IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-1312
[2021] NZHC 752

UNDER	The Defamation Act 1992
BETWEEN	JOHN DOUGLAS SELLMAN First Plaintiff
	BOYD ANTHONY SWINBURN Second Plaintiff
	SHANE KAWENATA FREDERICK BRADBROOK Third Plaintiff
AND	CAMERON SLATER First Defendant

Appearances: D Salmon for the Plaintiffs
No appearance by or for the First Defendant
E Grove for Second and Third Defendants
W Akel for Fourth and Fifth Defendants
D Fisher in person for NZ Herald
J Miles QC for British American Tobacco (NZ) Limited as non party

Judgment: 9 April 2021

JUDGMENT OF WALKER J

This judgment was delivered by me on 9 April 2021 at 2.15 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

CARRICK DOUGLAS MONTROSE GRAHAM
Second Defendant

FACILITATE COMMUNICATIONS LIMITED
Third Defendant

KATHERINE RICH
Fourth Defendant (*Discontinued*)

NEW ZEALAND FOOD AND GROCERY COUNCIL INC
Fifth Defendant (*Discontinued*)

Introduction

[1] David Fisher is a senior journalist with the NZ Herald. He seeks access to documents on the court file of this long running defamation proceeding.[1] This is the second instalment of an application by media for access to court documents. The question for the Court is where to strike the balance between open justice and countervailing privacy and confidentiality interests. The question arises in the context of proceedings settled at trial and where collateral issues with a prospective witness fell away before being argued or determined.

Background

[2] On 3 March 2021, this judge-alone defamation trial commenced in the High Court.[2] The litigation had been hard fought. It had taken nearly five years to reach trial and had a complex procedural history. Only the second and third defendants, Carrick Graham and Facilitate Communications Limited ("FCL"), were left defending the claims by the time of trial. Mr Slater, the first defendant, consented to judgment being entered against him, having been adjudicated bankrupt on 27 February 2019.[3] On 20 September 2019, Palmer J ordered that Mr Bradbrook, the third plaintiff, be taken as having formally discontinued his claims against the fourth and fifth defendants.[4] By mid-October 2020, the first and second plaintiffs had settled on a confidential basis with the fourth and fifth defendants and were granted leave to discontinue the claims against them.[5]

[3] On 23 December 2020, just over two months before trial, the plaintiffs served a subpoena on British American Tobacco (New Zealand) Limited ("BAT"). The subpoena required BAT to produce to the Court at trial any invoices which may have been rendered to BAT by Mr Graham and associated parties in the period 2008 to

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1 This is the third application for access. The first and second were pre-trial applications dealt with in *Sellman v Slater (Media access)* [2021] NZHC 349. Some aspects of earlier media applications were deferred. This judgment deals with the deferred aspects and the further access request.

2 It commenced during Alert Level 3 announced as from midnight 28 February 2021 and expiring at 6 am on 7 March 2021.

3 Judgment was entered against the first defendant for declaratory relief and costs in *Sellman v Slater* [2021] NZHC 414.

4 Minute of Palmer J (No 19), 20 September 2019 at [2].

5 Minute of Palmer J (No 25), 15 October 2020 at [1].

2016.[6] BAT applied to set aside the subpoena on the grounds that the subpoena sought documents not relevant to the issues at trial and was a collateral attack on earlier discovery orders. It was common ground that the plaintiffs did not intend to press the subpoena if Mr Graham/FCL provided the invoices. The plaintiffs argued they had to do so to meet their discovery obligations. Mr Graham/FCL argued that they had provided all documents they were obliged to provide. The resulting dispute over discovery was to be determined as a preliminary issue but after the plaintiffs opened their case.

[4] BAT's potential involvement was therefore deferred and is best characterised as collateral and contingent.

[5] The plaintiffs opened their case on day one. In the usual way, this amounted to presenting the plaintiffs' claims in their most favourable light and providing context from the plaintiffs' perspective. Media attended by VMR link due to Alert Level three restrictions. The BAT application was touched on by Mr Salmon in opening.

[6] The opening was still under way when, after an extended lunch adjournment, the parties advised they had reached a resolution of all the claims. The terms were not made known but a fulsome statement was read in open court on behalf of the second and third defendants.

[7] That brought the substantive case to a close save for the issue of relief and costs against the first defendant. I adjourned the proceeding to permit the plaintiffs time to consider how they wanted to proceed. They subsequently applied for judgment. I issued judgment against Mr Slater for declaratory relief and costs in reliance on his consent to judgment.[7] This in turn meant that the subpoena served on BAT became moot. BAT's application was thus withdrawn without being heard or determined.

[8] Mr Fisher now seeks:

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6 It appears that the subpoena purported to be a subpoena duces tecum as well as a subpoena ad testificandum.

7 *Sellman v Slater* [2021] NZHC 414.

(a) Access to all interlocutory affidavits and attachments (i.e. exhibits) filed during the course of the proceedings. Orally, Mr Fisher amended this application to exclude access to material relating to Mr Slater's medical and health information which is subject to a suppression order by Palmer J.[8]

(b) Affidavits and attachments (i.e. exhibits), if any, submitted by BAT during the course of the proceedings.

Legal principles

[9] The application is made under the Senior Courts (Access to Court Documents) Rules 2017.

[10] Every person has a right to access the formal record in a civil proceeding.[9] Rule 4 defines what constitutes the formal court record. It includes judgments, orders and minutes. It does not include pleadings or affidavits.[10]

[11] Rule 11(2)(c) provides that requests for access by any person to documents that do not fall under the general right of access must specify the reasons for asking for access to documents. Parties who wish to object must give written notice of that objection and set out the grounds of objection.[11]

[12] The procedure is generally informal. It is often dealt with on the papers. In this instance, I heard from the parties and BAT. I did so because the application engages important principles.

[13] Rule 12 states that the judge "must consider the nature of, and the reasons for, the request" and take into account each of the matters set out that is relevant to the request or any objection to the request. The matters listed in r 12 which are relevant in this case are:

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8 Minute No 11 of Palmer J, 18 December 2018 at [3].
9 Senior Courts (Access to Court Documents) Rules 2017, r 8(1).
10 Access to the most current pleading was granted by the Court. It did not extend to earlier iterations of the pleading as the parties against whom claims were discontinued had not been heard.
11 Rule 11(5).

(a) the orderly and fair administration of justice:

…

(c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:

(d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:

(e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):

(f) the freedom to seek, receive, and impart information:

…

(h) any other matter that the Judge thinks appropriate.

[14] It is well understood that there is no hierarchy between the r 12 factors however the weight given to each principle is also informed by the statutory scheme which provides in r 13:

13 Approach to balancing matters considered

In applying rule 12, the Judge must have regard to the following:

(a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited:

(b) during the substantive hearing, open justice has—

(i) greater weight than at other stages of the proceeding; and

(ii) greater weight in relation to documents relied on in the hearing than other documents:

(c) after the substantive hearing,—

(i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but

(ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

[15] The principle of open justice and the right to seek, receive and impart information guaranteed under s 14 of the New Zealand Bill of Rights Act 1990 is a fundamental consideration – even the starting point – but it is not a paramount consideration.

[16] The principle was recently explained by Arnold J on behalf of the Supreme Court in *Erceg v Erceg.*[12]

> The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court.

[17] The Supreme Court also recognised that "there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice."[13]

[18] The approach to requests for access to documents has been clarified by the Court of Appeal in *Crimson Consulting Limited v Berry*:[14]

(a) "No particular factor, including open justice, [has] paramountcy";[15]

(b) The principle of open justice is fundamental to the common law system of civil and criminal justice and engaged when access involves media organisations who wish to investigate and report on the proceeding;[16]

(c) Where an access application related to a proceeding that was settled prior to trial and there was no hearing, and given that it involved a

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12 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].
13 At [3].
14 *Crimson Consulting Limited v Berry* [2018] NZCA 460, [2019] NZAR 30.
15 At [16] referring to *Schenker AG v Commerce Commission* [2013] NZCA 114, (2013) 22 PRNZ 286 at [21], [29] and [37] – a decision under the previous access regime.
16 At [33].

dispute between private entities, other matters set out in r 12 had particular significance;[17]

(d) When matters are still at the pleadings stage, there is an element of unfairness on parties in the publication of one side of the story. There being no hearing in court, the need for transparency and public scrutiny is less, because pre-trial the court is generally not determining substantive issues;[18]

(e) Reporting on a statement of claim and a statement of defence, provided it is fairly done, is one way of informing the public so that the business of the courts is known and transparent. Thus the publication of a statement of claim which sets out a contract dispute between parties, which has no commercially sensitive information or matters unduly intruding into the private lives of individuals, can be permitted;[19]

(f) The principle of open justice, and the freedom to seek information remain important factors which do not cease to work in the pre-trial stage. Transparency of the court process at all stages is in the public interest.[20]

[19] The Court of Appeal in *Crimson Consulting* agreed that to allow access to the redacted statement of claim and statement of defence and refuse access to the evidence and memoranda on the Court file strikes the correct balance. Notably the media applicant did not cross-appeal the High Court decision to grant only limited access.

[20] The rationale behind adopting a different approach at different stages of a proceeding was explained by the Court of Appeal in *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo:*[21]

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17 At [34].
18 At [39].
19 At [41].
20 At [40].
21 *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* [2017] NZCA 490, [2017] NZAR 1617.

> [25] These divisions reflect that during the substantive hearing open justice has greater weight, in particular in relation to documents admitted in evidence. When a court is engaged in hearing a dispute its workings, including documents referred to or relied on, should be open to full scrutiny by all members of the public, unless there are particular and strong reasons to the contrary. The public should be able to follow and understand the hearing process. However, prior to and after the substantive hearing, the importance of public scrutiny is less, as the court is not hearing and resolving the dispute. Prior to the hearing there is no guarantee the case will go to hearing at all. Therefore open justice has less weight. *The parties are entitled to the protection of confidentiality and privacy within reasonable limits, given that they have not at that point aired the dispute in public.* After the substantive hearing the need for public scrutiny diminishes in importance as time moves on (emphasis added).

[21] The reality of modern litigation needs also to be borne in mind. As Lady Hale recently observed in *Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd (Media Lawyers Association intervening)*:[22]

> … whereas in the olden days civil proceedings were dominated by the spoken word—oral evidence and oral argument, followed by an oral judgment, which anyone in the court room could hear, these days civil proceedings generate a great deal of written material—statements of case, witness statements, and the documents exhibited to them, documents disclosed by each party, skeleton arguments and written submissions, leading eventually to a written judgment.

The respective positions

[22] The plaintiffs did not oppose the narrowed request for access. Their submissions supported both limbs of the application. Mr Slater stated his opposition prior to the hearing but did not appear. Mr Graham and FCL opposed. Mrs Rich and the New Zealand Food and Grocery Council (NZFGC) opposed those aspects of the request affecting them and BAT opposed access to the material it filed in support of its application.

The proceedings and their history

[23] The balancing exercise required by the Rules is necessarily context dependent. It is helpful to have some brief background in respect of which I gratefully rely on earlier judgments issued by Palmer J.

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[22] *Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd (Media Lawyers Association intervening)* [2019] UKSC 38, [2020] AC 629 at [1].

[24] The plaintiffs are public health professionals engaged in research and advocacy on public health issues. They brought these proceedings in mid 2016 after publication of the book *Dirty Politics* by Nicky Hager. In the book, Mr Hager alleged that Mr Slater was paid to publish articles on the Whale Oil website, written by others who were motivated to undermine or even attack those who threatened their interests. *Dirty Politics* attracted much public attention on publication.

[25] The plaintiffs sued in respect of a series of blog posts by Mr Slater on the Whale Oil website and comments in the comments threads which they claimed Mr Graham/FCL authored. The plaintiffs subsequently joined Mrs Rich and the NZFGC alleging that they had procured Mr Slater, Mr Graham and FCL to publish the substance and sting of some of the alleged defamations on behalf of industry groups they represented.

[26] It is unnecessary to describe the defamatory statements in detail. They were described in an earlier judgment as personally abusive about the plaintiffs as well as their positions on matters of public policy relating to the regulation of alcohol, tobacco, sugar and fat.[23] The plaintiffs pleaded that the publications formed part of a campaign by the defendants on their own behalf and/or on behalf of their clients to, among other things, discredit the plaintiffs, damage their reputations, undermine their efforts to promote public health and prevent industry regulation.

[27] The defendants robustly defended the proceeding. The defendants other than Mr Slater denied participating in publication. All denied that the publications were defamatory. Affirmative defences such as a limitation defence, honest opinion and responsible publication on matters of legitimate public interest were also pleaded by some defendants. Mrs Rich denied on oath that she or NZFGC procured, instructed or requested any of the other defendants and/or Whale Oil to publish any of the blog posts or Mr Graham's comments. She also deposed that neither she nor NZFCG had made any payments or other compensation to Mr Slater and or Whale Oil or any entity associated with them for any publications at issue.

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[23] *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218.

[28] In turn, the plaintiffs served notices under the Defamation Act 1992 alleging that the defendants were predominantly motivated by ill-will or otherwise took improper advantage of the occasion of publication as part of campaigns to discredit them.

[29] The proceedings took many twists and turns. The assigned Judge, Palmer J, issued nine interlocutory judgments and 26 minutes. Some of those judgments dealt with novel legal issues and developments in the law of defamation. I am informed by counsel that these judgments attracted media reporting.

[30] On 25 October 2016 Palmer J dealt on the papers with an application for media access by a specialist medical publication under the previous access regime.[24] At that stage, the court file did not include much more than pleadings and memoranda of counsel. Palmer J directed that the pleadings should be released to the specialist publication once all sets of pleadings had been filed and could be reasonably anticipated not to need significant amendment. He considered that point would be reached when a trial date was allocated. He denied access to affidavits or other evidence or intimations of possible evidence contained in memoranda because "reporting of such material may impinge on the perceptions of potential jury members and then not be admitted as evidence at trial." He also noted that if the applicant seeks further documents from the court files before trial, that request will need to be the subject of response by the parties.

[31] The first significant interlocutory judgment on relatively untested aspects of defamation law was delivered by Palmer J on 2 October 2017.[25] He declined to strike out the proceeding. He held that the claims were not time barred because of the multiple publication rule. He declined to strike out the claims as an abuse of process after applying the minimum threshold of harm test. He struck out 21 of 161 pleaded meanings because they were not capable of being defamatory but preserved the rump. He considered that the most tenuous part of the plaintiffs' pleadings was whether there is a link between Mrs Rich, the NZFGC and the plaintiffs. On balance, he held that

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[24] *Sellman v Slater* (No 2) [2016] NZHC 2542, [2017] NZAR 258. The intent of the Rules Committee in drafting the 2017 access rules was to clarify rather than substantively change the previous regime.

[25] *Sellman v Slater*, above n 23.

the allegations in *Dirty Politics* were capable of supporting an inference of the pleaded link. He ruled that the pleadings against Mrs Rich and the NZFCG were not self-evidently speculative or false on the basis of the little information before the court. He considered the allegations would need to be considered at trial. Palmer J was at pains to point out that his judgment should not be taken to indicate any view of the outcome of the case – the alleged defamations may or may not be proven and the defences may or may not succeed.

[32] Palmer J also directed that because the proceedings could be the subject of a jury trial and it is important the jury's minds not be prejudiced, the contents of the allegations in the pleadings should not be publicly reported.[26]

[33] On 23 November 2018, Palmer J issued a further interlocutory judgment dealing with discovery and oral examination in which he recorded, among other things:[27]

> I decline Mr Slater's application to exclude hacked documents obtained by the plaintiffs from Mr Nicky Hager at this stage of the proceeding because the evidence does not satisfy me they are inauthentic and they appear relevant to the applications about discovery.
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> …
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> I grant a narrower version of the plaintiffs' applications for particular discovery by Mr Slater, Mr Graham and FCL because there are grounds for believing they have not discovered relevant documents but the original applications were too broadly framed.
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> …
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> I grant the plaintiffs' application to examine Mr Slater and Mr Graham orally because I consider they have made insufficient answers to interrogatories, particularly about whether blog posts were posted on the Whale Oil website for reward.

[34] The so-called hacked documents at issue were adduced as exhibits to affidavits filed by the plaintiffs.[28] At least some of those emails were summarised in Palmer J's judgment. Whether or not these documents were genuine was to assume some importance at trial. Mr Slater and Mr Graham disputed their authenticity. They argued

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26 At [127].
27 *Sellman v Slater* [2018] NZHC 3057 at [1].
28 Affidavit of Sophia Malecaut-Watts of 16 April 2018.

that there was nothing before the Court that proves they are in fact emails between the named senders and recipients. Nor is there evidence that these documents were in fact ever "hacked" or are the same documents that Mr Hager relied on for his book.

[35] The next most significant step was that on 14 December 2018, Mr Slater applied for a temporary stay of the proceeding for health reasons. That led to a slew of telephone conferences dealing with the consequences for Mr Slater of not taking any further steps in the proceeding.

[36] Mr Slater was adjudicated bankrupt on 27 February 2019. The plaintiffs sought leave to continue the proceeding to, among other things, vindicate their reputations. The Official Assignee did not object.[29] On 20 March 2019, Palmer J allowed the proceeding to continue against Mr Slater under s 76(2) of the Insolvency Act 2006.[30] He stated that Mr Slater must comply with orders against him in the proceeding, including to provide further discovery and to attend the High Court to be orally examined.

[37] On 20 September 2019 Palmer J ordered that Mr Bradbrook was to be taken as having discontinued his claim against the fourth and fifth defendants.[31] He awarded increased costs of $17,000 against Mr Bradbrook, an uplift of around 22 per cent. In doing so, Palmer J stated:[32]

> There does not appear to be any factual or evidential foundation for his claim against the fourth and fifth defendants. His argument lacked merit. It put the fourth and fifth defendants to additional effort in responding to interrogatories, providing discovery and preparing pleadings and progressing the defence. The fourth and fifth defendants attracted negative media publicity because of the claim.

[38] In mid-February 2020 the proceeding was set down for a judge-alone trial.

[39] Palmer J ordered a stay of the orders against Mr Slater to enable prosecution of an appeal by Mr Slater. He attached conditions to the stay. On 19 December 2019 the Court of Appeal declined to review the Registrar's decision declining to dispense

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29 Minute No 14 of Palmer J, 20 March 2019 at [5].
30 At [7].
31 Mr Akel submitted that Mr Bradbrook's claims made up almost 50% of the plaintiffs' claims against the fourth and fifth defendants comprising 18 out of 39 publications sued on.
32 Minute No 19 of Palmer J, 20 September 2019.

with security for costs.[33] Mr Slater took no steps. The Court of Appeal struck out the appeal on 2 June 2020.

[40] On 4 June 2020 Mr Slater made an affidavit of documents to the effect that he had no further documents to discover. He also consented to judgment in favour of the plaintiffs. Notwithstanding that, Palmer J ordered Mr Slater to attend an oral examination at the High Court along with Mr Graham.[34]

[41] The oral examination was conducted in open court on 17 July 2020. During the course of Mr Graham's examination, an issue arose as to whether he was required to discover invoices sent by him and/or FCL to clients in the food, alcohol or sugar industries. Palmer J determined that the discovery orders made to date encompassed the invoices in dispute and they should already have been discovered. Further discovery orders were made against Mr Graham and FCL.

[42] Palmer J granted leave to the plaintiffs to discontinue against the fourth and fifth defendants on 15 October 2020 following a settlement reached between those parties.

[43] Argument over the scope of discovery persisted up to trial. A third round of the discovery dispute was heard by Palmer J on 27 November 2020 and further orders made. Mr Graham and FCL insisted that they had provided discovery in strict accordance with the orders made.[35] Those orders encompassed among other things, documents passing between them and third parties including any of NZFGC's members relating to:

(a) publication of the blog posts, comments or other material on Whale Oil that are the subject of this proceeding and/or that concern the plaintiffs;

(b) the services provided by Mr Slater, SMC, Mr Graham or FCL (including invoices for the services) including in relation to the alcohol,

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33 *Slater v Sellman* [2019] NZCA 670.
34 *Sellman v Slater (No 6)* [2018] NZHC 3057 at [61]; and Minute No 24 of Palmer J, 13 July 2020.
35 Minute No 26 of Palmer J, 27 November 2020.

food and beverage or tobacco industries, which relate to the subjects of the blog posts or comments that are the subject of this proceeding.

[44] The parties disagreed on the ambit of the discovery orders. Mr Graham deposed that he had not located any invoices or correspondence which mentioned, alluded to or could even be wide enough to encompass (or did in fact relate to) any form of authoring/preparation, procuring, or publication of any online posts, articles or comments relating to the plaintiffs. This set the scene for the ongoing contest over document production and, in turn, the issue of the subpoena to BAT.

Discussion

A public interest context

[45] Having broadly set out the issues in the proceeding and its history, the heightened public interest character of this litigation is self-evident. The genesis was publications on a well-known and accessible website. The publication subject matter encompassed public health issues capable of affecting people at large, the impact of policy advocacy on the health of the general population and the tension between public health, regulation and industry interests.

[46] The currency and importance of public health issues and media influence could not be clearer in today's Covid-19 environment. Mr Slater and Mr Graham/FCL pleaded the recently developed defence of responsible publication on matters of public interest. This lends further support to the public interest context. In support of his submission that this case is of the highest public interest, Mr Fisher depicted Mr Graham's acknowledgment in court as an admission of efforts to thwart the efforts of public health professionals. In particular, his statement that:[36]

> I made various defamatory comments about the plaintiffs, using various pseudonyms, on blogs published on Mr Slater's Whale Oil website. I also encouraged, inspired or contributed to the text of certain defamatory blog posts about the plaintiffs that were published on Whale Oil, including by making payments to Cameron Slater. I did so as part of my business and in order to advance the interests of industry.

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[36] Statement in open court made on behalf of the second and third defendants, 3 March 2021.

[47] I accept that the New Zealand public has a significant and legitimate interest in these proceedings. As Mr Fisher pointed out, the case was subject to public scrutiny as it progressed but its conclusion was opaque and therefore potentially unsatisfactory from the public's perspective.

[48] The public interest values at stake distinguish the present case from the litigation backdrop in *Crimson Consulting v Berry.* There, the private nature of the dispute informed the Court's view as to the undesirable risk of interfering with access to justice by discouraging litigation because of the fear of damaging or embarrassing publicity.[37] Nonetheless, in that case the Court still permitted access to a statement of claim as it contained no commercially sensitive information or matters unduly intruding in to the private lives of individuals.[38]

Sufficiency of reasons and purpose

[49] Mr Akel was critical of the thin reasons in Mr Fisher's request for access to the parties' affidavit material. It is correct that Mr Fisher's application was principally focussed on the BAT material. Only broad reasons are provided in support of access to the earlier affidavits. Mr Fisher also acknowledged that it was only during the hearing that he appreciated the volume of material on the court file (some 35 affidavits).

[50] Unduly formalistic requirements do not sit well with the purpose of the access regime. The degree of particularisation needed depends on the context. As the United Kingdom Supreme Court recently observed in *Dring*, "it may well be that the media are better placed than others to demonstrate a good reason for seeking access".[39] The clear and compelling public interest in advocacy work undertaken on behalf of industry consultants and its intersection with public health policy is pivotal within this context. An application brought by non-media, or concerning a public interest less persuasive, is likely to require more detailed reasons and purpose. Here, with respect to a media request in relation to proceedings of high public interest, the reasons were neither too vague nor too broad. I am satisfied that the reasons provided here allow the

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37 *Crimson*, above n 14 at [36].
38 At [41].
39 *Dring*, above n 22 at [45].

court to weigh the nature of and reasons for the request which is the underlying purpose of providing reasons.

The stage of the proceedings

[51] There are legitimate questions as to how the litigation should be categorised in terms of r 13. This informs the legislative priority of different values. In my assessment, all three categories in r 13(a), (b) and (c) have some relevance.

[52] As the parties reached settlement on the first day of the trial, the substantive dispute was not aired in public in the way envisaged by the statutory scheme. In that sense, it could be said to fall within the situation in r 13(a) when the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require access to documents be limited.[40]

[53] No particular confidentiality or privacy concerns were identified in any of the 35 affidavits forming part of the historical material on the file. I exclude from this Mr Slater's private medical information which is not sought by Mr Fisher. I therefore proceed on the basis that the privacy and confidentiality concerns are the broad interests of parties to litigation rather than specific concerns. BAT's position requires separate consideration. I return to that later in my judgment.

[54] Where access to court documents is sought before the substantive hearing, privacy has greater weight than open justice.[41] The rationale for this emphasis on privacy is that set out in *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* and *Crimson Consulting Ltd v Berry*.[42]

[55] As such, applications for access to affidavits brought at the pre-trial stage will often be declined in circumstances where they contain "untested and unanswered allegations and could give an unbalanced impression of the issues and facts involved

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40 I read rule 13(a) as guidance only and not proscriptive.
41 Rule 13(a).
42 Above n 21.

in the proceeding".[43] Mr Grove's submissions drew on this well accepted principle in two ways. First, he referred to the authenticity dispute over the exhibits annexed to the affidavits of Ms Malecaut-Watts and Mr Potter. This is the contested material which the plaintiffs alleged was ultimately sourced from Mr Hager. Secondly, he submitted that the parties had been conducting the proceedings with the benefit of the earlier direction by Palmer J that the media would not have access to the court file until the substantive hearing. He submitted that from that point the parties were entitled to operate and negotiate settlements in the knowledge that the court file would not be available to the media. To provide access now, in the absence of a substantive trial and testing of evidence filed was a change in position leading to the very real potential for subsequent unfair trial by media.

[56] In my assessment, none of the rationales for the pre-trial emphasis on privacy are persuasive in the present case because unlike many disputes which settle before the substantive hearing, this dispute has been aired in public in an unusually thorough way. This includes setting out the disputed material referred to in [34] above. It would be unrealistic to ignore the many interlocutory decisions and their nature, and inaccurate to suggest that the parties' dispute remained private because the trial never proceeded beyond the first day.

[57] The explicit rationale for not permitting media access until trial was to avoid prejudice to a jury trial. As soon as a judge-alone trial was set down, the rationale fell away. From that point, there was the distinct possibility of a fresh application for access. In my assessment, the contest over the disputed material would have been aired at trial in any event in a way which the media would have been entitled to report in full. The contest was not the usual contest where inadmissible evidence does not see the light of day.

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[43] *Commissioner of Police v Doyle* [2017] NZHC 3049 at [17] per Palmer J. See also the observations of Winkelmann J (as she then was) in *GFD I LLP v Melview (Kawarau Falls Station) Investments Ltd (in rec)* [2012] NZHC 677, (2012) 21 PRNZ 125 at [16], where it was stated that: Parties file applications at an interlocutory stage and typically make various allegations in memoranda and affidavits. Some of those allegations are not responded to by parties in the full confidence that when a matter gets to a substantive hearing, issues which remain relevant can be fully addressed and an appropriate focus brought to bear upon the critical factual and legal issues.

[58] Unlike *Crimson Consulting Ltd v Berry*[44] the proceeding was very advanced. And unlike *Greymouth*, the request for access was close in time to the hearing. Media applicants had already been granted access to certain court documents including the most recent pleadings between the plaintiffs and first to third defendants inclusive.[45]

[59] Mr Akel argued that the position of Mrs Rich/NZFGC was different from Mr Graham/FCL. He submitted that there is no currency in these claims because of the passage of time since discontinuance. Consequently, any reporting would not be contemporaneous in the only sense that matters.

[60] The concept of currency is implicit in r 13(b) and (c). Rule 4 defines the substantive hearing in relation to a civil proceeding as "a hearing (other than the hearing of an interlocutory application) at which issues that will decide the ultimate outcome of the proceeding are determined; and from the start of that hearing until the court finishes delivering its judgment in the proceeding (unless the proceeding is earlier discontinued, in which case until the discontinuance)." The Law Commission Report which led to the current access regime proposed that "during" extend "from the commencement of the substantive hearing until 28 days after the end of the proceedings".[46] The present application plainly falls within that period. Although that proposal never received explicit legislative recognition, it hints at the underlying rationale that open justice has greater relevance when the matters in issue are freshly concluded.

[61] Where an application for access to court documents is brought after the substantive hearing has concluded, privacy is again considered to hold greater weight than open justice.[47] The Court of Appeal in *Greymouth* stated:[48]

> After the substantive hearing the need for public scrutiny diminishes in importance as time moves on. Parties are entitled to expect that the need for open justice has been met by full access during the substantive hearing stage,

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44 See, for example, the pre-trial settlements reached in *Donaldson v Chiswell* [2019] NZHC 3083 and *Rani v Bhatti* [2019] NZHC 2975.

45 See *Sellman v Slater* [2021] 349 at [41]. I also granted access to the parties' opening submissions once delivered, the briefs of evidence of any witness (subject to appropriate redactions) once the evidence was given, the notes of evidence in the trial once complete and notes of evidence from the oral examination of Mr Slater and Mr Graham and the closing submissions once delivered.

46 Law Commission *Access to Court Records* (NZLC R93, 2006) at 107.

47 Rule 13(c).

48 *Greymouth*, above n 21 at [25].

> and that personal information not part of the formal court record or the decision will be given greater protection as the years go by.

[62] However, as with the rationale that underlies the pre-trial emphasis on privacy, this reasoning also has little application to the present case. Although the parties may rightly expect a degree of finality to follow resolution of their dispute, this would not justify placing undue emphasis on privacy in this case. There is no resemblance to the "years" envisaged by the Court in *Greymouth* as giving rise to a need for greater protection of privacy. Here, the request for access is so close to the substantive hearing that it cannot realistically be a factor with respect to Mr Slater, Mr Graham and FCL. It is also insufficiently distanced from the discontinuance against Mrs Rich/NZFCG. I accept Mr Salmon's submission that the various materials before the court were as relevant to the trial as they were when filed years earlier; there is no evident staleness to that material. I am also satisfied that the relationship between all the claims (discontinued and live at trial) is such that there is sufficient currency for the whole proceedings.

[63] Thus, the rationales which underlie the emphasis placed on privacy before and after the substantive hearing are not material in this case. The classification of a proceeding under r 13 provides a useful heuristic to determine the approximate weight that should be afforded to different values. It cannot substitute for a reasoned evaluation of the circumstances of an application and the facts of the case.

Rule 13(h) – the risk of deterring settlement

[64] Whether under the catch all provision of r 13(h) or the orderly and fair administration of justice, Mr Akel argued that media access after settlement of claims could have a chilling effect on dispute settlement before trial. As he put it, parties invariably settle a case to save the cost of litigation, often coupled with a desire to avoid the risk of unfair prejudicial publicity if they are wrongly perceived to be the less worthy litigant. To allow access well after settlement and discontinuance could diminish the prospect of settlement with parties forced to weigh up the benefit of determination by a judge after trial versus judgment by media if they settle pre-trial.

[65] I accept that this is a factor which points away from access. It must be weighed in the balance against the principle of open justice. As was stated in *Rani v Bhatti*:[49]

> The parties settled. The benefits of settlement include bringing a dispute to an end by resolving differences without a public hearing and allowing the parties to move on. Those benefits may be eroded by allowing third parties access to the court file.

[66] A further consideration is whether the fact there are many judgments available resulting from the various interlocutory arguments lessens the public interest in the procedural applications and their supporting evidence.[50] Or, to put it another way, whether the principle of open justice is sufficiently satisfied by the availability of those judgments without any need for the supporting evidence to now be accessed and potentially reported.

[67] Both these considerations are weighty but, in the end, they are not sufficient to deny Mr Fisher access. The overwhelming public interest in this particular case answers both points. I am also satisfied that a more complete understanding of the issues is enhanced by understanding the path to trial. As the Court of Appeal stated in *Crimson Consulting* "the transparency of the court process *at all stages* is in the public interest" (emphasis added).[51] This is an instance where that observation is acute.

[68] Weighing all these required matters, I allow Mr Fisher's request to access the historical affidavit evidence filed in this proceeding, with the exception of evidence relating to Mr Slater's medical details.

BAT material

[69] This material comprises an application, supporting affidavit and written submissions filed on behalf of BAT in support of its application to set aside the subpoena. It was filed a matter of weeks before trial. The application fell away when the plaintiffs elected to forego damages against Mr Slater and seek declaratory relief only.

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49 *Rani v Bhatti* [2019] NZHC 2975 at [14]. Of course, the mere fact that the parties settled does not preclude access. See, for example, access granted to pleadings, judgments and minutes despite settlement in in *Donaldson*, above n 44.

50 *Donaldson,* above n 44 at [13].

51 *Crimson,* above n 14 at [40].

[70] Mr Fisher submitted that Mr Graham's statement in open court raises the question of whether BAT is part of the "industry" whose interests he sought to serve. He posited that the BAT affidavit may answer this question. He added that based on the BAT Group website's statement of "Standards of Business Conduct" it would be expected that the evidence would be exculpatory but access to the evidence to understand the relationship would shed light on the issue. At worst it will be embarrassing for BAT, but this alone cannot overcome the principle of open justice.[52]

[71] Mr Miles QC described BAT's opposition to access as one of principle extending well beyond the facts of this case. Thus, the fact that the material might be seen as exculpatory rather than inculpatory is irrelevant. The principle remains – to what extent should a court restrict access to a non-party's documents when the party is an unwilling participant dragged into the substantive proceedings. Mr Miles submitted that the court must balance on the one hand access to documents which are not essential to the public understanding of the case against a non-party's rights to and legitimate expectation of commercial confidentiality.

[72] Materially, Mr Miles relied on a general notion of commercial confidentiality between a corporation and its advisors rather than identifying any specific confidential content in the material. This must be correct. There is nothing in my view in the material filed which is commercially sensitive or which comprises information about the private lives of individuals within the intent of r 12(c).

[73] Despite the lack of particular confidentiality or sensitivity, I have concluded that there are more factors working against access than for access in respect of this material. There are three reasons. First, BAT's involvement in the proceeding was peripheral. This is so even though BAT's involvement strayed beyond that strictly necessary to set aside the plaintiffs' subpoena. In particular, it weighed in on questions of relevance. The extent of its potential involvement cannot be characterised as entirely "forced". Clearly, it filed the affidavit in the full expectation that it would be read in determining the application.

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52 *Peters v Birnie* [2010] NZAR 494 at [30].

[74] Nevertheless, as a non-party BAT had no direct ability to settle or otherwise resolve these proceedings out of court. Its hand was, to some extent, forced. Although non-parties are frequently required to be witnesses in civil proceedings as a matter of course, the law recognises a distinction between the treatment of parties and non-parties to civil proceedings. Indeed, the specific interests of a non-party may be relevant when considering an application for access to the court file.[53] BAT's status as a non-party/prospective witness points against access.

[75] Secondly, there is the extent to which BAT's reliance on the affidavit, or lack thereof, weighs in the exercise. Mr Miles drew support for a more restrictive approach in respect of non-party documents arising from the withdrawal of the application. He submitted that, as the BAT application was not argued or determined, wider distribution shorn of context (as would be inevitable) is misleading and unhelpful and likely lead to unfounded speculation that BAT was part of the "industry" referred to in Mr Graham's in-court apology.

[76] The statutory scheme makes clear that reliance is relevant. Rules 13(b) and (c) expressly provide that open justice has greater weight in relation to documents that have been "relied on" than other documents. This is an orthodox approach seen in other jurisdictions. For instance, English authorities recognise that access is less likely to be granted in respect of affidavits that have not been read in open court.[54] I agree with Mr Salmon that the act of filing in itself evinces an intention to rely on this evidence but there were two important contingencies. First, it depended on the trial proceeding. Secondly, and more materially, it also depended on the outcome of the discovery dispute between the parties.

[77] The fact the BAT application was never argued or determined is significant. This is chiefly because the principle of open justice and its rationale is much less engaged. The reference to the BAT application in the plaintiffs' opening was a

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53 See *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271 at [10]. In that case, DHL voluntarily provided information to the parties that was never intended to become public. It expressed a reluctance to provide voluntary assistance again "if it was to find that its commercial interests will, or might be, prejudiced by doing so".

54 See, for example, *Dian AO v Davis Frankel & Mead (A Firm)* [2004] EWHC 2662 (Comm), [2005] 1 WLR 2951. See also Paul Matthews and Hodge M Malek *Disclosure* (5th ed, Thomson Reuters, London, 2017) at 104.

sidewind only. Although it may have alerted media to the satellite issue, it does not follow that all material on that issue becomes accessible.

[78] Thirdly, as Mr Salmon submitted, there may be a public interest in the BAT affidavit because Mr Graham was a consultant to BAT during the period covered by the plaintiffs' claims, but my assessment is that for the reasons already given, this does not overcome the insufficiency of engagement with the principle of open justice. This material is in a different category to the affidavit material filed by the parties to the litigation and which was relied on, expressly or implicitly, in interlocutory judgments issued.

[79] Accordingly, the balancing exercise leads me to decline Mr Fisher's request for access to the BAT material.

[80] Finally, Mr Salmon referred to an earlier affidavit sworn by another senior representative of BAT for the purposes of the BAT application but which was not filed. He sought a direction that BAT file this to complete the picture because reference was made to it in the filed BAT affidavit. I apprehend the point was to ensure that it too would be subject to the access regime which is limited to documents in the control or custody of the Court. It is unnecessary to decide this view of my conclusions on access. I observe only that I doubt that this Court has the jurisdiction to make such a direction in these circumstances.

Result

[81] I grant Mr Fisher's request to inspect the affidavits filed in this proceeding by the parties other than the affidavits of Juana Atkins of 12 December 2018 and 14 August 2019 (filed on behalf of Mr Slater) and the affidavit of Dr David Abernathy of 15 December 2018 or any other affidavit which includes medical details relating to Mr Slater. The suppression order made by Palmer J on 18 December 2018 suppressing publication of any details of Mr Slater's medical condition remains in place.

[82] I decline Mr Fisher's request for access to the affidavit filed on behalf of BAT (or any other material filed by BAT).[55]

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Walker J

[55] The memorandum on behalf of the plaintiffs dated 21 March 2021 in relation to the media application may not be searched without leave of the Court.