IN THE HIGH COURT OF NEW ZEALAND
AT AUCKLAND

CIV-2013-404-5218

BETWEEN Cameron John Slater

Appellant

AND Matthew John Blomfield

Respondent

SUBMISSIONS OF AMICUS CURIAE

Dated 20 June 2014

Next event: Hearing, 23 June 2014

Amicus curiae:
J G Miles QC
Barrister
Richmond Chambers
Ph: (09) 600 5504
miles@richmondchambers.co.nz

May it please the Court—

INTRODUCTION

1. This proceeding involves a novel issue concerning the interpretation of s 68(1) of the Evidence Act 2006, which provides for the protection of journalists' sources. The appellant, Mr Slater, is unrepresented.

2. The role of the *amicus* is "to help the court by expounding law impartially, or if one of the parties [is] unrepresented, by advancing legal arguments on his behalf."[1]

3. The respondent, Mr Blomfield has brought an action against Mr Slater in the District Court alleging defamation. He says that between 3 May 2012 and 6 June 2012 the appellant published 13 articles on www.whaleoil.co.nz (**Whale Oil**) (a blog website run by the appellant),[2] which defamed the respondent by suggesting that he was, *inter alia*, a thief, dishonest, dishonourable, a party to fraud, criminal conspiracy, bribery, deceit, perjury, conversion and the laying of false complaints.[3] Copies of the articles are annexed as schedules to the statement of claim dated 7 October 2012 **[CB** 33-213**]**.

4. The majority of the articles contain extracts of emails which the respondent is party to and electronic files which the evidence indicates were sourced from the respondent's hard drive (and potentially other sources, including a filing cabinet). The appellant admits that "he has in his possession copies of emails, databases and electronic files relating to the affairs" of the respondent.[4] He has sworn that (emphasis added):[5]

> On or about February 2012 I was provided with a hard drive that included approximately one Terabyte of computer files previously owned by the plaintiff.
>
> ...

---

1 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 266 as adopted by the Court of Appeal in *Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* [2009] NZAR 523 at [14] per Robertson J. The appointment of an amicus was made pursuant to Minute (No. 2) of Asher J dated 3 April 2013 at [12] **[CB** 26**]**.

2 Affidavit of Cameron John Slater in support of interlocutory application for security for costs sworn 26 July 2012 at [1] **[CB** 278**]**.

3 The articles and broad allegations are summarised as Annexure **B** to these submissions.

4 Revised statement of defence dated 21 November 2012 at [3] **[CB** 215**]**.

5 Affidavit of Cameron John Slater sworn 26 July 2012 at [2] and [3] **[CB** 278**]**.

> Since 3 May 2012, I have blogged approximately 65 posts about the plaintiff on the site, **based on the contents of the data** or other, publicly available information.

5. It appears from the affidavit of Mr Price (the liquidator of a number of the respondent's companies) that the hard drive may possibly have been obtained by the appellant, Ms Easterbrook and Mr Spring from Mr Warren Powell (a former business associate of the respondent).[6] Mr Spring has since deposed that he is "the source" of the "numerous articles" written by Mr Slater about the respondent (the impact of this is considered below).[7]

6. The respondent admits publishing the statements, but denies that the statements convey, or are capable of conveying the alleged defamatory meanings. He raises the defences of truth and honest opinion[8] in respect of each of the statements in each of the articles published.[9]

7. On 12 November 2012 the respondent made an interlocutory application for discovery seeking, relevantly, "all email correspondence between" the appellant and several other persons, including Mr Powell, Mr Spring, Ms Easterbrook and Mr Price.[10] This was accompanied by a notice to answer interrogatories, which included a question about the source of the allegedly defamatory material published on Whale Oil:

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

8. Mr Slater declined to comply with the discovery request and the interrogatory set out above. He refused to do so on the basis that the information was "privileged" under s 68 of the Evidence Act 2006. His statement in answer to the interrogatories said:[11]

> As editor of the website I regularly receive information via the "tip line" information by informants in the expectation that the information may be published on the website.

---

6 Affidavit of John Albert Price for plaintiff sworn 23 August 2012 at 3 [**CB** 306].

7 Affidavit of Marc Robert Spring sworn 14 May 2014 at [3] [**CB** 581].

8 Defamation Act 1992, s 9.

9 Revised statement of defence dated 21 November 2012 at [26] and [39] respectively [**CB** 231 and 242].

10 Request for discovery dated 12 November 2012 [**CB** 253].

11 Defendant's statement in answer to interrogatories dated 7 December 2012 [**CB** 264].

9. Matters would appear to have then languished for one reason or another until, on 26 August 2013, the respondent made an interlocutory application for orders that the appellant answer his interrogatory and provide discovery **[CB** 270]. A notice of opposition was filed relying, *inter alia*, upon s 68 of the Evidence Act 2006 **[CB** 274]. The appellant opposed the application on the basis that he is a "journalist" and to require him to answer the interrogatory or to give discovery would be to require him to disclose the identity of his "informants" to whom he has promised non-disclosure.[12]

10. The matter was heard by Judge Blackie on 2 September 2013. The Judge held that s 68(1) afforded no basis on which Mr Slater could refuse to answer interrogatories or give discovery.[13] Central to the Judge's reasoning was the holding that **[CB** 09]:

> Whaleoil is a blog site. It is not a news medium within the definition of s 68(sub-section 5) of the Evidence Act. It is not a means of dissemination to the public or a section of the public of news and observations on news.

11. Although not included in Mr Slater's formal notice of opposition, the Judge also considered, and dismissed, r 8.46 of the High Court Rules as providing Mr Slater with a basis on which to object to answer interrogatories as to his source(s):[14]

> Neither do I consider that the sources of the material published on the defendant's blog site would be protected pursuant to Rule 8.46 of the High Court Rules. The rule applies where the defendant pleads that the words complained of are honest opinion on a matter of public interest or published on a privilege occasion. Whereas the defendant pleads "honest opinion", it is not claimed that that the opinion was expressed on a matter of public interest.

12. It is from that decision that Mr Slater appeals, having been granted leave out of time.[15] His notice of appeal states that the District Court Judge erred in holding that "section 68 of the Evidence Act 2006 does not apply to blogs sites"; and that his "blog site is not a 'news medium' as

---

12 Notice of opposition dated 27 September 2013 at [3](d) **[CB** 275].

13 *Blomfield v Slater* DC Manukau CIV-2012-092-001969, 26 September 2013 at [18] **[CB** 9].

14 At [17] **[CB** 9].

15 *Slater v Blomfield* [2014] NZHC 612 **[CB** 22].

defined by section 68(5) of the Evidence Act."[16] Furthermore, that the District Court erred in denying him the protection of r 8.46 of the High Court Rules.

13. It is noted that Mr Slater has filed an affidavit sworn 14 May 2014 containing much in the way of legal submission **[CB** 407]. It is suggested that paragraphs [1] to [10], [13], [15], [33] and [48] to [50] of Mr Slater's affidavit be treated as his submissions.

THESE SUBMISSIONS

14. These submissions are intended to assist the Court with the matters of fact and law which it must determine, and in doing so to ensure the fair presentation of Mr Slater's case (as an unrepresented litigant) on those issues; namely:

    (a) The meaning and applicability of s 68(1) of the Evidence Act 2006 to this case;

    (b) If s 68(1) of the Evidence Act 2006 is applicable, whether, having regard to the matters at issue in this proceeding, the Court should be satisfied that "the public interest in the disclosure" outweighs the factors set out in a s 68(2)(a) and (b); and

    (c) And, to a more limited extent, the applicability of r 8.46 of the High Court Rules.

PROTECTION OF JOURNALISTS' SOURCES GENERALLY

15. The starting point is that all relevant evidence should be available to the courts. However, the European Court of Human Rights has said that the ability for a journalist to refuse to disclose his sources is necessary to ensure the press are able to fulfil a "vital public-watchdog" role and to ensure reportage of "accurate and reliable information."[17] It is the importance of sources to a quality and free press that provides the rationale for the protection afforded to journalists above ordinary citizens:[18]

---

16 Notice of appeal dated 3 April 2014 **[CB** 2].

17 *Goodwin v The United Kingdom* (1996) (17488/90) (Grand Chamber, ECHR) cited by Randerson J in *Police v Campbell* [2010] 1 NZLR 483 (HC) at [60].

18 Geoffrey Robertson and Andrew Nicol *Media Law* (5th ed, Penguin Books, 2008) at 5-053.

> One essential skill of investigative journalism is the cultivation of sources of information. Unless the law affords real protection to the confidential relationship between the journalist and his cultivated source, both the quantity and quality of "news" will be diminished.
>
> ...
>
> Sources, however carefully cultivated, are delicate blooms. They come in many varieties. Invariably, they have some reason for seeking anonymity. Sometimes, the position they hold makes it unseemly that they should be identified speaking to the press. Mostly, they have come by the knowledge that they think it right to impart because they are in some relationship which can be termed confidential—an employee, or a professional adviser, or a friend or relative. They apprehend that they will in some way suffer if their identity is discovered: maybe just hostility, more often reprisals in the form of loss of job or loss of trust. Almost always, they could be sued for breach of confidence by those on whom they inform. So most journalistic sources would decide not to impart information at all if there was any appreciable risk that their identity would subsequently be disclosed.

16. However, disclosure may be justified where the moral imperative of disclosure can be seen as outweighing, or overriding, the 'chilling effect' of source disclosure:[19]

> The journalist whose source genuinely imperils national security, or threatens innocent life or continues to commit serious crime, can be obliged by law to break a confidence he should never expect to keep. Orders made in such rare cases would not frighten off sources who are the mainstay of news and information: they would recognise the moral imperative of disclosure, and would realise it could never happen to them.

17. The Court of Appeal has recognised the societal benefit of "having discussion and evaluation of affairs that is informed", and noted "the desirability of protecting those who contribute from the consequences of unnecessary disclosure of their identity."[20]

---

[19] Geoffrey Robertson and Andrew Nicol *Media Law* (5th ed, Penguin Books, 2008) at 5-054.

[20] *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163 (CA) citing *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73.

SECTION 68(1) OF THE EVIDENCE ACT 2006

18. Section 68(1) of the Evidence Act 2006 contains a statutory presumption against disclosure of the identity of journalists' sources. Subsection (1) puts the default position as follows (emphasis added):

> 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.

19. The section provides for one of the stated purposes of the Evidence Act 2006, being to protect rights of confidentiality and other important public interests;[21] namely the public interest in a free press. It was enacted following a recommendation by the Law Commission made in 1999 as part of its ten year review of the law of evidence. In its report, the Commission said:[22]

> The 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.

20. In the report from the Justice and Electoral Committee on the Evidence Bill it was noted that no submissions were received from media organisations regarding the section. The Committee said:[23]

> The clause follows the recommendation made in the Law Commission's report. We consider that this clause adds a high degree of clarity to the bill on the matter. In addition, we consider that there was ample time for interested parties to comment on the clause, especially given the fact that we extended the closing date for submissions on the bill.

21. There were no amendments to cl 64 of the Evidence Bill (256-1), which later became s 68.

22. Randerson J, in *Police v Campbell,* the leading and only detailed New Zealand decision applying s 68, summarised the provision as follows:[24]

---

[21] Evidence Act 2006, s 6.

[22] Law Commission *Evidence* (NZLC R55, 1999) at [301] referring to the earlier preliminary paper, Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994).

[23] Evidence Bill (256-2) (select committee report) at 8.

> Except to the extent specifically enacted in s 68, journalists are competent and compellable witnesses in the same way as any other witness. The protection from compellability is limited and specific. It applies only where a journalist has promised an informant not to disclose his or her identity. The protection is limited to exemption from the obligation to answer questions or produce documents that would disclose the identity of the informant or enable that identity to be discovered. It does not extend, for example, to the content of any document or conversation between an informant and a journalist unless the content would enable the identity of the informant to be discovered. The limited protection conferred by the statute is not absolute. It is qualified by the power given to a High Court judge to order under s 68(2) that the protection under s 68(1) is not to apply. While a journalist may not be compelled to disclose the identity of an informant by virtue of s 68(1), the journalist may choose to do so if he or she wishes.

23. It is submitted that s 68 is to be read in a manner consistent with s 14 of the New Zealand Bill of Rights Act 1990,[25] which states that:

> Everyone has the right to freedom of expression, including the freedom to seek, **receive, and impart** information and opinions of any kind in any form.

Has there been a promise of non-disclosure?

24. In order for s 68(1) to be invoked there must have been a promise of non-disclosure made by the journalist to his source.[26]

25. In most cases the only evidence for the existence of a promise will be that given by the journalist. It is submitted that the section would be unworkable if the existence of a promise required evidence from the source and so, in most instances, the evidence of the journalist of a promise within s 68(1) must be taken, subject to a critical review of the circumstances, as sufficient.

26. The appellant was advised by the Court's minute of 2 April 2014 **[CB**24**]** that the issue of whether s 68(1) may be invoked is "partly a factual

---

24 *Police v Campbell* [2010] 1 NZLR 483 (HC) at [84].

25 See *Police v Campbell* [2010] 1 NZLR 483 (HC) at [92].

26 A matter not in dispute in *Police v Campbell* [2010] 1 NZLR 483 (HC) at [14] and [85] where the journalist, John Campbell gave a detailed account of the circumstances of the interview at [35].

issue" and that the Court would only be able to act upon "factual information properly provided".

27. The appellant has sworn that he "promised the person/people who provided [him] the information that their identity or identities would not be disclosed." **[CB 358].**[27] However, no further detail of the circumstances surrounding the promise is given.

28. The existence of a promise was not in dispute in *Police v Campbell* where the journalist, Mr Campbell and others gave a detailed account of the circumstances in which the relevant promises were made.[28]

29. In order for Mr Slater to invoke s 68(1) it is necessary for the Court to be satisfied that a promise was made as a matter of fact. While the only evidence of this is Mr Slater's deposition of 27 August 2013 at paragraph [6] **[CB 358]**, the failure to go into further detail is not necessarily conclusive.

Is Mr Slater a "journalist"?

30. A "journalist" is defined by s 68(5) as (emphasis added):

> a person who in the **normal course of that person's work** may be given information by an *informant* in the **expectation** that the information **may be published** in a *news medium.*

31. This is the first New Zealand case in which the definition of "journalist" has been in issue.

32. In *Ashby v Commonwealth of Australia (No 2)* the Federal Court of Australia said of the definitions that:[29]

> the statutory definitions of —informant and —journalist in s 126G create a relationship that must exist between the particular information conveyed and the persons between whom it is communicated.
>
> ...
>
> the definitions in s 126G tie the privilege conferred by s 126H(1) back to the imparting of the particular information given by the

---

27 Affidavit of Cameron John Slater sworn 27 August 2013 at [6] **[CB 354]**.

28 *Police v Campbell* [2010] 1 NZLR 483 (HC) at [14] and [85].

29 *Ashby v Commonwealth of Australia (No 2)*[2012] FCA 766 at [19] at [24].

> informant and to the occasion of that imparting. The privilege exists so that an informant cannot be identified as having provided that particular information or as having been the source of, in the usual situation, the journalist's story containing that information. There is no indication that s 126H(1) intended to provide confidentiality for the identity of the informant as the provider of information, where and at a time that the circumstances of its imparting are not, or are no longer, confidential.

33. It is submitted that whether someone is a "journalist" within the definition calls for an examination by the Court of:

    (a) the "normal course of" the activities put forward by the person in question as being that person's "work", and whether those activities properly constitute "work"; and

    (b) whether, having regard to that "normal course of work" so identified, it would be reasonable for there to arise an expectation that that person may, in the "normal course of that work", publish or cause to be published in a "news medium" information that is given to them by persons who might expect that such publication may occur.

What does "normal course" mean?

34. The phrase "normal course" calls for an "objective factual assessment based on all the circumstances of the particular case".[30] The Court of Appeal, in interpreting the phrase "ordinary course" have said that:

> The word "course" suggests **flow or continual operation** and ordinary is self-explanatory.

35. It is submitted that in order for someone to have a "normal course of work" there must be degree of regularity and consistency in the activities said to constitute work.

36. While typically "normal course" would be an appropriate description for full time employment it will not always be so. A part time journalist writing regularly would produce journalism in the normal course of his work, even though the articles might only be weekly or even monthly.

37. The meaning of "work" will be considered below (at paragraph 53).

---

[30] *StockCo Ltd v Gibson* (2012) 11 NZCLC 98-010, [2013] NZCA 330 at [42].

The relevant time period

38. The test must be an objective one of what expectation may have arisen from the normal course of the person's work at the time the promise was made and the information imparted.[31] The primary focus should therefore be on the "normal course" of the appellant's work at, and before, the time the promise of non-disclosure was made.

39. Evidence of the appellant's subsequent work might, however, go to the Court's assessment of whether the appellant was a person who may, at the time of the provision of the information, have been expected to receive information for publication. Such evidence may be confirmatory of the expectation.

40. Mr Blomfield alleges that the defamatory material began to be published by Mr Slater on or around 3 May 2012.[32] Mr Slater must have received the "information" from the source of the allegedly defamatory material prior to that date.

41. Mr Slater deposes to having received the hard drive from his source in around February 2012 **[CB** 278**]**.[33] This is corroborated by Mr Price's evidence of having attended a meeting with the appellant and others in May 2012 at which he was told that the appellant was in possession of the contents of electronic files belonging to the respondent **[CB** 305].[34]

42. The s 68(1) inquiry should therefore focus upon the "normal course" of Mr Slater's activities around and prior to February 2012 and what reasonable expectation might have arisen from those activities around that time, with evidence of his subsequent activities carrying less weight in assessing the expectation.

Evidence as to the "normal course" of Mr Slater's work

43. In invoking s 68(1) Mr Slater must be submitting that he is a journalist and that he works as such. In his affidavit of 14 May 2014 he gives examples of the normal course of what he says is his "work" spanning variously from 2011 to 2014, to summarise:

---

31 As the respondent submits, due to the "impracticalities of assessing the expectations of the source": respondent's submissions at [46]. See *Ashby v Commonwealth of Australia (No 2)*[2012] FCA 766 at [19].

32 Affidavit of Matthew John Blomfield sworn 21 May 2014 at [4] to [6] **[CB** 585**]**.

33 Affidavit of Cameron John Slater sworn 26 July 2012 at [2] and [3] **[CB** 278**]**.

34 Affidavit of John Albert Price for plaintiff sworn 23 August 2012 at 3 **[CB** 306**]**.

(a) Writing about, primarily, national and local political issues for publication on Whale Oil (which he submits is a "news medium" (discussed below at paragraph 74)), including some stories which he was the first to report and which subsequently received coverage from mainstream media outlets.[35]

(b) Appearing on television and radio as a commentator on current affairs;[36]

(c) Being employed as the editor of Truth Newspaper from November 2012 to May 2013;[37]

(d) Attending court proceedings as "media".[38]

44. On 3 March 2014 in an interview published on Sounzgood.co.nz Mr Slater described how his time is spent:[39]

> **How many hours a day do you spend blogging? Do you have a structure workflow or do you just blog when inspiration hits?**
>
> Two to four hours a day actually writing posts. The rest of the day is all the work that goes into getting the background material, interviews, meetings and general networking that keeps the information flowing.

Mr Slater goes on to say in that interview that Whale Oil is his "hobby", but in context as a response to the question "What are some other things Cameron Slater enjoys doing in his spare time?" the possible meaning being that Mr Slater enjoys blogging, in the same way as he would enjoy a hobby [**CB** 630].

45. However, in order to determine what expectation may have arisen it is necessary to isolate from the available evidence those matters of fact which go to determining the "normal course" of Mr Slater's "work" at the time when he deposes the promise was made and the information received; namely around February 2012.

46. Mr Slater has detailed some of his journalistic endeavours in 2011 and 2012. Counsel have reviewed the links in Mr Slater's affidavit [**CB** 414]

---

35 Affidavit of Cameron Slater dated 14 May 2014 at [17] [**CB** 414].
36 Affidavit of Cameron Slater dated 14 May 2014 at [16] [**CB** 413].
37 Affidavit of Cameron Slater dated 14 May 2014 at [19] [**CB** 417].
38 Affidavit of Cameron Slater dated 14 May 2014 at [14] [**CB** 412].
39 Affidavit of Matthew John Blomfield sworn 21 May 2014 at Exhibit "I" [**CB** 618].

and have inserted the relevant date of publication of the article referred to:

(a) **January 2011:** a "2011 – Summer series of interviews with notable New Zealand political personalities", including Trevor Mallard, Garth McVicar and Celia Wade-Brown;

(b) **7 January 2011:** the "2011 – Investigation of Albany Dairy selling drug paraphernalia to minors" story, which involved a story about a Superette allegedly selling pipes designed for smoking methamphetamine to children;

(c) **19 February 2011:** the "2011 – South African neo-nazi and skulduggery in Rodney selection" story, where the appellant covered "the story of a former South African neo-nazi member of the Afrikaner Resistance Movement holding the position of Electorate Chair for the National party in Rodney electorate";

(d) **14 March 2011:** the "2011 – Revealed NZ Principals Federation plans to run a political campaign against the Minister of Education";

(e) **2 December 2011:** the "2011-2014 Ports of Auckland story" involving "extensive coverage of Port Strike that began in 2011", although counsel notes that this appears to be a re-posting of another blogger, "Cactus Kate's" story;

(f) **31 December 2011:** the "2011 – Labour party website story" where the appellant broke a story of "Labour party website vulnerabilities;

(g) **1 January 2012:** the "2011 Phil Goff – SIS story" which involved a story that Phil Goff was "briefed by Director of SIS in 2011 regarding Israeli spies despite" claims that Mr Goff had never been briefed;

(h) **8 April 2012:** the "April 2012 – Meatworkers Union financial misreporting in their accounts story" involving "massive financial underreporting in contravention of statutory obligations by the NZ Meatworkers Union."

(i) **6 September 2012:** the "September 2012 Interviews with key members of Fiji Government" where the appellant "[g]ained

interviews with the Attorney General of Fiji" and other Fijian officials.

47. Mr Stephen Cook, an experienced freelance journalist, gives evidence in support of Mr Slater's journalist credentials in his affidavit sworn 14 May 2014 (annexed to Mr Slater's affidavit at Appendix 5 **[CB** 560**]**). Mr Cook states **[CB** 562**]**:

> I was first introduced to Mr Slater in mid-2012 after he was appointed Editor of Truth. Prior to that I knew him by reputation only. Often my colleagues would receive news tips from Mr Slater or contact him to verify information they'd gleaned from other sources.
>
> I had also closely followed his work over the Phil Goff SAS scandal and the Labour Party credit card story and was impressed at the level of detail in his coverage.

48. Mr Slater was also employed by the Truth Newspaper from around late October 2012 **[CB** 578**]**. The evidence of Mr Horler is that the Truth wanted a "hard hitting editor that would tackle issues head on and not be easily intimidated" he says that the Truth "found these attributes in Mr Slater".[40]

49. Based on the publication of the stories detailed in paragraph 46 (which appear regular and continual in nature) published via Whale Oil, and the evidence of Messrs Cook and Horler, it is submitted that Mr Slater was someone who, in late 2011 to early 2012, might have been expected, in the normal course of his activities, to publish information he received, particularly via Whale Oil.

50. At paragraph 16 of his affidavit of 14 May 2014 Mr Slater summarises his credentials as a journalist **[CB** 413**]**. However, no particulars of the precise dates and the capacities in which Mr Slater appeared in the various news media discussed in his affidavit are provided. A table summarising those credentials is attached to these submissions as Annexure **A**. It is submitted that this evidence could be accorded some weight as it does tend to suggest that Mr Slater was likely, at the relevant time, to have been developing (or to have developed) a public profile – which may give rise to an expectation that he may publish in a news medium.

---

[40] Sworn statement of Michael Francis Joseph Horler at [5] **[CB** 578**]**.

51. For the reasons advanced above, little benefit is derived from surveying the evidence of Mr Slater's conduct post-dating the relevant time period, including the numerous editorials and articles written by Mr Slater and published in the 'Truth Newspaper' (annexed as appendix 1 to his affidavit of 14 May 2014 [**CB** 430-505]). They are only relevant for the fact that they are consistent with a claim that his normal course of work involves the dissemination of news or observations on news.

52. The respondent has drawn attention to statements made by Mr Slater on Whale Oil in late 2011 / early 2012 that he is "not a journalist" [**CB** 369, 375 and 384] and comments made in relation to, and in the course of, this proceeding to the effect that he does not contend to be a "journalist" [**CB** 586]. This may tend to indicate that Mr Slater does not regard journalism as being his "work". However, it would seem that Mr Slater's own assessment of whether he is a "journalist" or not, at a time post-dating the relevant promise, is of little significance in terms of the statutory definition of "journalist".

Are Mr Slater's activities "work"?

53. The respondent's evidence is that Mr Slater was "a sickness beneficiary or the recipient of income protection insurance, due to illness which rendered him incapable of work due to depression."[41] He refers to various articles which suggest that Mr Slater:

(a) was the recipient of income protection insurance from Fidelity Life for a period, it seems, of around 5 years from 2004, during which time he maintained that he was not "working" in the formal sense of being employed;[42]

(b) was apparently the recipient of a sickness benefit;[43]

(c) finds using Whale Oil important to dealing with his depression;[44]

(d) started Whale Oil as a "form of therapy";[45]

---

41 Affidavit of Matthew John Blomfield sworn 21 May 2014 at [14] [**CB** 586].
42 Affidavit of Matthew John Blomfield sworn 21 May 2014 at Exhibits "A", "B", "C" (at "Phase six") and "D" [**CB** 592, 594, 596 and 599].
43 Affidavit of Matthew John Blomfield sworn 21 May 2014 at Exhibit "E" [**CB** 601].
44 Affidavit of Matthew John Blomfield sworn 21 May 2014 at Exhibit "F" [**CB** 603].
45 Affidavit of Matthew John Blomfield sworn 21 May 2014 at Exhibit "F" [**CB** 618].

(e) describes his career as being "consulting work, and" Whale Oil as "a product of passion"[46], or as an all-consuming "hobby"[47] rather than as "work";

(f) and that Whale Oil does not generate any revenue for Mr Slater.[48]

54. Much of this evidence is in the nature of hearsay. But it does give rise to questions about what Parliament intended by the word "work".

55. Given the available evidence of Mr Slater's activities during the relevant period, it becomes necessary to consider whether they constitute "work" within the definition of "journalist".

56. Mr Blomfield contends for a narrow definition of "work" in the sense of how a person "makes a living".[49] He submits that the word "work" is a reference to:[50]

> … the person's occupation and **means of earning a living**, and would not include, for example, a hobby

57. Publishing information on Whale Oil may very well be in the "normal course" of Mr Slater's activities, but the respondent submits that it is not in the "normal course of his *work*". It is a "hobby" or a "pass-time".

58. The respondent points to the fact that Mr Slater appears to have been unemployed for much, if not all, of the relevant period (refer paragraph 53 above).

59. The respondent's submission is to define "work" quite narrowly. There may well be persons who choose to be publish in the news media, but who do not do so as a "means of earning a living". On the respondent's submission all but those who make their living from journalism would be excluded. His submission gains support from the extension of s 68(1) to the journalist's "employer". Section 68(1) reads:

> neither the journalist **nor his or her employer** is compellable

---

46 Affidavit of Matthew John Blomfield sworn 21 May 2014 at Exhibit "I" **[CB** 617**]**.

47 Affidavit of Matthew John Blomfield sworn 21 May 2014 at Exhibit "I" **[CB** 617**]**.

48 Affidavit of Matthew John Blomfield sworn 21 May 2014 at Exhibit "J" and "K" **[CB** 634 and 639**]**.

49 Submissions for respondent at [31].

50 Submissions for respondent at [31].

60. However, this reference to an "employer" is necessary in the case of a journalist who is employed because otherwise the employer could be compelled. It was not intended to assist in the definition of what might amount to "work".

61. The Australian position is worthy of note. Section 126G of the Evidence Act 1995 (Cth) defines a journalist as:

> a person who is **engaged and active in the publication of news** and who may be given information by an informant in the expectation that the information may be published in a news medium.

62. The first version of the Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) which introduced s 126G into the Evidence Act 1995 (Cth) defined a journalist on identical terms to s 68 of the Evidence Act 2006 (NZ):

> a person who **in the normal course of that person's work** may be given information by an informant in the expectation that the information may be published in a news medium.

63. The Explanatory Memorandum to the Bill suggested that the protection to be afforded would be limited (emphasis added):[51]

> It is also significant to note that the **journalist should be operating in the course of their work.** This means that the journalist should be **employed as such** for the privilege to operate, and private individuals who make postings on the internet or produce non-professional news publications, where this is not their job, **will not be covered** by section 126H.

64. This definition was subject to considerable debate before the Senate Standing Committee on Legal and Constitutional Affairs. The Australian Greens said:[52]

> 'Journalism' and 'blogging' are two examples of activities that end up producing certain kinds of media outputs that are often 'observations on news' or are conveyed to a section of the public'. What remains ambiguous in this interpretation is whether 'in the

---

[51] Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) (Explanatory Memorandum) at [8].

[52] Senate Standing Committee on Legal and Constitution Affairs *Evidence Amendment (Journalists' Privilege) Bill 2010 and Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2)*: *Additional comments by Australian Greens.*

> normal course of that person's work' implies that a journalist has to be paid.

65. To address the ambiguity the Greens introduced a successful amendment to the Bill to broaden the definition of journalist to "a person who is engaged and active in the publication of news".[53]

66. In my submission, the caution that was driving the amendment was unnecessary.

67. In contrast with the Commonwealth, both New South Wales and Western Australia have adopted arguably narrower 'press shield' laws. The New South Wales definition of "journalist" is:

> a person **engaged in the profession or occupation of journalism** in connection with the publication of information in a news medium.

68. Western Australia introduced a similar law with the Evidence and Public Interest Disclosure Legislation Amendment Act 2012 (WA), which introduced a definition of "journalist" into s 20G of the Evidence Act 1906 (WA) on the same terms as the Evidence Act 1995 (NSW).

69. It is submitted that on the evidence Mr Slater is someone who, in the course of his normal activities, might be *expected to publish* information he receives. It will be for the Court to determine whether "work" is to be construed narrowly or broadly; but the definition itself gives little support to the argument that it should be restricted to paid employees by the traditional media. In contrast to the Australian State definitions it seems to have been Parliament's intention to cover anyone who in the normal course of their work disseminates news, which would include bloggers who meet that definition.

70. Reference can usefully be made to comments of the High Court of Ireland in *Cornec v Morrice*.[54] There the Court was concerned with whether the director of a charity who ran a blog chronicling the activities of religious cults was compellable to testify as a witness of fact. The Court said Mr Garde was "not a journalist in the strict sense of the

---

[53] Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) (Amendments to be moved by Senator Ludlam on behalf of the Australian Greens in committee of the whole).

[54] *Cornec v Morrice* [2012] IEHC 376 at [66].

term."[55] However, discussing the relevant provisions of the Irish Constitution the Court held that:[56]

> A person who blogs on an internet site can just as readily constitute an "organ of public opinion" as those which were more familiar in 1937 and which are mentioned (but only as examples) in Article 40.6.1, namely, the radio, the press and the cinema. Since **Mr. Garde's activities** fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected.

71. The subsequent issue for determination in deciding whether Mr Slater is a journalist is whether it might be expected that Mr Slater would publish information in a "news medium" as part of his "work".

72. Mr Slater relies principally on the status of his website as giving rise to the expectation.[57] However, it is submitted that the Court should not discount other news media in which there may be some expectation Mr Slater might publish. The situation of a freelance journalist, who may provide stories to numerous news media, but none in particular, should not be overlooked.

73. Nonetheless, in this case principal reliance is placed upon the fact that Mr Slater operates Whale Oil as giving rise to the expectation that in the normal course of his activities he may publish information given to him, which gives rise to the issue of whether Whale Oil is in fact a "news medium".

Is Whale Oil a "news medium"?

74. The Evidence Act 2006 defines a news medium as "a *medium* for the dissemination to the public or a section of the public of *news* and observations on *news*."[58]

75. Whale Oil, being a collection of text available for access via the internet, is plainly a medium, being a means or mode of expression or communication. Similarly, there can be little argument that Whale Oil

---

[55] *Cornec v Morrice* [2012] IEHC 376 at [65].

[56] *Cornec v Morrice* [2012] IEHC 376 at [66].

[57] Affidavit of Cameron Slater dated 14 May 2014 at "Status of Site as Media and Appellant as Journalist" **[CB** 409**]**.

[58] Evidence Act 2006, s 68(5).

disseminates information to a section of the public. It is the appellant's evidence that Whale Oil is viewed more than 75,000 times per day by members of the public (although there is no evidence of the period over which this statistic was collected).[59]

76. The more contestable issue is whether, at the relevant time, Whale Oil was disseminating "news and observations on news".

77. The Collins Concise English Dictionary offers the following definition of "news":[60]

> **news** *n.* (*functioning as sing.*) **1.** important or interesting recent happenings. **2.** information about such events, as in the mass media. **3. the news.** a presentation, such as a radio broadcast, of information of this type. **4.** interesting or important information not previously known.

78. Although it seems Whale Oil publishes much that is not news, the articles detailed at paragraph 46 above would, it is submitted, qualify as news or observations on news.

79. Judge Blackie held that as a "blog site" Whaleoil did not come within the definition of "news medium".[61] The Judge referred to the Law Commission "report News Media Meets 'New Media'[62] in holding that Whale Oil was not a "news medium".[63] The Judge cited [2.131] of what was in fact the Commission's issues paper where it was said:

> However blog sites are not democratic public forums: as noted earlier they are often highly partisan and blog posts and commentary can be highly offensive and personally abusive

80. It is submitted that the Judge erred in concluding that a blog cannot be a "news medium" based on this comment.

81. A full reading of the issues paper makes clear that the Commission considered it an open issue whether the definition of "news medium" in s 68(5) would apply to a blog. At [3.31] of the issues paper the

---

59 Affidavit of Cameron Slater dated 14 May 2014 at [11] [**CB** 410].

60 Collins Concise English Dictionary (2nd ed, 1988) at 763.

61 *Blomfield v Slater* DC Manukau CIV-2012-092-001969, 26 September 2013.

62 Law Commission *The News Media Meets 'New Media'* (2011) at [3.28].

63 *Blomfield v Slater* DC Manukau CIV-2012-092-001969, 26 September 2013 at [16] and [17].

Commission expressly considered the scope of the definition of "news medium" and said:

> That definition may be wide enough to encompass a blog or other website...

82. Furthermore, in March 2013 the Commission had released a final report *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*[64] where it said:[65]

> The Evidence Act 2006 codifies what had probably become the common law position: that journalists do not have to disclose their sources in court unless the judge so orders. This is also an aspect of access to information, because sources may decline to provide material to journalists if they are afraid it might be disclosed in court.[66] The Act defines both "journalist" and "news media" in such a way as to **leave it open exactly who is included in those terms. Does it for example include a blogger?** Overseas courts have given different answers to that question: the New Jersey Supreme Court has refused to allow a blogger to use the New Jersey Press Shield law,[67] whereas an Irish Court has taken the opposite view.[68]

83. The respondent seeks to introduce a requirement that for something to be "news" it must "hold a certain degree of objective public interest".[69] This ought to be rejected. Something can be news, even if there is little to no "public interest" in its publication, such as revelations about the private affairs of the famous.

Conclusion: news medium?

84. If the Court is satisfied on the evidence available that in late 2011 to early 2012 Whale Oil published news, or made observations on news, then it should be considered a "news medium". The evidence in favour

---

64 *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013).

65 At [2.13] to [2.14].

66 Evidence Act 2006, s 68.

67 Terry Baynes "New Jersey Court Denies Blogger Shield Protection" Reuters (online ed, New York, 7 June 2011).

68 *Cornec v Morrice* [2012] IEHC 376 discussed in Eoin Carolan "The implications of media fragmentation and contemporary democratic discourse for "journalistic privilege" and the protection of sources" Irish Jurist 49 (2013) 182.

69 Respondent's submissions at [56].

of a finding that Whale Oil is a "news medium" is set out at paragraph 46 above.

PUBLIC INTEREST IN DISCLOSURE: S 68(2)

85. Only if the Court holds that s 68(1) is applicable must s 68(2) be considered. That section is in the following terms:

> 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**—
>
> (a) any **likely adverse effect** of the disclosure on the informant or any other person; and
>
> (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**.

86. The section is similar to s 35(2) of the Evidence Amendment Act 1980 (No 2) which applied to confidential communications in general and, like s 68(2), required the weighing of competing public interests. The Court of Appeal held in *R v Howse* that:[70]

> Identifying an area as having problems not lending themselves to solution by fixed rules, the legislature has conferred a discretion on the Court to weigh the competing public interests bearing on each particular case, having regard to broad criteria.

87. The onus to satisfy the Court rests upon the party seeking to displace the presumption of non-disclosure.[71] However, as the Court discussed in *Police v Campbell* this is not in the nature of an evidential onus, but rather "an evaluative judgment of fact and degree".[72]

---

[70] *R v Howse* [1983] NZLR 246 (CA) at 251 as cited by Randerson J in *Police v Campbell* [2010] 1 NZLR 483 (HC) at [53].

[71] *Police v Campbell* [2010] 1 NZLR 483 (HC) at [86] per Randerson J.

[72] *Police v Campbell* [2010] 1 NZLR 483 (HC) at [87] per Randerson J.

88. As Randerson J said in *Police v Campbell*, having referenced the importance placed upon freedom of expression by s 14 of the New Zealand Bill of Rights Act 1990:[73]

> The presumptive right to the protection should not be departed from lightly and only after a careful weighing of each of the statutory considerations.

The weighing exercise

The issues to be determined

89. Against the factors outlined in s 68(2)(a) and (b), must be weighed the "public interest in the disclosure of evidence of the identity of the informant". In assessing this the Court must have "regard to the issues in the case".

90. The issues to be determined in the proceeding will be whether the alleged defamatory statements have the defamatory meanings alleged and, in relation to Mr Slater's defences, whether those statements were true and/or whether they were Mr Slater's honest opinion.

91. The respondent submits that the identity of the appellant's source(s):

> ... is relevant to the rebuttal of the appellant's honest opinion defence and to the question of damages.

The relevant factors going to disclosure

92. In *X Ltd v Morgan-Grampian (Publishers) Ltd* Lord Bridge of Harwich, speaking of s 10 of the Contempt of Court Act 1981 (UK) (which differs from s 68 in that it requires disclosure to be "necessary"), said that it would be "foolish to attempt to give comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration."[74]

93. In that case the House of Lords ordered a journalist to disclose the identity of a source who was in possession of a stolen copy of the plaintiff's business and refinance plans. Their Lordships considered it

---

73 *Police v Campbell* [2010] 1 NZLR 483 (HC) at [93] per Randerson J.

74 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 (HL) at 44, the journalist later obtained a ruling from the European Court of Human Rights in *Goodwin v The United Kingdom* (1996) (17488/90) (Grand Chamber, ECHR) that the disclosure was a breach of Art 10 of the European Convention on Human Rights.

essential that the identity of the informant be disclosed in order to prevent "severe damage to [the plaintiff's] business, and consequentially to the livelihood of their employees".[75] There the House said that in carrying out the balancing exercise that:[76]

(a) The **nature of the information** obtained from the source will be relevant, that is the "greater the public interest in the information which the source has given to the publisher or intended publisher, the greater the importance of protecting the source." For example, where the information is obtained "for the purpose of exposing iniquity" then there may be a greater legitimacy in source protection.

(b) The **manner in which the information is obtained** may be of greater importance still, "If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. If it appears to the court that the information was obtained illegally, this will diminish the importance of protecting the source."

94. Other cases have also found the following matters relevant in deciding whether to order disclosure:

(a) In *Police v Campbell* the Court ordered disclosure, on the basis that the **prosecution of crime** and the bringing the potential thieves of war medals to justice was "very much in the public interest."[77]

(b) **The falsity of the information disclosed**: In *Financial Times Ltd v Interbrew* the Court of Appeal for England and Wales said, "If, as the Court stressed in Goodwin (above, para. 39), the central purpose of the shielding of journalists' sources is to enable the press to provide accurate and reliable information, to the extent that that purpose is departed from the rationale of the protection recedes, and with it, arguably, the weight which the courts are called on to accord to it. **There is no public interest in the dissemination of falsehood**."[78] The case concerned a

---

75 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 (HL) at 45.

76 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 (HL) at 44 per Lord Bridge of Harwich.

77 *Police v Campbell* [2010] 1 NZLR 483 (HC) at [104] per Randerson J

78 *Financial Times Ltd v Interbrew* [2002] EWCA Civ 274 at [57].

fabricated version of a presentation that was confidential to Interbrew SA which falsely suggested it was interested in acquiring another company. The Court upheld the order of Lightman J requiring disclosure.

95. *Ashworth Hospital Authority v MGN Ltd*[79] concerned the publication by the "Daily Mirror" of confidential medical records of a murderer who was in custody at the appellant's hospital. The hospital obtained an order against the publisher of the "Daily Mirror", MGN Ltd requiring it to disclose how the medical records came to be in its possession and identifying the employee who provided them. Their Lordships held that an order requiring disclosure was justified because of the wrongful nature of the disclosure of the records, the desire to deter the same or similar wrongdoing and due to the increased difficulty created in caring for patient as a result of the disclosure.[80]

96. Where a source has clearly provided information for the purposes of character assassination or for some other self-serving purpose then, it is submitted, there is a greater public interest in disclosure.

97. Here it is submitted that there is little "public interest" in the information provided by Mr Slater's source. The information has been used to level allegations about the business and other dealings of Mr Blomfield in respect of which the public is likely to have little interest. It seems from Mr Blomfield's evidence **[CB** 588**]** the relevant authorities have declined to take an interest:[81]

> As a result of the complaints I understand to have been made by the appellant, I have been investigated by the Serious Fraud Office, the Internal Revenue Department, the Companies Office, the Police and the Ministry of Economic Development and the Official Assignee. None of these complaints were upheld and all investigations have been concluded. I do not have a criminal record, nor are there any pending charges against me. My bankruptcy has been discharged.

98. There is also a suggestion that the source's (or sources') information was stolen, or at the very least its disclosure constitutes a breach of

---

79 *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, [2002] UKHL 29.

80 *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, [2002] UKHL 29 at [66] per Lord Woolf CJ.

81 Affidavit of Matthew John Blomfield sworn 21 May 2014 at [24] **[CB** 588**]**.

confidence.[82] Mr Slater produces an email **[CB** 568**]** which he says negates any suggestion of theft, but without more this must be of doubtful weight.

Whether there might be a "chilling effect"?

99. It is submitted that it is not necessary to adduce evidence of a "chilling effect". As Randerson J said in *Police v Campbell*:[83]

> Such an effect could be specific to the informant in the particular case or more generally as tending to deter members of the public from communicating confidential material to the media. While any potential impact of this kind may be difficult to quantify, the courts and the legislature have specifically recognised the public interest in preserving the ability of the media to access sources of fact.

100. In the circumstances of this case there is unlikely to be a chilling effect if disclosure were ordered. The information disclosed is of little public interest.

Possible "adverse effects"

101. Weighing against disclosure is the likelihood of the "adverse effect of the disclosure" on the informant or "any other person".

102. It is submitted that this consideration is aimed at the quintessential whistle-blower who may face a loss of employment, status, reputation or adverse familial consequences in the event of disclosure. This can perhaps be contrasted with the nature of the information provided in this case which, it seems, is unlikely to visit any real adverse consequences upon the informants, save for the possible suggestion of physical violence.

103. The appellant suggests that the respondent may take retaliatory action, in the form of physical intimidation or the threatening of his source(s)' jobs or finances.[84] He alleges that the respondent has been the source of a number of false complaints to authorities in respect of "his opponents".

104. The respondent received a conviction in 2008 for assault for which he was discharged without conviction **[CB** 589**]**.

---

[82] Affidavit of Matthew John Blomfield sworn 21 May 2014 at [22] **[CB** 588**]**.

[83] *Police v Campbell* [2010] 1 NZLR 483 (HC) at [101] per Randerson J.

[84] Affidavit of Cameron John Slater sworn 14 May 2014 at [33] on **[CB** 424**]**.

105. Mr Spring provides evidence that if Mr Slater's sources are named then they "run the risk of being threatened and intimidated by Mr Blomfield."[85]

106. There may be some adverse effect on the journalistic reputation of the appellant if the Court orders disclosure and it may prevent his ability to obtain information from some sources. If this discourages some informants from disclosing defamatory information of little public interest then so be it. It is not in the public interest to provide protection for informants intent on pursuing personal vendettas or in conducting personal or commercial attacks.

107. It is of note that where a Court orders disclosure that the reputation and integrity of the journalist concerned is unlikely to be effected and such considerations should be given little weight: *R v Campbell*.[86]

108. It is for the Court to assess the evidence of any likely adverse effects on the informants and the appellant in deciding whether to order disclosure.

IDENTITY ALREADY DISCLOSED:

109. Rares J said in *Ashby v Commonwealth of Australia (No 2)*:[87]

> There is no indication that s 126H(1) intended to provide confidentiality for the identity of the informant as the provider of information, where and **at a time that the circumstances of its imparting are not, or are no longer, confidential**.

110. The Federal Court held that in circumstances where the identity of the informant is already known then the privilege is lost.[88]

111. Mr Spring's position is made clear in his affidavit. He has named himself as a source **[CB** 581**]**.[89]

112. It is submitted that the respondent is correct, following *Ashby*, that "the appellant could nevertheless not refuse to provide discovery and answers

---

85 Affidavit of Marc Robert Spring sworn 14 May 2014 at [8] **[CB** 582].
86 *Police v Campbell* [2010] 1 NZLR 483 (HC) at [110] per Randerson J.
87 *Ashby v Commonwealth of Australia (No 2)*[2012] FCA 766.
88 *Ashby v Commonwealth of Australia (No 2)*[2012] FCA 766 at [31].
89 Affidavit of Marc Robert Spring sworn 14 May 2014 at [3] **[CB** 581**]**.

to interrogatories that involve Mr Spring due to his identity as a source now being known and admitted."[90]

THE "NEWSPAPER RULE" AND r 8.46 OF THE HIGH COURT RULES

113. Rule 8.46 of the High Court Rules provides:

> If, in a proceeding for defamation, the defendant pleads that the words or matters complained of are honest opinion on a matter of public interest or were published on a privileged occasion, no interrogatories as to the defendant's sources of information or grounds of belief may be allowed unless the interrogatories are necessary in the interests of justice.

114. The Court of Appeal gave the rationale underpinning the rule as follows in *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*:[91]

> The broader purpose is to encourage the flow of information to the public and thereby facilitate free trade in ideas. That flow is dependent on the reporting of matters of public interest to the news media. The rule promotes this end by holding out to news gatherers and contributors of information to the news media the assurance that, unless and until a matter goes to trial and in the setting of the trial itself, identification of the source of the news media's information will not ordinarily be compelled.

115. Judge Blackie dismissed the appellant's reliance on r 8.46 by stating that the rule only applies where the words complained of "are honest opinion on a matter of public interest or published on privileged occasion". His Honour said **[CB** 09**]**:[92]

> Whereas the defendant pleads "honest opinion", it is not claimed that the opinion was expressed on a matter of public interest. This is not surprising, having regard to the allegedly offensive nature of much of the material which the defendant admits that it [sic] published.

---

[90] Submissions for the respondent dated 10 June 2014 at [83].

[91] *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163 (CA) at 172.

[92] *Blomfield v Slater* DC Manukau CIV-2012-092-001969, 26 September 2013 at [18] **[CB 9]**.

116. Whether the defence of "honest opinion" is only applicable to matters of public interest or on privilege occasions is perhaps slightly unsettled. The learned authors of Todd observe:[93]

> On one view of the matter the wording of the Act still requires that "honest opinion" can be pleaded only if the facts on which the opinion is expressed are a matter of public interest. Section 8 says that the defence formerly known as fair comment shall "now be known as the defence of honest opinion". That suggests that, except insofar as they are changed by the Act, the same requirements attach to the new defence as the old. Moreover, given the greater protection the law is giving to privacy these days, it would be surprising if the defence of honest opinion had lost the public interest requirement. Nevertheless, there are a number of pronouncements of high authority which take the view that since the 1992 Act makes no reference to public interest, it is, therefore, no longer a requirement. It may now be difficult to argue for the contrary view.

117. That authority is *Awa v Independent News Auckland Ltd* ("In defamation proceedings under the new Act it is now unnecessary for a defendant relying on honest opinion to prove that the matter was of public interest or to prove absence of malice."[94]) and *Lange v Atkinson*:[95]

> There is no requirement stated in the statute that the matter on which the opinion is expressed has to be of public interest: *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 at p 595. This apparent relaxation of the common law requirement of public interest would seem to be consistent with s 14 of the New Zealand Bill of Rights Act 1990.

118. This would appear to render r 8.46 of the High Court Rules inconsistent with the requirements at law for the defence of "honest opinion".

119. It is submitted that the purpose of s 68 was to provide a statutory codification of journalistic source privilege and to provide a manner in which that privilege may be overridden. It would be a surprising result if a statutory provision enacted in 2006 was negated by a High Court Rule.

---

93 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [16.8.05].

94 *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 (CA) at 595 per Blanchard J.

95 *Lange v Atkinson* [1998] 3 NZLR 424 at 436.

CONCLUSIONS/SUMMARY

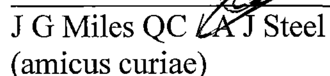
120. As noted above, this is the first time for this Court to consider the applicability of s 68(1), and in particular the definition of "journalist" within the Evidence Act 2006.

121. For the reasons advanced the reasoning of the District Court's decision should not be followed.

122. On the facts, if the Court is satisfied that there has been a promise, that Mr Slater's normal course of work is a course of "work" (primarily by reference to his activities in relation to Whale Oil) in which he might be expected to receive information and to publish that information in a news medium (i..e Whale Oil), then s 68(1) will be applicable.

123. The Court must then engage in an exercise of weighing competing public interests to determine whether, notwithstanding the presumption, it should exercise its discretion under s 68(2) to displace the protection afforded by s 68(1).

Dated 20 June 2014



J G Miles QC / A J Steel
(amicus curiae)

Annexure A – Mr Slater's 'journalistic credentials' appearing from his affidavit of 14 May 2014

Para	Fact	Comment
16(a)	*Appearing on "Citizen A" television programme regularly for over a year appearing with Chris Trotter, Selwyn Manning and Martyn Bradbury.*	No particulars of when Mr Slater appeared on "Citizen A" and in what capacity are in evidence.
16(b)	*Appearance on "The Nation" on TV3, including an interview after my appointment as editor of Truth newspaper with Brian Edwards and Bill Ralston, subsequent regular appearances on The Nation, most recently to discuss my breaking story of Len Brown and his two year secret affair.*	No particulars of when Mr Slater appeared on "The Nation" and in what capacity are in evidence.
16(c)	*Regular appearances with Pat Brittenden at Radio Rhema*	No particulars of when Mr Slater appeared on "Radio Rhema" and in what capacity are in evidence.
16(d)	*Regular appearances on NewstalkZB with Larry Williams each Monday night.*	No particulars of the date from which Mr Slater appeared on "NewstalkZB" and in what capacity are in evidence.
16(e)	*Relieved as host during Christmas New/Year 2012 on Sunday night show for NewstalkZB*	Assuming, at best this was the 2011/2012 holiday period (which is unclear) no evidence of the capacity in which Mr Slater "relieved" are in evidence.

16(f)	*Relieved as host of Mike King's Radio show on RadioLIVE four times in 2012.*	No particulars of the specific times in 2012 when Mr Slater relieved as a talkback radio host are in evidence.
16(g)	*Regular appearance on RadioLIVE political panel on Thursday afternoons with Willie Jackson, John Tamihere and Matt McCarten. Recently spent one hour on RadioLIVE discussing breaking Len Brown story.*	No particulars of the specific times when Mr Slater "regularly appears" are in evidence.
16(h)	*A six month contract currently with NewstalkZB for 5 hours per week of political coverage, stories and commentary.*	Assuming the currency of the contract, this well post-dates the provision of information to Mr Slater.
16(i)	*The appellant was awarded a Canon Media Award at the recent 2014 Canon Media Awards held 9 May 2014*	This post-dates the relevant time period significantly and its weight in proving an expectation of publication in a news medium should be limited accordingly.

Annexure B – Summary of respondent's statement of claim

Date of publication	Para	Article	Defamatory meanings alleged
3 May 2012	5	"Who really ripped off KidsCan – The real story of Matt Blomfield's rip off of Kidscan and how he blamed Warren Powell"	Theft, dishonesty, unprofessionalism, greed, being party to a conspiracy to defraud a charity and abusive nature.
3 May 2012	7	"Knowing me, Knowing You – Matt Blomfield"	Violence, dangerousness, party to threatening behaviour, criminal activity, lying and delusion.
4 May 2012	8	"Operation Kite"	Conspiracy to steal and theft, party to criminal conspiracy to launder money and thievery.
8 May 2012	9	"Ghostwriting for Repeaters 101"	Engaging in conspiracy with journalists to publish negative and malicious news stories.
14 May 2012	10	"Blomfield Files: Free to a Good Home"	Dishonourableness, involvement with drugs, commission of fraud, a bully, corruption, perjury, party to hydraulic-ing, deceitfulness and regularly involved in criminal activity.
15 May 2012	11	"The Blomfield Files: The Compromise"	Dishonesty, engagement in illegal activity, bribery and rapaciousness.
15 May 2012	12	"The Blomfield Files: The Compromise Ctd"	Dishonesty, conspiracy, willingness to pay bribes, thievery and dishonourableness.
16 May 2012	13	"Blomfield Files: The Perfect Storm"	Theft, dishonesty and criminal activity.
17 May 2012	14	"Blomfield Files: The Perfect Storm Ctd"	Involvement in the concealment of assets, illegal conduct, theft, conversion, dishonourableness.

18 May 2012	15	"A Conversation with the Police"	Lying and deceitfulness, laying false complaints and conversion.
31 May 2012	16	"Blomfield Files: Where is the Vengeance Money"	Failure to pay creditors, concealment of criminal activity and criminality.
6 June 2012	17	"It's a Kind of Mattjik"	Fabrication of complaints of fraud and being a thief.
6 June 2012	18	"Blomfield Files: Ctd"	Theft of a cheque, money laundering, thievery and lying, engaging in unlawful business practices, deception, dangerousness and lacking in empathy.