ltd, together with two journalists who were employed by Mediaworks at the relevant time, Kate McCallum as a television producer, and Tristram Clayton as a journalist (for convenience we will refer to all three as Mediaworks).

[2] The first respondent Bryan Staples is a director of the second respondent, Claims Resolution Service Ltd (Claims Resolution). Mr Staples and Claims Resolution are engaged in the business of assisting claimants in bringing claims for those who suffered damage to their properties in the Canterbury earthquakes of 2010 and 2011. Mr Staples and Claims Resolution claim they were defamed by Mediaworks and its journalists when, in a Campbell Live programme and subsequently, Mediaworks broadcast and published complaints that were very critical of aspects of their Christchurch business activities. Mediaworks refused to discover certain documents, claiming the protection from disclosing the identity of informants in s 68(1) of the Evidence Act. In the High Court Mr Staples and Claims Resolution successfully challenged the availability of that protection relying on s 68(2).[1] That decision has been appealed to this Court.

[3] Following the delivery by the Associate Judge of the decision that is challenged, Mediaworks proceeded by way of appeal. The case on appeal was filed followed by submissions, and the respondents filed a memorandum seeking to support the judgment on other grounds. The case was fully argued before us as an appeal without opposition from the respondents. Subsequent to that hearing in the process of our deliberations, the Court became aware that the decision appealed from was a part of proceedings governed by the Judicature Act 1908. That being so, any challenge to the High Court decision fell under s 26P of the Judicature Act 1908 and should have proceeded as a review by the High Court. The Senior Courts Act 2016, which abolished review, did not apply.[2] Following a minute of the Court, that position is now accepted by the parties.[3] For reasons that we set out at the end of this judgment we have decided to determine the challenge to the High Court decision as a full court of the High Court sitting on review. We will for convenience continue to refer to the parties as the appellants and the respondents.

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1 *Staples v Freeman* [2018] NZHC 1604.
2 Senior Courts Act 2016, s 27.
3 *Mediaworks v Staples* CA436/2018, 29 March 2019.

Background

District Court proceedings

[4] A Mr Richard Freeman, who is not a party to this review but is a defendant in the High Court proceedings, was a director of the company Ironclad Securities Ltd (Ironclad), a debt collection company, and had an association with Mr Staples and his companies that ended in acrimony. In April 2014 Mr Freeman started publishing posts on a Facebook website he administered which were highly critical of Mr Staples and his business operation. Mr Freeman claimed that he and his company were owed in excess of $200,000 by Mr Staples and his business. He did not limit his attack on Mr Staples to just that matter. The statements about Mr Staples involved the use of strong language including descriptive phrases of Mr Staples and his enterprises as "professional conmen" involved in "dodgy dealings" and other similar pejorative remarks. There was an accusation of manipulation of police, media and lawyers.

[5] On 11 April 2014 Mr Staples issued defamation proceedings against Ironclad and its associates. He sought an interim injunction in the District Court at Christchurch against Ironclad and other persons associated with Ironclad, Mr Richardson, Mr Joseph Smith and Mr Kane Smith. On 15 April 2014 Judge Kellar of the District Court granted a without notice application of Mr Staples for an interim injunction in the following terms:

> (1) That the first respondent, IRONCLAD SECURITIES LIMITED, and the second respondents, LYNDON VAUGHAN RICHARDSON, JOSEPH DENNIS ROBERT SMITH and KANE ARANA SMITH, immediately remove all statements and material in any way related to the applicant and his associated companies from the webpage on Facebook operated by the first and second respondents at the internet address www.facebook.com/ironcladsecurities
>
> (2) That the first and second respondents or their employees or associates are hereby restrained from publicising any information in any way relating to this proceeding pending further order of the Court.

Later Mr Freeman was joined by Mr Staples as a defendant to the District Court proceedings. We will refer to these proceedings as the District Court proceedings, to distinguish them from the later High Court proceedings which have led to this review.

[6] Mr Staples had also filed an affidavit in support of his District Court application for an interim injunction. That affidavit was responded to by statements of defence by Ironclad and the other defendants, and supporting affidavits were also filed in the District Court. It is alleged by Mr Staples that Ironclad's statement of defence and the other supporting affidavits state amongst other things that Mr Staples is corrupt and a thief, has an unpaid and undisputed debt of over $170,000, with an associate has over 24 companies struck off, is a fraudster and a conman, has committed an unlawful act and has defrauded members of the public.

The first Campbell Live programme

[7] In the statement of claim filed by Mr Staples and Claims Resolution in the later High Court proceedings which have led to this review, it is alleged that after the interim injunction was granted in the District Court Mr Freeman through a third party provided copies of the District Court documents to the Rt Hon Winston Peters MP. It is also alleged that Mr Freeman spoke by telephone to Ms McCallum about the contents of the District Court documents and the website posts. It is pleaded that on 23 July 2014 Mr Peters used the information that he had been given to deliver a speech in Parliament which was highly critical of Mr Staples, accusing him amongst other things of:

(1) a long list of fraudulent practices;

(2) using his companies which purported to assist earthquake victims to defraud, mislead and cheat people;

(3) carrying out technical inspections of properties for earthquake compensation purposes which neither he, nor his companies and the people they employed were qualified to do; and

(4) being paid for but not actually providing genuine technical reports.

[8] It is alleged that on 23 July 2014 Mediaworks broadcast Mr Peters' allegations on the Campbell Live programme (which we will refer to as the first Campbell Live programme) to an audience of hundreds of thousands of

New Zealand viewers. It is also alleged that Mediaworks posted reports of Mr Peters' allegations on its website which was on the worldwide web system of the internet and open to general access by any user.

[9] There is no claim against Mediaworks for this first Campbell Live programme. The claim arose from events that followed.

The second Campbell Live programme

[10] Ms McCallum and Mr Clayton started working on a story about Mr Staples and his associated companies. It is alleged that on about 23 July 2014 Mr Staples told Ms McCallum and Mr Clayton that there was an interim injunction in place and that they could not discuss the case because of that. Mr Staples asserts that he put this in an email of 28 July 2014.

[11] On 30 July 2014 Mediaworks broadcast another Campbell Live programme which we will call the second Campbell Live programme. This was produced for Mediaworks by Ms McCallum. Mr Clayton was a reporter and presenter on that programme. It is this programme and what followed which is the subject of these proceedings. It is pleaded that various defamatory statements were made about Mr Staples and his companies.

[12] Those who spoke in the second Campbell Live programme included Mr Staples who was asked to and did comment on some of the allegations against him. The programme included quotes from Mr Peters, Hon Ruth Dyson MP, a customer of Mr Staples and a former business associate. These were critical both of him and his business. The programme ended with some statements by Mr Staples.

[13] We do not propose setting out all the contents of what was said. It is alleged by Mr Staples that the nature and ordinary meaning of the words Mediaworks published on the web were that his company defrauded, misled and cheated his clients, rorted the system, knowingly used unqualified people to carry out assessments of building damage, and stole money from its clients. The allegations extend to what was said on the programme and what was then reported by Mediaworks subsequently. In the course of the interview Mr Staples had strongly denied the allegations and

asserted that his company was "part of a solution to try and help people get what they are fully entitled to". Damages were sought against the appellants.

[14] Mediaworks in its statement of defence plead no defamatory meaning, consent on the part of Mr Staples, statutory qualified privilege, common law qualified privilege, and qualified privilege — responsible journalism and honest opinion.

The lists of documents

[15] Lists of documents were filed by Mediaworks, Ms McCallum and Mr Clayton. The lists of documents accompanied a paragraph based on a claim for confidentiality of sources for part 3 of the schedule to the discovered documents which lists the relevant documents. It is stated in Mediaworks' statement of defence, in respect of part 3:

> 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.

[16] Confidentiality is no longer claimed for all the documents that were originally listed in that schedule. There are now 11 documents that remain subject to such claims, described in part 3 as follows:

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

[17] It is claimed by Mediaworks that to give further details of these documents would be to reveal their source, and thereby defeat the purpose of s 68(1). It is that claim that has led to these proceedings.

The issue

[18] Section 68(1) and (2) of the Evidence Act 2006 provides:

> **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.
>
> (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.

[19] It is common ground that the three appellants, Mediaworks and Ms McCallum and Mr Clayton, are journalists. It is not contested that qualifying promises to informants were made. Therefore s 68(1) applies.

[20] The central issue is whether the High Court should have ordered that s 68(1) not apply because under s 68(2) the public interest in the disclosure of the identity of the informants outweighed the likely adverse effect of the disclosure on the informant or any other person, and the public interest in the communication of facts and opinion to the public and the ability of the news media to access sources of fact.

[21] Other peripheral issues arose at the hearing before us. There was an application for leave to file out of time a memorandum supporting the decision appealed against on other grounds made. It was argued that the descriptions of the documents should have been more precise. The question of whether a court should look at the allegedly confidential documents to see whether sources were disclosed was raised. It was submitted that in relation to the listed court documents, the disclosure of those documents would not reveal the identity of the source, and that any additions to the documents could be redacted. We deal with these issues at the end of the judgment.

The High Court judgment

[22] Having found that s 68(1) applied, Associate Judge Matthews concluded that under s 68(2) there was a public interest in the disclosure of the identity of the sources of the relevant documents. He held that it would be relevant to the ability of Mr Staples and Claims Resolution to respond to the defence of honest opinion, to know the sources of the documents.[4] Their identities could be important. There was also a public interest in ascertaining whether the supply of the documents was in breach of the injunction, which he thought may have been the case.[5]

[23] The Associate Judge felt that the personal nature of the criticisms and the apparent breach of the injunction were factors weighing in favour of the identity of the sources being disclosed.[6] He held that the public interest in the free disclosure of

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[4] *Staples v Freeman*, above n 1, at [60]–[62].
[5] At [62].
[6] At [69].

information to the news media by protecting sources was not a major factor. Although the conduct of claims against insurers was of the public interest, these claims were more extensive and were "derived from private feuds of no public interest".[7] They alleged dishonest and potentially criminal conduct. He took the view that personal vendettas formed the basis for casting aspersions on Mr Staples and his company.[8] He held:

> [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.

[24] In reaching his decision he applied and followed two earlier High Court decisions of *Police v Campbell* and *Slater v Blomfield*.[9]

The issues

[25] Mr Miles QC for the appellants argued that the High Court had set the bar too low for the removal of source protection for journalists. The Associate Judge had relied heavily on *Police v Campbell* and *Slater v Blomfield*, and in so far as he saw analogies between the present case and *Slater v Blomfield*, Mr Miles submitted there was an error; the cases were very different. He argued that unless corrected by this Court, the High Court judgment would "serve to chill the freedom of the media to report on matters of public interest".

[26] In response Mr Morten for the respondents argued that the Associate Judge's assessment of the weight to be given to the various factors was accurate, and that the factors weighing against protection that arose in *Slater v Blomfield* also arose in this case.

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7 At [70].
8 At [70].
9 *Police v Campbell* [2010] 1 NZLR 483; *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835.

Section 68 of the Evidence Act

[27] The principles to be applied in approaching s 68 were extensively discussed in three High Court cases, *Police v Campbell*, *Slater v Blomfield* and *Hager v Attorney-General*,[10] and we do not propose repeating what was said in those cases. In the first of these, *Police v Campbell*, Randerson J set out comprehensively the development of the protection of journalistic sources in England, and the Law Commission recommendations that led to the enactment of s 68 in the Evidence Act.[11] We do not repeat his helpful analysis which has been adopted in the other recent cases.[12] However, some initial points must be made about s 68(2) of relevance to the issues in this case.

[28] As was stated in a different legislative context, adopting a passage from the European Court of Human Rights decision in *Goodwin v United Kingdom*:[13]

> Protection of journalistic sources is one of the basic conditions for press freedom. … Without such protection sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

[29] The free flow of information is a vital component of any democracy. In *Ashworth Hospital Authority v MGN Ltd* the English Court of Appeal spoke of the chilling effect of Court orders requiring the disclosure of press sources.[14] The public interest in the non-disclosure of press sources is constant, "whatever the merits of the particular publication, and the particular source".[15] In New Zealand in 1994 the Law Commission issued a discussion paper entitled *Evidence Law: Privilege*.[16] It noted that the enactment of the New Zealand Bill of Rights Act 1990 arguably gave scope to journalistic privilege arising from the right to freedom of expression guaranteed by s 14 of the New Zealand Bill of Rights Act.[17] The Commission observed that there was a case for according privilege to journalists' confidential

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10 *Hager v Attorney-General* [2015] NZHC 3268, [2016] 2 NZLR 523.
11 At [50]–[103].
12 *Slater v Blomfield*, above n 9, at [105]–[106] and *Hager v Attorney-General*, above n 10, at [88].
13 *Goodwin v United Kingdom* [1996] ECHR 16, (1996) 22 EHRR 123 at [39].
14 *Ashworth Hospital Authority v MGN Ltd* [2001] 1 All ER 991
15 At [101].
16 Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994).
17 At [338].

sources of information. However that had to be circumscribed with some care and there was no room for any "absolute" privilege that would prevent courts from looking at whether the privilege was justified.

[30] At that time s 35 of the Evidence Amendment Act (No 2) 1980 conferred a statutory discretion on the court to excuse any witness from answering any question or producing any document on the ground that that would be a breach by the witness of a confidence that the witness should not be compelled to breach. Such a confidence could arise from this special relationship existing between the witness and the source of the information or document. The protection set out in the section was not confined to journalists.

[31] The Law Commission in its 1999 *Evidence* report took the issue further, and proposed a specific section to create a specific qualified privilege for journalists' confidential sources.[18] The Commission stated in its report "[t]he protection of journalists' confidential sources of information is justified by the need to promote the free flow of information, a vital component of any democracy".[19]

[32] The Commission noted that an express qualified privilege which put the onus on the person seeking to have the source revealed was preferable to a general discretion. It was said that "[t]his would give greater confidence to a source that his or her identity would not be revealed".[20]

[33] The draft section it put forward was similar to the present s 68, and there were no material changes when s 68(1) and (2) were enacted.

[34] Section 68 is in subpart 8 of the Evidence Act. That subpart is headed "Privilege and confidentiality". The subpart commences with "Matters relating to interpretation and procedure" and is then further subdivided under the headings "Privilege" and "Confidentiality". Sections 68–70 come under the heading of "Confidentiality". The protection of sources is therefore placed in the Act as a confidentiality rather than a privilege issue. Effectively it provides an exemption for

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18 Law Commission *Evidence: Reform of the Law* (NZLC R55, 1999).
19 At [301].
20 At [302].

journalists from the usual procedural obligations by which in civil or criminal proceedings persons may be required to answer any question or produce any document. The protection only arises when the answer or production would disclose the identity of the informant or enable that identity to be discovered.

[35] Except as specifically enacted in s 68, journalists are generally competent and compellable witnesses who are no different from other witnesses. It is only in the defined circumstances of s 68(1) that they are able to take advantage of a protection against compellability. Section 68(1) creates a starting point that a journalist, as defined in s 68(5), who has promised confidentiality is not obliged to answer questions or produce documents that will disclose the identity of the informant or enable the identity to be discovered. This prima facie protection may be displaced by an order under s 68(2). The listing of documents is the first stage of the production of a document for inspection, and s 68(1) can be applied to give protection at that first stage of the discovery process. Indeed, this was not contested before us.

[36] Consistent with the view expressed by the Law Commission, s 68(1) sets out the protection, and s 68(2) the circumstances when it is not to apply. It is not to apply only if a Judge of the High Court is "satisfied" that on the basis of the test in s 68(2) there should be disclosure of evidence of the identity of the informant. Consistent with the Law Commission's view, this wording makes it clear that the onus is on the person seeking to have the source revealed. That person must "satisfy" the Judge.

[37] There is nothing in the section that dictates the type of onus, other than that the Judge must be "satisfied" that the section should apply. The Court therefore must approach its task from the position that under s 68(2) a departure from the default position as sought, with the onus being on the person seeking to invoke that departure. We see no point in categorising the onus, and we agree with the comment made in *Police v Campbell*, "[t]he presumptive right to the protection should not be departed from lightly and only after a careful weighing of each of the statutory considerations".[21]

[21] *Police v Campbell*, above n 9, at [93].

[38] We also agree with the view expressed in that case that in carrying out a s 68(2) exercise, a Judge is carrying out a balancing exercise weighing stated criteria.[22] This is an exercise of evaluative judgment of fact and degree, and not the exercise of a discretion.[23]

[39] It is relevant to note in relation to this review that the phrase "public interest" is used in two different ways in s 68(2). Initially in s 68(2) it is used in the sense of a public interest in the disclosure of evidence of the identity of an informant. This is quite a narrow consideration, focused on why knowing the identity of the informant is important. This use of the phrase "public interest" is to be contrasted with the use of the phrase in s 68(2)(b), where it is a reference to the public interest in the free and safe communication of facts and opinion to the public by the news media, whereby sources are protected from having their identity exposed. Used in this second way, the phrase "public interest" reflects the protection of journalists' sources we referred to earlier in this section.

[40] Therefore, a person seeking to invoke s 68(2) must first explain how the public interest in disclosure of an informant's identity bears on the case. The phrase "public interest" in this part of s 68(2) is not defined, and with the other s 68(2) factors is used in juxtaposition with "having regard to the issues to be determined in that proceeding". It is also stated in s 68(5) that the phrase "public interest in the disclosure of evidence includes, in a criminal proceeding, the defendant's right to present an effective defence". In our view, that public interest can extend also to a plaintiff's right to present their claim effectively in civil proceedings, in this case a defamation proceeding.

[41] In *Police v Campbell* the public interest identified in this first sense was the public interest in the resolution of a widely publicised crime. The identification of the informant was of high relevance and significance to the prosecution of that crime.[24] The disclosure of the source could lead to the disclosure of the perpetrator. In that particular situation, s 68(2) was applied.

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22 At [90].

23 For discussion of the distinction see *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308 at [41]–[50].

24 At [106].

[42] In *Slater v Blomfield* there was a defamation claim against a blogger, the background dispute was personal between the plaintiff and the defendant and the complainants, and was in the nature of a feud. The public interest in this first sense was in ensuring that parties to civil litigation have sufficient information to enable them to fairly advance their position, and have a level playing field in the courtroom. It was held that in all litigation there is a strong public interest in parties being able to present their cases effectively.[25] This was because the identity of those involved in the complained of actions was not known, and the allegations arose out of a private feud between the parties. There was no materially countervailing public interest in the defamatory material. In that particular situation s 68(2) was applied.

[43] Both these cases where s 68(2) was applied can be seen as having unusual facts giving rise to a public interest in disclosure. With this background, we turn to the question of the public interest in these circumstances in the first sense it is used in s 68(2).

The public interest in the disclosure of the informants' identity

[44] The public interest in the disclosure of evidence of the identity of an informant will generally be particular to the facts of the case. As we have indicated, there is a public interest as a general proposition in the disclosure of all material that may assist or hinder parties involved in civil litigation, so the parties can present their cases effectively.[26] In this case this public interest is reflected in the High Court rules that require discovery of all relevant documents, to give parties access to all documents that can assist or damage their case.[27] Sometimes those documents will reveal the informants of complaints as is claimed to be the case in this proceeding.

[45] As was discussed in *Slater v Blomfield*, in defamation cases the identity of sources may in some circumstances assist in assessing whether statements are true.[28] The identity and role of a source who may obviously be deliberately seeking to hurt another party could be relevant to the credibility of that person's allegations. It could

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[25] *Slater v Blomfield*, above n 9, at [112].
[26] *Slater v Blomfield*, above n 9, at [112].
[27] See High Court Rules 2016, pt 8, in particular r 8.7.
[28] At [115].

be relevant to establish truth. It could be relevant also to the defence of honest opinion, as certain informants may be seen as so obviously unreliable, so that no honest opinion could be held as to the accuracy of what they say. Conceivably the identity of an informant would also be relevant to other defences.

[46] Such a personal vendetta did exist in *Slater v Blomfield*, the decision relied on by the Associate Judge and the respondents. In that case it was accepted that the sources who had provided the defendant, Mr Slater, with the information that he published on his blog site could be persons whose identity could be relevant to the defences of truth and honest opinion. There was evidence in *Slater v Blomfield* that those informants were locked in a private and vindictive feud with the plaintiff. They appeared to wish to deliberately hurt him. Their identity was potentially very important to the plaintiff. As we have indicated, if the source was patently vindictive and unreliable, it would be more difficult to run the defence of honest opinion, as the defendant should have been on guard.

[47] These factors do not arise here. The Associate Judge referred to "unsatisfactory prior relationships between those interviewed in the programme and Mr Staples and his associates, derived from private feuds of no public interest", and that "personal vendettas form the basis for casting aspersions of Mr Staples and Claims Resolutions in the publications in issue".[29] There was a factual foundation for those statements. At least some of the complainants did appear to have considerable personal animosity to Mr Staples. However, the identity of those complainants referred to is known in this case. Contrary to the position in *Slater v Blomfield*, in this case the informants do not appear to have been the sources of the initial complaints, and have been conduits only. Here the actual complainants of wrongdoing by Mr Staples and Claims Resolution were the complainants publicly named on the programme. However, the informants are not those complainants; they are unknown persons who passed on to Mediaworks complaints of those now known persons. The sources only make up a small fraction of the content of the second Campbell Live programme

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[29] *Staples v Freeman*, above n 1, at [70].

[48] There is a basic distinction between identifying informants who experienced the conduct they describe, as in *Slater v Blomfield*, and those who are reporting what others say about the allegedly defamatory matters, and who are passing on those complaints of others to the media. The informants whose identity Mediaworks seeks to protect are in the latter category. In the second Campbell Live programme the persons who had experienced the bad behaviour of Mr Staples and his associates were known.

[49] Thus, we are unable to see any significant public interest in Mr Staples and Claims Resolution knowing the identity of the informants in this case. There is nothing to indicate that knowing their identity could help Mr Staples and Claims Resolution disprove truth and honest opinion or any other defence. We appreciate we cannot dismiss the proposition that the identity of the informants might help in some peripheral way in the proceeding, but the possibility is speculative. We are not prepared to make an adverse inference of the existence of informants whose identity is relevant in the absence of any facts or circumstances to justify that.

[50] The Associate Judge also appears to have taken the view that there may have been a public interest in knowing who the sources were because Mediaworks may have acted in breach of the District Court's injunction and such conduct may constitute contempt.[30] As we discuss later, we accept the possibility that in some circumstances unlawful behaviour by the informant could be relevant to a plaintiff's case in a defamation proceeding. For instance, a knowing and clear breach of a court order might be relevant to a defendant's defence of honest opinion or privilege.

[51] However even then, the public interest in disclosing the identity of informants may be outweighed by the public interest in protecting sources. It will not be uncommon that informants have breached some duty or broken some law providing information. Many whistleblowers who are employees or in some sort of business relationship with the person complained about will be breaching confidence or a contractual obligation in disclosing information. That without more will not create a public interest in the disclosure of their identity. Wrongful behaviour may, however,

[30] At [66].

in some circumstances lessen the public interest in protection, and we consider this later.[31] In *Slater v Blomfield* where unlawfulness was a factor, there was a likely inference that highly confidential information had been stolen and then used for malicious purposes.[32] There may be circumstances where unlawful acts by an informant could be relevant.

[52] There is evidence that Mediaworks knew about the injunction Mr Morten submits that on the basis of this evidence it is established that Mediaworks and Mr Clayton did receive, and use for the purposes of the Campbell Live programmes, documents from the District Court proceedings. However, there is no evidence that any of the informants for Mediaworks were parties to the District Court proceedings. A deponent for Mediaworks has sworn on oath that none of the parties whose identities are known including the defendants to the District Court proceedings, are the source of the documents. There is no evidence that the informants were aware or should have been aware of any contempt of court in publishing material. The complainants who made the statements the subject of the proceedings did so openly, in the full public gaze. In the first Campbell Live programme, what they said they put in the public domain. In the second Campbell Live programme, when the same type of general allegations were being made, they occurred as part of a public process, not connected to the District Court proceedings.

[53] While we cannot reach any final view on whether Mediaworks was in contempt, in all these circumstances it has not been shown that the existence of the District Court injunction in any material way adds to the public interest in the disclosure of the identity of the informants.

The likely adverse effect of the disclosure on the informants or any other person

[54] This factor can weigh against disclosure under s 68(2). For instance, the informants might be employees of the entity that is the subject of the complaint or a family member. Such persons could suffer severe consequences if their identity is disclosed.

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31 *Slater v Blomfield,* above n 9, at [60]–[61].
32 At [134].

[55] This circumstance does not arise in this case. There is nothing to suggest that disclosure could have an adverse effect on these informants. For instance, there is no suggestion, as there was of the defendant in *Slater v Blomfield* (although it was rejected) that any party is capable or would wish to do any physical harm to the informants.

Public interest in communication with the media

[56] We turn to the second type of public interest referred to in s 68(2) to be weighed against the first. This balancing factor reflects the policy behind s 68(1) of protection of media sources.

[57] There was at the time of the second Campbell Live programme a public interest in information being disclosed about the actions of those involved in advocacy and litigation for Christchurch homeowners after the Canterbury earthquakes. Following the Canterbury earthquakes there was a large number of homeowners in Christchurch whose property had suffered significant damage. They needed (often urgently) to bring claims against those who might have a legal obligation to give them compensation, in particular the Earthquake Commission and private insurers. However, many lacked the financial backing and expertise to conduct major litigation. It was of great importance to such victims of the earthquake that they find access to trustworthy and competent litigation help.

[58] On the information before us Mr Staples had been very successful in Christchurch in attracting such claims work from these vulnerable people. Indeed it seems clear that he was acting for the majority of Christchurch earthquake claimants in claims before the High Court. His companies funded some of the costs while charging clients for certain steps in the claims process. On the information before us his companies would take by way of a commission a percentage of any amount recovered. It is said that Mr Staples claimed to be the Robin Hood of Christchurch.

[59] In those circumstances there was a significant public interest in any information indicating that Mr Staples and his companies were not pursuing these claims in a satisfactory manner. Further, given the vulnerability of claimants, the numbers of them, and the trust they gave to those who ran their claims, general

information about Mr Staples' reputation, and that of his various enterprises, was of public interest. The issues were of sufficient importance to attract the attention of a senior member of Parliament who spoke in Parliament, attracting nationwide media coverage and interest. This was symptomatic of the importance of the issue to a large number of people in Christchurch, who had the sympathy and support of the New Zealand community. This crosses the threshold of public interest in s 68(2)(b), and by a significant margin.

[60] We agree with the submission of Mr Miles on behalf of Mediaworks that there was insufficient recognition of this in the judgment, and therefore insufficient weighting of this factor. In written submissions it was suggested for the appellants that the Associate Judge did not address the issue of the public interest in protecting journalistic sources. However, the Associate Judge did make some reference to this factor:

> [68] The present issues between Mr Staples and [Claims Resolution] 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 [Claims Resolution] 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.
>
> (Emphasis added).

[61] We agree that some of the criticisms were of actions by Mr Staples and his company that did not involve earthquake claimants. But the questioning of his actions was all in the context of his performance as a litigation funder and manager of earthquake claims. Thus the programme began with these words:

> We begin tonight with New Zealand First Leader Winston Peters and his accusations that the Christchurch rebuild is being hampered by a massive fraud, how massive? Well Winston Peters has previously said $130m in total.

[62] The Hon Ruth Dyson spoke as a member of Parliament concerned about what was happening to Christchurch claimants. The more specific non-earthquake complaints, provided in the context we have set out, if true, did reflect badly on Mr Staples' general business practices. They were in that sense relevant to his earthquake business.

[63] The situation is in stark contrast to that which arose in *Slater v Blomfield*, where the allegedly defamatory allegations Mr Slater made against Mr Blomfield were of an intensively personal nature and not of general interest to the community. The defendant Mr Blomfield, unlike Mediaworks, was not a public figure and was not involved in any sort of a business or operation affecting large numbers of the public in the way that Mr Staples and his associates were. Therefore with respect we are unable to agree with the Associate Judge's conclusion after the quoted discussion, that public interest in the free disclosure of information to Mediaworks was "not a major factor".[33] We have reached the opposite conclusion.

[64] Under this head, the Associate Judge diminished the weight placed on the public interest in the communication of facts and opinions to the public by the news media, because of the breach of the injunction.[34] This issue was addressed by Lord Bridge in *X Ltd v Morgan-Grampian (Publishers) Ltd*:[35]

> If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity.

[65] We accept that there can be less public interest in the ability of news media to access sources of facts, where the source has acted illegally and in a manner deserving

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33 At [70].
34 At [66].
35 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 at 44.

serious opprobrium. Nevertheless we recognise even the most serious illegality may not disqualify protection where the public importance of the information is high.[36]

[66] For reasons we have already set out, we do not consider that it has been shown, even to a prima facie level at this point, that Mediaworks was acting in contempt of court when it published some of the material for which it now seeks the protection of s 68(1). The general complaints were already in the public domain in any event. We do not see the possibility of contempt as a factor which dissipates the strength of the public interest in enabling the news media to access sources and promise the protection of their identity.

[67] In assessing the public interest, it is relevant that Mediaworks is a major New Zealand news organisation. As a mainstream media organisation, it is subject to the complaints procedures of the Broadcasting Standards Authority and the Media Council. The fact that it is an established major media organisation is relevant because when it publishes it knows it will be widely watched and read, and can be held to account.

Weighing the factors

[68] As we have set out we are not satisfied that there is any significant public interest in the disclosure of the identity of the informants in this case. There was nothing to indicate that Mr Staples and Claims Resolution will be significantly inhibited in conducting their claim because they do not know the identity of the persons who sent the Court documents to Mediaworks.

[69] We weigh against that the strong interest we have identified in the communication of facts and opinion to the public by the news media, and the fact that the issue being addressed, namely the credibility of the business operation of Mr Staples and his associates, was of significant interest to a considerable number of Christchurch home owners who had suffered in the Canterbury earthquakes. It is in such an area, where the confidence and trustworthiness of persons who are providing a significant service to the public is being debated, that the news media should have

[36] See the statement of Laws LJ in *Ashworth Hospital Authority v MGN Ltd*, above n 14, at [101].

the ability to access sources. As part of that they should have the ability to receive material from informants and give undertakings of confidentiality in the knowledge that they and the informants can expect them to be upheld under s 68. We have already referred to this factor at the outset of our discussion.

[70] For the reasons we have set out, we have reached the view that the weighing process comes out firmly in favour of protection, and against disclosure under s 68(2). We respectfully differ from the Associate Judge on the assessment of the considerable public interest in disclosure, the assessment of Mediaworks possibly being in contempt, and the assessment of the considerable public interest in protection. We therefore allow the review, and quash the decision requiring the respondents to disclose each of the documents listed in part 3 of the schedule to their affidavits without redactions.

Other issues

[71] Two weeks before the hearing the respondents applied for leave to file out of time a memorandum supporting the decision appealed against on other grounds. They wish to submit that the Associate Judge should have determined that certain documents or parts of those documents, do not qualify as documents capable of protection under s 68(1), an issue which was raised before the Associate Judge but not addressed in his judgment. The application was not determined in advance of the hearing, and the parties were advised that they should come to Court prepared to argue the point.

[72] The substantive issue raised was in the end discussed in some detail at the hearing. It was submitted for the respondents that some of the documents for which protection was sought were clearly not protected. Disclosure of some documents would not lead to the identity of the informant being discovered. Reference was made to documents for which protection was claimed which were documents from the District Court proceedings, which would not reveal the identity of the source.

[73] We agree that the Judge did not determine this issue. In our view there is some force in the submission that the description of some of the documents, in particular the Court documents which are labelled "Court documents" in the list of documents, is inadequate. It may be that a description of such documents by name (for instance,

"list of documents") would not reveal the identity of the informants. It may also be that if there are real disputes about whether the documents do disclose the identity of informants, that could be addressed by a Judge looking at the documents and reaching a decision on whether identity is disclosed, in the way that Judges can look at documents when privilege is claimed in them.[37] However, it is not possible to assess this point in the absence of the documents in question. It is possible that the documents even if they are third party documents, do on their face in one way or another disclose the source. That matter could only be determined by an examination of the documents. They are not before us.

[74] Thus, we grant leave to file the memorandum out of time, but we are not able to determine the substantive point raised, as that would require intense factual analysis. That point will need evidence to be determined, and that evidence was not before the High Court and is not before us. As we state later, it is open to the respondents to pursue its claim that the documents do not qualify for protection under s 68(1) in further applications to the High Court. We will not carry out a de novo hearing with evidence on the point.

[75] In reaching this conclusion we place no reliance on the affidavit of Thomas Turton that the appellants have filed in relation to the memorandum.

[76] Therefore, we do not propose making any orders in this regard. We have allowed the review only in relation to that part of the judgment that directs the full disclosure of the documents, as not falling under s 68(1). We have decided that s 68(1) applies. We expressly leave open the possibility that an application for further and better discovery can be further pursued in the High Court. We note that the Associate Judge reserved leave to seek a supplementary order if there was a disagreement about whether disclosure and identification was sufficient.[38] The respondents can avail themselves of this.

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37 High Court Rules 2016, r 8.25.
38 At [85].

Jurisdiction

[77] We return to the issue of jurisdiction. The decision appealed against was an interlocutory decision of an Associate Judge sitting in Chambers.[39] The Senior Courts Act, which abolished the right of review and replaced it with an appellate pathway to this Court, does not apply.[40] The decision could only be challenged by review under s 26P(1) of the Judicature Act 1908.[41] As we have set out, this was not the way the matter proceeded. The challenge to the Associate Judge's decision was by way of an appeal, and it was heard by us as an appeal.

[78] After the hearing, in the latter stages of our considerations, it was appreciated by the Court that this was a proceeding to which the Judicature Act 1908 applied.[42] A minute was issued to the parties pointing this out.[43] We stated that the Court was minded to deal with the matter by sitting as three High Court Judges, as it was empowered to do under s 57(4) of the Judicature Act. Memoranda were sought as to whether it was agreed that the Court lacked jurisdiction, and if so whether the members of the Court ought to refuse to sit as High Court Judges to decide the challenge.

[79] Both parties now accept that the Court of Appeal has no jurisdiction to determine the challenge. They differ as to the way forward. The appellants support the suggestion that the members of the Court who heard the appeal should treat the matter as an application for review before three High Court Judges under s 57(4). The respondents oppose that course of action being adopted, and ask for the appeal to be dismissed for want of jurisdiction.

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39 The decision concerned an application for an order under s 68 of the Evidence Act for further particularisation in discovery. This is an interlocutory order, see the High Court Rules, r 1.3. Under High Court Rules, r 7.34(1) all interlocutory applications are to be heard in chambers, unless otherwise directed. The Associate Judge was exercising his jurisdiction in chambers in deciding this application, see Judicature Act, ss 26IA and 26J.

40 Under s 27 of the Senior Courts Act any Associate Judge's decision may be appealed to the Court of Appeal, subject to s 56. Section 56(3) provides that any appeal against an order or decision of the High Court made on an interlocutory application in respect of any civil proceeding requires leave of the High Court to appeal to the Court of Appeal.

41 *Nottingham v Registered Securities Ltd (in liq)* (1998) 12 PRNZ 625 at 628; *Young v New Zealand Police* [2007] NZAR 92 (CA) at [12]–[15].

42 The Senior Courts Act came into effect on 1 March 2017, after these proceedings were filed. The proceedings continue under the Judicature Act, see the Senior Courts Act, sch 5 cl 10(1).

43 *Mediaworks v Staples* CA436/2018, 29 March 2019.

[80] Section 57(4) of the Judicature Act provides "[e]very Judge of the Court of Appeal shall continue to be a Judge of the High Court, and may from time to time sit as or exercise any of the powers of a Judge of the High Court."

[81] While not challenging the technical ability of the Court to sit as High Court judges, the respondents submitted that any application for review is out of time and that if it heard the case as High Court judges it is not in the same position as a High Court Judge on review. An application for review would have followed a different course. They also argued that the course taken before the Court was for an appeal rather than review, and the respondents would be prejudiced by the change. Moreover, it was submitted, there were different thresholds for the admission of new evidence under the two procedures, and the respondents would have pressed for the High Court Judge to inspect the documents on review. There are, it is said, different standards of review.

[82] We have concluded that it is in the interests of justice that we determine this case as a review application heard before three High Court Judges. There are four reasons for this.

[83] First, and most importantly, we have heard the appeal over a full day, and considered the arguments in detail. In the absence of prejudice, if there is a lawful and pragmatic way forward which does not waste the time effort and cost of the full hearing that has taken place before us, it should be adopted. In this regard we note that the matter proceeding before us by way of appeal without objection from the respondents, who took active steps in the process, and the pro-active step of seeking to support the judgment on other grounds.

[84] Second, the test applied for an appeal is by way of a rehearing.[44] That is also the test applied for a review of an Associate Judge's decision given in Chambers.[45] The case was argued before us, therefore, on the basis of the correct test.

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44 Court of Appeal (Civil) Rules 2005, r 47.
45 High Court Rules, r 2.3(4).

[85] Third, we do not accept that the respondents are prejudiced if we adopt this course, for reasons that we now set out.

[86] The key issue before us was whether the Associate Judge was right in his application of s 68(2). His decision was predicated on the basis that the documents fell under the protection of s 68(1) unless s 68(2) could be invoked. As we have set out, during the hearing in this Court the issue was raised by the respondents whether the documents in question in whole or in part qualified under s 68(1) as capable of protection. This was not a point that was determined before the Associate Judge, who although the s 68(1) issue was raised, does not appear to have been asked to examine the documents in question. In this judgment we have left that issue the s 68(1) issue open for to be further pursued in the High Court.

[87] Indeed, the respondents have since the hearing taken the step of making specific application in the High Court for orders properly identifying certain aspects of the allegedly confidential documents, and for an order setting aside the claims to confidentiality.

[88] We have found that we are not able to determine the issue of whether the documents fall into the category of protected documents under s 68(1). Whether the documents qualified could only be determined following a detailed examination of the documents in question, and the documents were not before the Associate Judge. To determine a dispute about whether the documents disclosed sources without being able to look at the documents to determine what they showed as to sources, would not have been appropriate either on appeal or review. There is nothing to show that the respondents made any specific application to the Associate Judge for him to examine the documents, but they now suggest in opposing the matter proceeding as a review, that a Court on review could do so.

[89] We do not accept that if the appeal had been treated as a review from the outset, and argued on that basis, that the result could have been any different. If on review the respondents had formally applied to adduce new evidence about the documents, that application would have been refused whether the hearing was by way of appeal or review. It would have involved a factually intensive second review hearing, a

two stage process where the documents were first ordered to be disclosed, and after disclosure were considered by the reviewing Court de novo. This should not happen for the first time on review. It should happen during the original hearing, so that on review the Court has the benefit of the first instance considerations and conclusions. Importantly, we make it clear in our judgment that this step can still be taken before the Associate Judge.

[90] If we sit as High Court judges there will be no prejudice to rights of appeal. The usual appeal provisions relating to an appeal to the Court of Appeal from High Court judges sitting in review, which are by leave under s 26P(1AA) of the Judicature Act, will apply.

[91] Fourth, the course of action we intend to take, while rare, has been previously adopted. In *Nottingham v Registered Securities Ltd (in liq)* this Court relied on s 57(4) to sit as High Court judges considering a review in a matter which had wrongly come before it as an appeal.[46] In that case the respondent consented to that course being taken, but we do not see consent as essential before the jurisdiction plainly set out in s 57(4) can be exercised. We agree with the comment of that Court that this is an exceptional course, and that appellate jurisdiction should be checked by the parties on every occasion.[47] Other cases have emphasised that it is an exceptional course, and declined to adopt the s 57(4) course.[48] In none of those cases had there been the various steps, including a full hearing, that have taken place in this case.

[92] In *Young v Police* it was observed that if the Court of Appeal treated the appeal as an application for review, if the successful party sought leave to appeal the Panel considering the appeal "would be required to deal with a challenge to a decision of the present Panel (albeit that the present Panel would be acting, in effect as a full court of the High Court)".[49] We do not see that issue as a difficulty in this case. If such a situation arose a Panel constituted of different judges would consider the application for leave, and any appeal.

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46 *Nottingham v Registered Securities Ltd (in liq)*, above n 41.
47 At 628.
48 See *Young v Police*, above n 41.
49 *Young v Police*, above n 41, at [18].

[93] We conclude that for the reasons we have given, in particular the cost and time devoted to the issues to date and the lack of any material prejudice, that we should take the rare step of determining the issue before us as a full court of the High Court rather than dismiss the appeal for lack of jurisdiction.

[94] The respondents oppose the giving of an extension of time for the filing of a review application. We can see no merit in this opposition, given that with the appellants the respondents have been actively complicit in proceeding on the basis that an appeal was the appropriate procedure. They have only adopted their present stance following the Court drawing the jurisdiction question to the attention of their attention after the hearing.

[95] Given that there is no prejudice we grant an extension of time for review. We treat the appellants' memorandum as an application that we hear the matters as a full court of the High Court, and we determine that this is how we will deal with the matter. It follows that we will deal with the matters raised in the hearing as a full court of the High Court sitting on review.

Result

[96] An application for an extension of time to apply for a review of the Associate Judge's decision is granted.

[97] We determine that review sitting as a full court of the High Court.

[98] The review is allowed.

[99] The application to file a memorandum supporting the judgment on other grounds is granted.

[100] The High Court order to direct disclosure without redactions is quashed.

[101] The effect of allowing this review is that the High Court judgment directing the disclosure of each of the documents in part 3 of the schedule to their affidavits

without redactions is declined, but only to the extent that the documents or parts of them identify the informants who have provided the documents to Mediaworks.

[102] In all other respects issues of the adequacy of discovery remain open and are not determined by this review. It is open to the respondents to seek a further hearing in relation to discover issues that have not been determined, or to bring another application in the High Court in relation to discovery. In particular, the issue of whether the documents do in fact fall into the category of protected documents under s 68(1) remains open.

Costs

[103] The appellants have been successful and are entitled to costs.

[104] The respondents are jointly and severally to pay one set of costs to the appellants costs on a 2B basis under the High Court Rules 2016 and usual disbursements.

[105] The costs orders made by the Associate Judge in the High Court are quashed. If the parties cannot agree on those High Court costs, the issue should be determined in the High Court in accordance with this judgment.

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