IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-005218
[2014] NZHC 2221

BETWEEN	CAMERON JOHN SLATER Appellant
AND	MATTHEW JOHN BLOMFIELD Respondent

Hearing: 23 June 2014

Counsel: CJ Slater in person
MA Karam and MG Beresford for Respondent
J Miles QC as amicus curiae

Judgment: 12 September 2014

JUDGMENT OF ASHER J

This judgment was delivered by me on Friday, 12 September 2014 at 1.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
J Miles QC, Auckland.
MA Karam, Auckland.

Copy to:
C Slater, Auckland.

Table of Contents

Introduction

[1] The appellant, Cameron Slater, is being sued for defamation in the Manukau District Court by the respondent, Matthew Blomfield. There are two matters arising in this Court. First, there is an appeal against a decision of Judge Blackie declining to extend to Mr Slater the protection given by s 68(1) of the Evidence Act 2006 to journalists from being compelled to disclose the identity of informants.[1] An aspect of this appeal is a challenge to Judge Blackie's decision that r 8.46 of the High Court Rules did not apply and that interrogatories should have been allowed. The second matter is an originating application to this Court filed by Mr Blomfield after the

---

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

filing of the appeal, as a back-up position, seeking an order under s 68(2) of the Evidence Act that s 68(1) not apply should he be unsuccessful in opposing the appeal relating to s 68(1).

[2] Both parties in this Court were originally unrepresented. Mr Miles QC was appointed amicus curiae. By the time of the hearing Mr Blomfield had briefed Mr Karam who appeared for him, and Mr Slater remained self-represented. Mr Miles presented a wide ranging submission to assist the Court.

[3] Recently, some time after the hearing, Mr Blomfield has sought to produce further evidence, arising from the publication of the book *Dirty Politics* by Nicky Hager, and various email exchanges.

[4] I have declined to grant leave for the introduction of this further evidence on the basis that it is hearsay or privileged.[2]

The defamation claim

[5] In 2012, Mr Slater ran and administrated the blog website "Whale Oil" under the name www.whaleoil.co.nz (Whale Oil). Mr Blomfield had provided marketing services to Hells Pizza until 2008 and had been a director of a company Hell Zenjiro Ltd (in liquidation), which had owned several outlets of the Hells Pizza chain. That company went into liquidation on 9 April 2008 and was struck off the Companies Register on 6 September 2013. Mr Blomfield was adjudicated a bankrupt in 2010 and an order was made prohibiting him from being a director of a company. He has since been discharged from bankruptcy.

[6] Hells Pizza had an association with a charity known as "KidsCan". On 3 May 2012 Mr Slater wrote and published on his Whale Oil website a blog post entitled "Who really ripped off KidsCan?". It contained a number of statements that Mr Blomfield claims were defamatory of him. On the same day Mr Slater wrote another blog on the Whale Oil website entitled "Knowing me, knowing you – Matt Blomfield". In that story he made a number of statements about Mr Blomfield.

---

2 *Slater v Blomfield* HC Auckland CIV-2013-404-5218, 12 September 2014 (Minute (No 10)).

Between 3 May 2012 and 6 June 2012, Mr Slater wrote and published on his website 13 articles that referred to Mr Blomfield.

[7] Mr Blomfield claims that these articles allege that he had conspired to steal charitable funds and was alleged to be a thief, as well as dishonest, dishonourable, a party to fraud, involved in criminal conspiracy, bribery, deceit, perjury, conversion, the laying of false complaints, drug dealing and making pornography. He was also accused of being a psychopath, a criminal, a thief and a "cock smoker".

[8] The majority of the articles that are the subject of the claim contain extracts of emails to which Mr Blomfield is allegedly a party. They refer to electronic files which Mr Blomfield claims were sourced from his hard-drive and potentially other sources including a filing cabinet of Mr Blomfield.

[9] Mr Slater admitted in his statement of defence that he had in his possession copies of emails, databases and electronic files relating to the affairs of Mr Blomfield. He stated that on or about February 2012 he was provided with a hard-drive that included approximately one terabyte of computer files previously owned by Mr Blomfield.

[10] Following the publication of the articles on the Whale Oil website, Mr Blomfield filed proceedings in the Manukau District Court in October 2012 in which he claimed that the statements and the articles were defamatory. He sought an order that the material relating to him be removed from the Whale Oil website as well as compensatory and punitive damages. When the proceedings were commenced there was no statement of claim required under the District Court Rules 2009. It was only when interlocutory orders were sought and the file was referred to a Judge that a statement of claim and statement of defence were filed in the traditional manner.

[11] In his statement of defence, Mr Slater admitted that he published the articles that contained the words alleged to be defamatory. He denied that the words conveyed or were capable of conveying the alleged defamatory meanings. He raised

the affirmative defences of truth and honest opinion in respect of each of the statements in each of the articles published.

[12] Mr Blomfield filed applications for orders requiring discovery and the answering of interrogatories. The application for discovery sought amongst other things "all email correspondence between" the appellant and several persons, including persons allegedly involved in the supply of material: Mr Powell, Mr Spring, Ms Easterbrook and Mr Price. This was accompanied by a notice to answer interrogatories, which included a question about the source of the alleged defamatory material published on Whale Oil:

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

[13] Nothing very much happened on the file between November 2012 and 26 August 2013, at which point Mr Blomfield made an interlocutory application for orders that Mr Slater answer his interrogatories and provide discovery. Mr Slater refused to comply with the discovery request and the interrogatory on the basis that the information was privileged under s 68 of the Evidence Act.

[14] Mr Slater's notice of opposition to these applications relied on s 68(1) which provides journalists with a cloak of non-compellability. He asserted that he was a "journalist" and that to require him to answer the interrogatory or provide discovery would be to require him to disclose the identity of his "informants" to whom he had promised non-disclosure. He also relied on r 8.46 of the High Court Rules which provides that no interrogatories should be allowed unless necessary in the interests of justice.

[15] The applications were heard by Judge Blackie on 2 September 2013. He held that s 68(1) did not provide a basis for Mr Slater to refuse to answer the interrogatories or give discovery. He held:[3]

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

---

3 *Blomfield v Slater*, above n 1, at [15].

[16] The Judge also considered whether r 8.46 of the High Court Rules provided a basis on which Mr Slater could object to answer the interrogatories as to his sources. He held:[4]

> I can find no reference in the Law Commission report to support the contention that the defendant's blog site could be regarded as a news medium deserving of the protection afforded by s 68 of the Evidence Act. 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 privileged occasion. 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 published.

Section 68(1) of the Evidence Act 2006

[17] In s 68(1) of the Evidence Act, Parliament enacted an exemption to the compellability of witnesses. Section 68(1) provides:

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

[18] The section has its own definitions in subs (5):

> (5) In this section,—
>
> **informant** means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium
>
> **journalist** means 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
>
> **news medium** means a medium for the dissemination to the public or a section of the public of news and observations on news
>
> **public interest in the disclosure of evidence** includes, in a criminal proceeding, the defendant's right to present an effective defence.

---

4 At [17].

[19] This section was the product of a process of evolution in the common law, statute and High Court Rules whereby protection from the disclosure of confidential sources was extended to persons including journalists.

[20] The well-established exception to disclosure for journalists in defamation cases was known as the "newspaper rule", whereby a newspaper could not be forced to disclose its source of information.[5] This was not a form of recognised privilege, but rather a limited protection recognised in particular circumstances.[6] It was a protection that applied to the interlocutory phases of discovery and interrogatories and was justified on the basis of the irrelevance of the source of the information,[7] and the public interest and benefit to society in having informed discussion and evaluation of affairs.[8]

[21] The newspaper rule co-existed with s 35 of the Evidence Amendment Act (No 2) 1980, which conferred on the Court a discretion to excuse a witness from answering a question or producing a document. This was on the ground that to do so would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to other discretionary matters, the witness should not be compelled to breach.

[22] In the High Court Rules the predecessor to r 8.46 provided specific protection in defamation cases to disclosing sources in response to interrogatories where the defence of fair comment on a matter of public interest was raised. This protection was justified on the basis of the irrelevance of the source of the information.[9]

[23] In 1999 the Law Commission published a report leading up to the enactment of the Evidence Act. In its report, the Law Commission proposed a draft clause that

---

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

6 *Attorney-General v Clough* [1963] 1 QB 773 (CA) at 792; *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 (HL) at 1169.

7 *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*, above n 5, at 171.

8 At 166.

9 At 171 per Richardson J and 176 per McMullin J.

is the same as s 68 of the Evidence Act. The Law Commission explained that:[10]

> 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.

[24] Reference was made to creating an express protection for the identity of a source, which places the onus on the person seeking to have the source revealed.

[25] Section 35 of the Evidence Amendment Act (No 2) 1980 was repealed by the Evidence Act 2006. The predecessor to r 8.46 in the High Court Rules was not changed. There was no reference in s 68 or elsewhere in the Evidence Act to the newspaper rule.

[26] The newspaper rule had been considered and applied by the Court of Appeal in *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*. The rule was that in a defamation claim against a newspaper an order would not be made by which the plaintiff might obtain discovery of the name of the person who had supplied to the newspaper the information complained of by the plaintiff. The rationale of the rule was variously stated as being that the source of the information was irrelevant,[11] and the public interest and the benefit for society in having discussion and evaluation of affairs that is informed.[12]

[27] The newspaper rule was regarded as applying except in an "exceptional circumstance".[13] There was no exact weighing process involved in determining whether it applied of the type in s 68(2), although the considerations referred to in the cases on the rules had similarities to those outlined in s 68(2).

[28] In its 1994 paper *Evidence Law: Privilege*,[14] the Law Commission commented on the various means by which a Court could protect journalists' sources

---

10 Law Commission *Evidence. Volume 1: Reform of the Law* (NZLC R55, 1999) at [301] and [302] referring to the earlier preliminary paper, Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [342].

11 *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*, above n 5, at 171.

12 At 166.

13 At 171.

14 Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994), above n 10, at [342].

including the newspaper rule,[15] and the need for a specific statutory regime to protect journalists' sources.[16] The newspaper rule was referred to obliquely by the Law Commission in its 1999 report.[17] In discussing the proposed new section it was stated:[18]

> [S]ome limited protection is currently provided by the common law. It observed that the new section would provide specific qualified "privilege" for journalistic sources.

[29] Section 68 must be regarded as setting out a new comprehensive rule to be applied when a newspaper seeks to avoid disclosure of its sources, although r 8.46 can be invoked separately. This appears to be the intention indicated in the Law Commission reports. Moreover, under s 10 of the Evidence Act, s 68 may be interpreted having regard to the common law, but only to the extent that the common law is consistent with its provisions. To apply the newspaper rule would be to run the risk of reaching a result inconsistent with s 68. The rule and s 68 involve different tests. Section 68 applies not just to newspapers, but to journalists generally, and sets out a new regime. It is similar to the old newspaper rule but contains specific definitions. Further, in s 68(2) there is a new and particular test setting out particular factors and a defined and stipulated weighing process for denying a newspaper protection.

[30] While the newspaper rule co-existed with s 35 of the Evidence Amendment Act 1980 (No 2), that section did not impose a comprehensive regime of the type imposed by s 68 applying as it did only to confidential relationships. A court would be in a difficult position if it tried to determine a claim for confidentiality based on the newspaper rule and a claim based on s 68. Only one can apply, and that clearly must be s 68. I conclude that the newspaper rule has been subsumed by s 68, and should not be applied separately.

[31] Section 68 is in subpart 8 entitled "Matters relating to interpretation and procedure". Subpart 8 is divided into the headings "Privilege" and "Confidentiality".

---

15 At [342]–[343].
16 At [349]–[355].
17 Law Commission *Evidence. Volume 1: Reform of the Law*, above n 10, at [301].
18 At [301].

[32] Section 68 falls under the "Confidentiality" heading. The juxtaposition of the headings indicates that s 68 can be seen as arising from the concept of the receipt of confidential information, rather than privilege. The protection is not a right arising from a special relationship such as that between a solicitor and a client, but is a protection extended to those who disclose information for publication to journalists. It is an exemption from compellability rather than an entitlement to a particular type of privilege.[19] It can arise in single one-off exchanges, or a longer term series of disclosures, as appears to be the case in this matter. Although there must be an expectation of publication in a news medium, the section focuses on disclosure to journalists, and it is the function of the journalist who received the information that is the key. A non-journalist will not be able to invoke s 68(1) just because the publication is in a news medium as defined.

Approach to s 68(1)

[33] The only New Zealand decision in which s 68 has been considered in detail is that of Randerson J in *Police v Campbell*.[20] His Honour examined the common law background prior to the enactment of the Evidence Act,[21] and the genesis of s 68.[22] His Honour commented that:[23]

> 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.

[34] It can be seen from s 68(1) and the definitions in s 68(5) that a person seeking to invoke the protection must establish the following:

(a) there has been a promise not to disclose the informant's identity given by a journalist to that informant;

---

19 *Police v Campbell* [2010] 1 NZLR 483 (HC) at [83].
20 *Police v Campbell*, above n 19.
21 At [50]–[74].
22 At [75]–[79].
23 At [84].

(b) the medium used by the journalist disseminates the information to the public or a section of the public;

(c) what is disseminated is news and observations on news; and

(d) the person claiming to be a journalist is a person who, in the normal course of that person's work, might be given information by informants in the expectation that it will be published in a news medium.

[35] The section is silent on the onus and standard of proof. There is clearly a burden on the person who is seeking to resist compellability by claiming to be a "journalist", to put forward evidence to show that the criteria are met. Beyond that I do not consider that it is useful to carry out a consideration of the onus or standard of proof. Given the precisely stated criteria I would be inclined to see the exercise as an orthodox application of facts to a legal test.

The relevant time

[36] It is necessary first to establish the relevant period for the assessment of whether Whale Oil was a news medium and Mr Slater a journalist. It follows from the reference in s 68(1) to a "promise" being made for the provision of information that the time to consider whether a person is a journalist is when the information is imparted from the informant to the journalist. It is perfectly conceivable that a person may start out publishing not as journalist, and become one when a certain level of work and content is achieved. Thus while the whole period of publishing endeavour may be relevant, there must be focus on the time of promise and disclosure.

[37] It is not entirely clear when Mr Slater's regular blog began. There are articles that have been disclosed going back to 2010. Mr Slater published the articles that are the subject of the proceeding in May and June 2012. He deposed that he received four "filing cabinet drawers" containing documents which he delivered to the Serious Fraud Office in August 2011, and that in or about February 2012 he was

provided with a hard-drive. This hard-drive appears to have been a primary source of material. There are emails which indicate that Mr Slater was gathering information in the early part of 2012. The former liquidator of Mr Blomfield's company, Mr John Price, deposed that he met with Mr Slater on 6 May 2012 and was made aware that he and others had a hard-drive containing information about Mr Blomfield.

[38] I conclude that the promise and disclosure of information occurred in early 2012. Mr Slater and Mr Blomfield did not suggest any different time. Therefore I will examine the issue of whether Mr Slater received the information as a journalist focussing on early 2012.

Whether there was a promise

[39] Although there is not a great deal of evidence about Mr Slater promising his informants not to disclose their identity, he deposed that he "promised the person/people who provided [him] the information that their identity or identities would not be disclosed". He did not give further details of the circumstances surrounding the giving of the promise. His statement was not challenged in the affidavit evidence and there was no application to cross-examine him on the point.

[40] There is nothing inherently improbable in Mr Slater providing such a promise in the circumstances. Indeed, it is entirely possible that he would have given that type of assurance. It would have been preferable for more detail to have been provided,[24] but given the lack of an evidential challenge, I am satisfied that this criterion was satisfied.

[41] I am also prepared to assume that the informants here provided the information in question in the expectation that it would be published by Mr Slater on his Whale Oil website. This leads to whether that was publication in a news medium.

---

[24] It is to be noted that in *Police v Campbell*, above n 19, at [35] it was recorded that the journalist had given a detailed account of the circumstances of the interview. No such detailed account of the circumstances of any interviews was provided by Mr Slater.

Whether Whale Oil was a news medium

Blog sites

[42] The internet allows any person to publish (that is to issue information to the public) without the backing of financial resources or ownership of an established print, television or radio medium. A blog can be seen as a website on which persons record information, experiences and opinions, and links to other sites on a regular basis. Blogs do not need to be personal websites, and are used by the mainstream media. Companies have blogs to inform customers or to advertise. Content varies widely, and can include the release of new information. It is common for a blog to involve posts about opinions which are updated on a frequent basis.[25]

Can a blog be a news medium?

[43] Subsection (5) provides that a news medium:[26]

> … means a medium for the dissemination to the public or a section of the public of *news* and observations on *news*.
>
> (emphasis added)

[44] The issue of whether Whale Oil is a news medium is important to the public, as at the time Mr Slater's primary means of dissemination was that website. If Whale Oil was not a news medium he could not be a journalist. It is on this point of definition that Judge Blackie determined that Mr Slater was not a journalist. In his view, the Whale Oil website did not come within the definition of a news medium. The Judge cited[27] part of a 2011 Law Commission's issues paper (which did not relate to the Evidence Act but to the "New Media") where it was said:[28]

> However, blog sites are not democratic forums; as noted earlier they are often highly partisan and blog posts and commentary can be highly offensive

---

25 There is a helpful discussion of what is a blog by Judge David Harvey in *Police v Slater* [2011] DCR 6.

26 The definition of "news medium" is similar to that in s 2 of the Defamation Act 1992. It is different from that in s 2 of the Privacy Act 1992 and s 16 of the Personal Property Act 1999. The definition of "member of the media" in s 198(2) of the Criminal Procedure Act 2011 is different again.

27 At [16] and [17].

28 Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at [2.131].

> and personally abusive. Ultimately, the blog administrator/author sets both the tone and the threshold for abusive speech. A person who has been denigrated or who had been subject to any false allegation on a blog site is entirely dependent on the blog's administrator for any redress or corrective measures"[.]

[45] The Law Commission's 2011 paper relating to "New Media" did not indicate a view that the definition of "news medium" could not apply to a blog. In that issues paper the Commission expressly considered the scope of the definition of "news medium" and stated:[29]

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

[46] This is relevant commentary, although it is not relevant as to Parliamentary intention as it post-dated the Evidence Act and considered different issues. The comment on the meaning of "news media" of the Law Commission in its final report on New Media of March 2013 is also of interest. In *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* it was stated:[30]

> The [Evidence] 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, whereas an Irish Court has taken the opposite view.

[47] There is nothing in the Law Commission's pre-Evidence Act comments to indicate a legislative intention to exclude persons who are bloggers from the definition (or to include them in the definition), but that means little, given that blog sites are a recent development. There are now decisions of senior US courts where it is accepted that bloggers can have a news dissemination function like the traditional media.[31] Indeed, Mr Karam did not go so far as to suggest that no blog could be a news medium. Instead, Mr Karam submitted that the Whale Oil website at the relevant time was not a news medium because the blog did not publish information that was in the public interest.

---

29 At [3.31].

30 *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013) at [2.13]

31 *Obsidian Finance Group LLC v Cox* 12-35238 and 35319, 17 January 2014 (9th Cir 2014); *The Mortgage Specialists Inc v Implode-Explode Heavy Industries Inc* 160 NH 227 (NH 2010); compare with *TooMuchMedia v Hale* 206 NJ 209 (NJ 2011).

[48] Differences between bloggers and the traditional news media must be recognised. The low entry cost to set up a website and the low running costs are in contrast to traditional media, and mean that websites are considerably more susceptible to operators who do not observe good journalistic standards than traditional members of the media. No blogger at this point of time is a member of the Press Council or subject to the Broadcasting Standards Authority, and therefore bloggers have no body imposing upon them a code of ethics and a complaints procedure whereby they can be sanctioned for poor professional standards. Blog sites can vary widely in quality, and Mr Blomfield is very critical of the quality of Whale Oil.

[49] It must be recognised that the public is advantaged by the availability of blog sites which are often free and provide instant access to commentary and sometimes breaking news. The fact that those who operate websites are often not owned by large media corporates means that fresh perspectives are presented and the public have more choice. Mr Slater referred to the recent AUT annual internet use report, showing that 81 per cent of New Zealanders say the internet is an important source of information as compared to 47 per cent for television and 37 per cent for radio and newspapers.[32] Mr Slater quoted three editorials from prominent newspapers where views were expressed to the effect that he was a journalist.

[50] If the legislature had wished to impose a standards regime on bloggers for the purposes of s 68 it could have included a provision akin to that in s 198(2) of the Criminal Procedure Act 2011. That section requires members of the news media to be subject to or employed by a person subject to an organization subject to a code of ethics and the complaints procedure of the Broadcasting Standards Authority or the Press Council. It has not done so. The definitions make no reference to quality or a need for originality.

[51] Significantly the definition of journalist does not require the dissemination of news to be in any particular format, such as in a newspaper or periodical. The definition focuses on the facts of news gathering and dissemination, and not the form

---

[32] Andy Gibson, Melissa Miller, Philippa Smith, Allan Bell and Charles Crothers *The Internet in New Zealand 2013* (Institute of Culture, Discourse & Communication, Auckland, 2013) at 7.

of presentation. There is no reference to articles or programmes as there is in the definition in s 2 of the Privacy Act 1992.[33]

[52] In the definition of "news medium" there is reference to disseminating "news and observations on news". The distinction between observations on news and actual new information is relevant. Some bloggers will provide only observations on news. It requires greater resources and sources and more effort to provide original news as distinct from making observations on that which has been reported by others. The distinction between observing and providing information is supported by the New Zealand Oxford English Dictionary definition of "news":[34]

> **news** *[nju:z] n.pl.* (usu. treated as *sing)* **1** information about important or interesting recent events, esp. when published or broadcast. **2 (prec. by *the*)** a broadcast report of news. **3** newly received or noteworthy information. **4** (foll. by *to*) *colloq.* Information not previously known (to a person) (*that's news to me*).

The reporting of news involves this element of providing new information to the public about recent events of interest to the public.

[53] The Law Commission in its 2013 final report on *The News Media meets 'New Media'* considered that blog sites can break news:[35]

> There is ample evidence of the profound and growing influence new media are having both on mainstream media's culture and content. As we discussed in chapter 2 of our Issues Paper, there are well over 200 current affairs bloggers in New Zealand, some of which have become a rich alternative source of information and commentary. Although primarily a forum for the expression of robust opinion, a number of high profile blog sites are used to break news. Bloggers are also increasingly taking on a watch dog role over mainstream media, critiquing their performance and alerting the public to their alleged failures.

This is an important comment arising from an independent and expert body.

---

33 For this reason the decision in *Dotcom v Attorney-General* [2014] NZHC 1343 does not apply.

34 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 761.

35 *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, above n 30, at [3.39]. The Law Commission was discussing whether bloggers should be included in a new regulatory regime for the media, not how the Evidence Act should be interpreted, and its recommendations were not implemented by the government.

[54] I have no doubt that many bloggers are not journalists because they are not obtaining and disseminating news to the public or a section of the public on a regular basis. Some may not deal with news in the sense of providing new or recent information, and some may not deal sufficiently with the public or a section of the public. Nevertheless, I conclude that a blogger who regularly disseminates news to a significant body of the public can be a journalist. Given that the medium must be "*for* the dissemination to the public of news …" a blog that publishes a single news item would not qualify. The blog must have a purpose of disseminating news. Some regular commitment to the publishing of news must exist before a blog is a news medium.

Is Whale Oil a news medium?

[55] Whale Oil makes information available to the public for access through the internet. The blog site is a mode of expression or communication from a source to the public. There is uncontested evidence that Whale Oil was viewed 75,000 times per week day and 2,000,000 page views per month by members of the public, although it is not clear when that statistic was collected. What is clear is that in 2012 there were tens of thousands of viewers of Whale Oil on each day and Mr Slater makes the point that this is more than the visits to many provincial newspaper sites and a prominent television website.

[56] Mr Slater detailed some of his journalistic work in 2011 and 2012. He has appeared frequently on television and radio as a commentator on current affairs, and has a six month contract to provide five issues per week of political coverage, stories and commentary with a prominent radio station. In November 2012 after the period in question, he commenced employment as editor of the *Truth* newspaper. He explained that the newspaper was struggling at the time. The job continued through to June 2013. At that point the owners ceased its publication, and Mr Slater's employment came to an end. He claimed, and it is not refuted, that the closure had nothing to do with his performance.

[57] Mr Slater referred to a number of senior journalists who regard him as being a journalist. Mr Stephen Cook, an experienced freelance journalist, stated:

> 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 SIS scandal and the Labour Party credit card story and was impressed at the level of detail in his coverage.

[58] Mr Miles has helpfully reviewed the links that Mr Slater has provided to some of his journalistic endeavours in 2011 and 2012 and summarised them:

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

(b) 7 January 2011: an investigation of Albany Dairy selling drug paraphernalia to minors, which involved a story about a superette allegedly selling pipes designed for smoking methamphetamine to children;

(c) 19 February 2011 – 4 March 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" and the National candidate selection process for Rodney;

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

(e) 12 June 2011 – 18 November 2011: the "2011 – Labour Party website story" where the appellant broke a story of Labour Party website vulnerabilities and also information about donors and the obtaining emails from NZEI;

(f) 25 July 2011 – 5 August 2011: the "2011 Phil Goff – SIS story:" which involved a story that Mr Goff was "briefed by the Director of

SIS in 2011 regarding Israeli spies despite claims that Mr Goff had never been briefed" and the continuing denial by Phil Goff;

(g) 2 December 2011–10 April 2014: the "2011–2014 Ports of Auckland story" involving "extensive coverage of port strike that began in 2011", although this appears to be a re-posting of another blogger "Cactus Kate's" story;

(h) 8 April 2012 – 14 November 2012: the "Meatworkers Union financial mis-reporting in their accounts story" involving "massive financial under-reporting in contravention of statutory obligations by the NZ Meatworkers Union"; and

(i) 5 – 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.

[59] An examination of Mr Slater's articles in 2011 and 2012 show reporting on, as well as commenting on, the political affairs of the day. While some of his writing is derivative from other sources and contains largely his comments and expressions of opinion, as the above list shows many of the stories have contained an element of breaking news. There appear to have been other stories of lesser public interest than those listed, but which were nevertheless news in the sense of being new information released to the public, such as the stories about Mr Blomfield. Mr Slater has pointed out that this pattern has continued and this year he has received a media award for "breaking" the story on the private life of the Mayor of Auckland.[36]

[60] Mr Karam for Mr Blomfield places weight on what he submits to be the partisan nature of Whale Oil, and what he submits is scurrilous and malicious commentary on events and public figures. He cites what he sees to be Mr Slater's wrongful appropriation of Mr Blomfield's private material as an indication that he does not behave as a journalist should. He refers to the fact that Mr Slater has in the

[36] Canon Media Awards 2014 "Best Blog".

past breached suppression orders; breaches which Mr Slater has accepted although he now says that he has turned a new leaf and will scrupulously abide by suppression orders.

[61] I accept that a news medium that was shown to be using news as a basis for comment only might not be a news medium. I also accept that a news medium that published articles of such a low standard that they could not objectively be regarded as "news" might not qualify. Although the definitions in s 68(1) do not include a quality requirement, quality would be relevant to the extent that a writer who was shown consistently to invent stories or be inaccurate on a regular basis might not qualify. An article that is false is not news. I deal with what is a "journalist's work" in the next section.

[62] In my assessment, Mr Slater's reports contain genuine new information of interest over a wide range of topics. Some may support a particular political philosophy but others are of general interest. The style of journalism may be criticised and can be dramatic and abusive, but the expression is vigorous and coherent, and there is no evidence provided to this Court of consistent inaccuracy or deceit (although there is evidence of consistent hyperbole). On my assessment, while criticisms can be made of Mr Slater's style and modus operandi, Whale Oil is not of such low quality that it is not reporting news.

[63] In February 2012 Mr Slater was reporting on recent happenings of importance and of public interest. He was providing new information about such events. He did not just comment. The list of stories set out shows him "breaking" new stories. He has "broken" the following further major stories since:

(a) September 2013 – October 2013 – the "Paul Findlay story" reporting on a Christchurch Council candidate grooming teenagers via dating applications;

(b) October 2013: the "Len Brown story" relating to Mr Brown's affair; and

(c) October 2013: "MEGA/KIM Dotcom Illegal copy of the Luminaries" story about MEGA hosting an illegal copy of *The Luminaries* for file sharing.

[64] These stories may come from a particular political perspective, but so do stories from Fox News and the Huffington Post. Mr Slater was at the time running stories featuring new information of interest to readers. He had obtained this information from sources. Mr Slater was in early 2012 striving to provide news or recent stories on matters of public interest to his readers. His readers constituted a significant section of the New Zealand reading public.

[65] It is this element of regularly providing new or recent information of public interest which is in my view determinative. He was not doing this as often as would occur in a newspaper or a television or radio station, but that could not be expected of a single blogger. Such a person would not have the resources to operate on that scale. I do not see it as a pre-requisite that the quantity of stories must be equivalent to that of a substantial corporate news organisation. His motives for reporting are not crucial either. Because Whale Oil at the relevant time with reasonable frequency provided such information, as well as commentary and the opportunity for debate, it was a news medium.

Was Mr Slater receiving information in the normal course of his work?

The notion of normal course of work

[66] The word "work" is not defined. I assume its meaning follows the general dictionary concept of applying mental or physical effort to carry out a task.[37] The mental and physical effort involved in obtaining information on news topics and transforming it into readable prose which coherently disseminates the information to a reader is work. This is what Mr Slater does when he publishes a news article. While he will often refer to other materials, there was no evidence presented to suggest that he was only regurgitating the writings of others.

---

[37] Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary*, above n 34, at 1302.

[67] It has been stated by the Court of Appeal in *StockCo Ltd v Gibson* that the word "course" suggests flow or continual operation.[38] For a journalist to be receiving information in the "normal course" involves the concept of journalistic endeavour carried out with a degree of regularity and consistency.

[68] Mr Karam submitted that employment of the journalist was a requirement. That submission derived some support from the reference in s 68(1) to neither the journalist "nor his or her employer" being compellable. However, I see the reference to the journalist or the employer in the section as being no more than careful drafting to ensure that in the case of an employer/employee relationship, the employer is not compellable when the employee received the information. I do not consider that the definition should be restricted to paid employees or persons who make a living out of the publication in question.

[69] Such a restrictive definition is also inconsistent with a legislative intention that full-time employment is not a requirement. A part-time journalist who writes on a regular basis could well be receiving information in the ordinary course of that journalist's work. This might be so even if the work was only published on a weekly or even monthly basis, providing there was that element of regularity and consistency. While the degree of work and its regularity will be factors in the assessment of normal course of work, whether the employment is full-time or part-time should not be determinative.

[70] Both the amicus curiae and Mr Karam have referred to analogous Australian provisions. The equivalent Commonwealth section is s 126G of the Evidence Act 1995 (Cth) which 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.
>
> (emphasis added)

[71] This definition of journalist followed a debate before the Senate Standing Committee on Legal and Constitution Affairs where a possible definition requiring a

---

[38] *StockCo Ltd v Gibson* [2012] NZCA 330, (2012) 11 NZCLC 98-010 at [51].

journalist to be "employed as such" for the privilege to operate and excluding "… private individuals who make postings on the internet or produce non-professional news publications" was rejected.[39] The Commonwealth provision would be broad enough to cover a part-time employee or not-for-profit publisher like Mr Slater.

[72] Both New South Wales and Western Australia have adopted the narrower phrase "engaged in the profession or occupation of journalism." This imposes a requirement of greater work commitment than either the Commonwealth or New Zealand definitions.

[73] In my view the Commonwealth provision of "engaged and active in the publication of news" is more in line with the New Zealand definition "in the normal course of that person's work". On a plain meaning, like its Commonwealth counterpart, the New Zealand definition does not require remunerated work or engagement in a profession, although a lack of remuneration from the blog will be relevant to assessing "the normal course of work". However, the phrase does require regular endeavour over a period of time.

[74] In my view the following matters are relevant to the assessment of whether Mr Slater was receiving information in the normal course of his work:

(a) whether the receiving and disseminating of news through a news medium was regular;

(b) whether it involved significant time on a frequent basis;

(c) whether there was revenue derived by the blog site; and

(d) whether it involved the application of journalistic skill.

---

[39] Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) (Senate Standing Committee on Legal and Constitution Affairs) and Evidence Amendment (Journalists' Privilege) Bill 2010 (No 2) (Cth) (additional comments by Australian Greens).

Was Mr Slater receiving information in the normal course of his work?

[75] It was submitted by Mr Karam that work should be defined narrowly in the sense of how a person "makes a living". It was suggested that work was a person's occupation and means of earning a living. It would not include, for example, a hobby, and Mr Slater's efforts were by his own admission in that category. He submitted that Mr Slater did not receive information in the "normal course" of work as required by the definition in s 68(5), but rather in the course of a hobby or pastime. Mr Blomfield deposed that Mr Slater had been a sickness beneficiary in the receipt of income protection insurance, which due to illness rendered him incapable of work due to depression. He referred to a number of articles which suggested that Mr Slater received income protection insurance for a period of approximately five years from 2004, had been in receipt of a sickness benefit, and had stated in his blog that he found Whale Oil important in dealing with his depression and a form of therapy.

[76] Mr Karam also quoted statements by Mr Slater that his career was in consulting work, that Whale Oil was the "product of passion", and as an all consuming "hobby" rather than as "work". Mr Slater has stated that "I'm not a journalist, I'm a partisan blogger". Mr Karam quoted a statement of Mr Slater made during the relevant period that he does not generate any revenue from Whale Oil. Mr Karam relied on these facts to support the submission that receiving information for Mr Slater's blog was not in the normal course of his work.

[77] There is no doubt that Mr Slater works for Whale Oil. He owns it and administers it. For the reasons that I have given when considering whether Whale Oil was a news medium, in the course of working for Whale Oil Mr Slater obtained or was given information that he disseminated to the public.

[78] In a 3 March 2014 interview, a transcript of which was attached to one of Mr Blomfield's affidavits, the following exchange is recorded with Mr Slater:

> Q How many hours a day do you spend blogging? Do you have a structured work flow or do you just blog when inspiration hits?

> A Two to four hours a day actually writing posts. The rest of the day is all work that goes into getting the background material, interviews, meetings and general networking that keeps the information flowing.

He does go on to say in the same interview that Whale Oil is his "hobby".

[79] Mr Slater estimated that he published 20 posts on his site each day. What he published in the month of May 2012 was 377 pages of typed script. Mr Slater also commented in an interview attached to Mr Blomfield's most recent affidavit that it was very difficult for him to run his blog whilst being editor for *Truth* and he had to rely on volunteers and family to assist him. This is a further indication that he was putting a considerable amount of daily effort into the Whale Oil site.

[80] He also says in the interview that he would love Whale Oil to be his career as this would mean that he was making enough money to pay all the bills and pay himself a reasonable salary, but that in the meantime his career was his consulting work and that the blog was the product of passion. His efforts were considerable and regular. I have already concluded that making a profit is not essential for the endeavour to be "in the course of work".

[81] After reading all the affidavits, and considering his publications, my overall impression in terms of his efforts in running Whale Oil is that he worked on it daily, and devoted a number of hours of concentrated work to it each day. I consider he was engaged and active in the publication of news and that at the very least his efforts could be regarded as equivalent to those of a journalist doing significant and regular part-time work for a newspaper or television. Whether those efforts in terms of time and regularity could be equated to an employed journalist for such an organisation is debatable. They are perhaps better compared to those of a freelance journalist. The fact the evidence is that any earnings in early 2012 were modest is not conclusive.

[82] The fact that, back in 2012, Mr Slater denied that he was a journalist and was describing the site as a hobby and did not receive remuneration is not determinative. Of more importance than his self-categorisation is the nature and quality of his journalistic endeavours. Mr Slater was involved in working on the Whale Oil

website on a regular daily basis. The work involved significant effort. It is clear from a reading of the articles that they involved investigative work, and this is confirmed by the progression of his business as a blogger in the last two years. While some blog posts contain purely derivative material, Mr Slater has a distinct style that features in many blog posts.

[83] I am satisfied that from early 2012 onwards he received information from his informants in the normal course of his work as a journalist for publication in the news medium "Whale Oil". Therefore s 68(1) applies.

[84] In coming to this conclusion, I have had the advantage that the District Court Judge did not have of more detailed information about Mr Slater's endeavours at the relevant time and the submissions of expert counsel. I reach a different conclusion from the Judge. I consider that Mr Slater in early 2012 received information from informants as a journalist in the normal course of work and is able to rely in general on s 68(1).

Disclosure of sources has taken place

[85] Although Mr Slater could rely in general on s 68(1), Mr Karam submitted there had already been some disclosure of Mr Slater's sources. He submitted that where the identity of the source had already been disclosed there was nothing remaining for s 68(1) to protect and that no protection can operate.

[86] Section 68(1) is expressed to apply where a journalist has promised not to "disclose" the informant's identity. Section 68(1) provides that in such a situation a journalist cannot be compelled to answer a question that would "disclose" the identity of the informant. It seems plain from these words that the protection cannot arise when the identity of the informant is already known. In such a situation there is no identity to protect from discovery and nothing to disclose.

[87] The policy behind the provision, to protect the free flow of information, does not apply if the identity of the informant as the source of particular information is already known or able to be ascertained. The information has already flowed. It has

been observed by Rares J in the Federal Court of Australia in relation to the similarly worded s 126G of the Act 1995 (Cth):[40]

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

[88] One of Mr Slater's sources is clearly identified. Mr Marc Spring has filed an affidavit confirming that he has been the source of numerous articles written by Mr Slater about Mr Blomfield which have been published on the website. He states that the information he provided was accurate and truthful. He states that Mr Blomfield owes him $68,000 and he makes various allegations against Mr Blomfield in the course of that affidavit. Therefore he is already known as a source, and there is nothing to disclose. There can be no protection under s 68(1) in relation to Mr Spring.

[89] Mr Blomfield has deposed that he has strong suspicions that two other former business associates of his, Mr Warren Powell and Ms Amanda Easterbrook, as well as Mr Spring, are sources. He observes that the hard-drive and cabinets were in the possession of Mr Powell and that these were central to the information that Mr Slater referred to in his articles. He observed that each of the parties had an "axe to grind" against him. He has referred to emails which involve Mr Slater and these persons which were sent in the period when the posts about him were published. Further, in his statement of defence Mr Slater refers expressly to information provided by Mr Powell.

[90] Also Mr John Price, the former liquidator, has deposed that Mr Spring introduced him to Mr Slater and Ms Easterbrook and "to a lesser extent" Mr Powell. He attended a meeting at Ms Easterbrook's home with Mr Slater. Mr Spring was also in attendance. They wished to discuss with him Mr Blomfield's commercial behaviour. They had with them a hard-drive containing significant information about Mr Blomfield. He believes that from comments made by them that this may have been obtained from Mr Powell (the latter remark being hearsay). The three

---

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

showed him information on their laptops. Ms Easterbrook advised Mr Price that she would give him a copy of the hard-drive to assist him with his investigations.

[91] He also says there was a second meeting at Ms Easterbrook's house with her and Mr Spring and Mr Slater also in attendance. His evidence was to the effect that they were more interested in discussing Mr Blomfield's history, rather than matters specifically concerning his liquidation.

[92] There is a basis for Mr Blomfield's suspicions and the activities of Ms Easterbrook and Mr Powell are relevant to the s 68(2) exercise. But if suspicion, even a reasonable suspicion, could force the disclosure of identity, the benefit that lies behind s 68 of protecting sources and the true flow of information, would be greatly diminished. Given that the only proven source is Mr Spring, it is only his identity that is exempt from the protection under s 68(1).

Conclusion on s 68(1)

[93] Thus, Mr Slater has successfully challenged the District Court's decision that he was not a journalist under s 68(1) and so is in general entitled not to disclose the identity or identities of his informant(s). However, the appeal while being allowed on this point does not result in him obtaining protection against disclosing Mr Spring as a source as Mr Spring's identity has already been disclosed. Therefore s 68(1) does not apply with respect to Mr Spring. Any questions that will involve answers disclosing Mr Spring as a source must be answered, and any documents which show him to be a source must be discovered.

[94] I now turn to the related point of whether Mr Slater can also rely on r 8.46 of the High Court Rules. Rule 8.46 provides a different protection which is not limited to journalists.

Rule 8.46

[95] Rule 8.46 of the High Court Rules provides:

> **8.46 Defamation proceedings**

> 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*.
>
> (emphasis added)

[96] Rule 8.46 was updated by r 11 of the High Court Amendment Rules 2004. It now reflects the new terminology of the substantive changes made by the Defamation Act 1992 replacing "fair comment" with "honest opinion". Rule 8.46 refers to the opinion being expressed on a "matter of public interest". This phrase was relied on by Judge Blackie in rejecting Mr Slater's reliance on the rule.

[97] I do not think that the phrase "on a matter of public interest" adds a particular requirement to r 8.46 as it is a hangover from an earlier requirement of the common law that fair comment must be on a matter of public interest.[41] It is an irrelevant relic from that earlier law. The authors of *The Law of Torts in New Zealand* comment that there is room for argument that the requirement for "public interest" has survived the Defamation Act 1992.[42] However, they accept that it may be difficult now to argue to the contrary, and I take that view.

[98] In 2004 there was also a further addition to the rule in that interrogatories could be permissible if "necessary in the interests of justice". This change appears to be a response to the observations of the Court of Appeal in *Lange v Atkinson.*[43] It was noted by the Court that the statement in *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* that the newspaper rule applies unless there are special circumstances warranting a departure from it, might require reconsideration because the basis for departure was "too narrow".[44] It was observed also that the absoluteness of r 285, the predecessor to r 8.46, might require a re-assessment. The Australian High Court decision of *John Fairfax & Sons Ltd v Cojuangco*[45] was referred to, where it was held that a departure from the rule was permissible when it was "necessary in the interests of justice".

---

41 *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 (CA) at 595.

42 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at 16.8.05.

43 *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

44 At [55].

45 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346.

[99] If as I consider was the case, the Rules Committee in amending r 8.46 in 2004 was responding to the observations in *Lange v Atkinson* there was a possible confusion as the *John Fairfax & Sons Ltd v Cojuangco* decision related to the newspaper rule rather than the Australian equivalent to r 285. Be that as it may, the addition of the phrase "necessary in the interests of justice" was a substantive change, and the observations of the Australian High Court in *John Fairfax & Sons Ltd v Cojuangco* are relevant to its interpretation.

[100] The phrase as used in r 8.46 has not been considered in New Zealand. In *John Fairfax & Sons Ltd v Cojuangco* the Court quoted *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* and other English and New Zealand authorities. These were not followed, and it was held that the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary "in the interests of justice".[46] The Court held:[47]

> The point is that there is a paramount interest in the administration of justice which requires that cases be tried by Courts on the relevant and admissible evidence.

[101] The Court went on to hold that the Courts have acted according to the principle that disclosure of the source will not be required unless it is necessary in the interests of justice. The Court also held:[48]

> The liability of the media and of journalists to disclose their sources of information in the interests of justice is itself a valuable sanction which will encourage the media to exercise with due responsibility its great powers which are capable of being abused to the detriment of the individual. The recognition of an immunity from disclosure of sources of information would enable irresponsible persons to shelter behind anonymous, or even fictitious, sources.

[102] I set out later my reasons for determining that there is public interest in the disclosure of Mr Slater's sources.[49] Mr Blomfield has given notice under s 39 of the Defamation Act to Mr Slater, alleging that Messrs Spring, Powell and Price and

---

46 *John Fairfax & Sons Ltd v Cojuangco*, above n 45, at 6, relying on *McGuinness v Attorney-General* (Vic) [1940] 63 CLR 73 at 102–4, and *British Steel Corp v Granada Television Ltd*, above n 6, at 1169–70 and 1179–81.

47 *John Fairfax & Sons Ltd v Cojuangco*, above n 45, at 353.

48 At 355.

49 At [112]–[119].

Ms Easterbrook have constructed a planned attack on him. In relation to the just determination of the issues in the case it would be unjust for Mr Blomfield to have to respond to the defence of honest opinion without knowing the source(s) of the vilifying statements. The extreme nature of the attack on Mr Blomfield and the allegation of a planned attack involving sources are relevant, as is the fact that Mr Slater used confidential information belonging to Mr Blomfield.

[103] Therefore, the interrogatories seeking disclosure of the sources are necessary in the interests of justice, and the protection provided by r 8.46 cannot be invoked by Mr Slater. It follows that for different reasons, I agree with Judge Blackie's decision that r 8.46 does not apply. In this respect the appeal is unsuccessful.

Application for order that s 68(1) not apply

[104] By consent, Mr Blomfield has made an application under s 68(2) of the Evidence Act to this Court that an order be made that s 68(1) not apply. Sections 68(2) and (3) provide:

> **68 Protection of journalists' sources**
>
> …
>
> (2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs—
>
> (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.
>
> (3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.

[105] This aspect of the section was considered in detail by Randerson J in *Police v Campbell*.[50] The onus to satisfy the Court that an order under s 68(2) should be

[50] *Police v Campbell*, above n 19.

made rests upon the party seeking to displace the presumption of non-disclosure.[51] This onus does not import any particular standard of proof, rather it involves "an evaluative judgment of fact and degree".[52] The applicant must provide the relevant evidential material for that evaluative judgment, although if both sides have filed affidavits the matter can be considered on the basis of all the information available. Randerson J observed:[53]

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

[106] A Court in considering an order under s 68(2) having determined that s 68(1) is engaged, must then carry out the weighing of the public interest factors identified in the section. Randerson J helpfully set out the process to be adopted in applying s 68(2),[54] which I gratefully apply and adapt for the purposes of this exercise. In carrying out this exercise I will follow a five step process considering:

(a) The issues to be determined in the proceeding;

(b) The public interest in the disclosure of the identity of the source in the light of the issues to be determined, if any;

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

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

(e) Whether factor (b), if it exists, outweighs factors (c) and (d).

[107] In carrying out this process, a court has to consider and weigh matters of fact. This arises in an interlocutory context, where there is limited ability to test and explore factual assertions. A court has no alternative but to assess the facts as

---

51 At [86].
52 At [87] citing *R v White (David)* [1988] 1 NZLR 264 (CA) at 268.
53 At [93].
54 *Police v Campbell*, above n 19, at [103].

presented, and make robust findings in a manner akin to dealing with facts in interim injunction and freezing order applications, and other interlocutory and pre-trial processes. In doing so it must be sensitive to the fact that the evidence has not been tested as in a trial.

[108] The Court must also be sensitive to the view, expressed by some commentators, that fair trial rights particularly in a civil contest should not always prevail over journalistic protection.[55]

The issues to be determined in the proceeding

[109] This is a defamation case. The statement of claim alleges that Mr Slater wrote and published various stories that contained particularised statements that had meanings that were defamatory of Mr Blomfield.

[110] Mr Slater in his statement of defence admits that he was in possession of emails, databases and electronic files relating to the affairs of Mr Blomfield. He also admits he had possession of a filing cabinet of "physical files" relating to Mr Blomfield which he had for a short time and provided to the Serious Fraud Office. The statement of defence follows a pattern of admitting the making of the statement but denying the defamatory meanings. In the event that the defamatory meanings are made out, Mr Slater pleads an affirmative defence of truth. Mr Slater pleads that if the statements have the defamatory meanings then the statements are true in substance and in fact. He gives detailed particulars of the claims of truth. Mr Slater also pleads the affirmative defence of honest opinion. He gives particulars which reflect the particulars provided for the defence of truth. A reply was filed by Mr Blomfield in which he denied that the words complained of were expressions of honest opinion. Mr Blomfield also issued a notice under s 39 of the Defamation Act that the opinion was not genuinely held. He refers to Messrs Spring, Powell, Price and Ms Eastbrook who had "bad blood" with him, and who constructed a planned attack on him with Mr Slater for the purpose of causing him harm.

---

[55] Devin M Smith "Thin Shields Pierce Easily: A Case for Fortifying the Journalists' Privilege in New Zealand" (2009) Pacific Rim L & Policy J 217 at 229.

[111] The issues to be determined in the proceeding are therefore whether the statements have the defamatory meanings alleged, whether those statements were true, and whether they were Mr Slater's honest opinion, including whether the allegations in the s 39 notice were true.

The public interest in the disclosure of evidence of the identity of the informants

[112] The question of "what is the public interest" must be considered having regard to the issues to be determined. The phrase "public interest" is not defined in the Evidence Act. It is used in s 68(2) in juxtaposition with "having regard to the issues to be determined…". I do not think that the sentence can be intended to relate to only those cases where the issues in the proceeding are of regional or national interest or importance, and for that reason of public interest. This is indicated by the statement in s 68(5) that public interest in the disclosure of evidence includes in a criminal proceeding the defendant's right to present an effective defence. In the civil area most cases do not raise issues of public importance, but parties must have the right to present their cases effectively.

[113] In *Police v Campbell* the public interest identified by Randerson J was the public interest in the investigation and prosecution of crime. This was an interest in favour of the source being identified as it would assist this purpose.[56] In this case there are not criminal proceedings where the identification of criminals involved in criminal behaviour arises.

[114] As a general proposition, when a journalist such as Mr Slater has presented to the public extreme and vitriolic statements about a person such as Mr Blomfield alleging, as he has, serious crimes by him, there is a public interest in the fair airing of those statements and the circumstances of their making when the issues are traversed in defamation proceedings. The vitriolic remarks indicate that Mr Blomfield is a danger to society. The remarks being deliberately put in the public domain by Mr Slater show there is a public interest in all the circumstances relevant to Mr Blomfield's challenge.

---

[56] *Police v Campbell*, above n 19, at [72]–[74] and [95].

[115] Moreover, it is in the public interest that court processes to work fairly. The identity of sources may in some cases not assist in relation to assessing whether the statements were true, but in others in assessing the truth of the allegations the identity of the sources may be relevant. Here, a source, such as Mr Spring, had a direct business involvement with Mr Blomfield. It is alleged by Mr Blomfield in his s 39 notice that Mr Spring and other alleged sources were part of a plan to make perjorative comments about Mr Blomfield. The role of those persons as a source, deliberately planning to hurt Mr Blomfield, could be relevant to their credibility, and thus to the defence of truth. Disclosure of the source is required for the fair working of the court process.

[116] Disclosure of the sources may well assist in relation to the defence of honest opinion. The defence of honest opinion is now in s 10 of the Defamation Act 1992. Section 10(1) provides that the defence will fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion. Further, s 10(2) provides that where the defendant was not the author of the matter containing the opinion, the defence will fail unless the defendant was the author of the matter containing the opinion. The test is the honesty of the opinion, not its reasonableness.[57] The test is now different from that previously at common law. The concepts of malice and corrupt motive no longer arise.[58] The opinion must be based on facts which are true or not materially different from the truth.[59]

[117] Therefore to sustain this defence Mr Slater will need to demonstrate that he genuinely held the views that he expressed. In this regard, the identity of those who provided information to Mr Slater may be relevant. While malice is irrelevant, if a source is known to be angry and biased, it may be less likely that the journalist had a genuine (that is honest) opinion about a vilifying statement. Conversely, if the information originated from an apparently reliable source, that fact could make it more likely that the opinion subsequently based on that source was genuine. In *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* it was held in relation to the newspaper rule to be well settled that where the defendant in

---

57 *Mitchell v Sprott* [2002] NZLR 766 (CA) at [24].
58 Defamation Act 1992, s 10(3).
59 Defamation Act 1992, s 11(a); *Mitchell v Sprott*, above n 57, at [22]; *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [117].

defamation proceedings pleads fair comment or privilege and the plaintiff raises express malice in answer to the pleas, the identity of the informant is relevant and material to the plaintiff's case.[60] Fair comment is now honest opinion, and express malice has ceased to be an answer, but the concept that the identity of the informant could have been relevant to malice applies equally in my view to the new defence of honest opinion, when there is a challenge of this type. The identity of the informant can be relevant to whether the opinion is genuine.

[118] The pleaded expressions of opinion of Mr Slater are extreme. He accuses Mr Blomfield amongst other things of the exploitation of trust involving children, and of being involved in wrongly changing the amounts shown as donations. It is said that he ripped off a charity, that he is a psychopath and that he loves extortion, that he is a pathological liar, that he launders money, and that he is part of a network of crooks. Some of the exchanges between the alleged informants and Mr Slater show a gleeful attitude towards his shaming Mr Blomfield. In one blog post Mr Slater referred to the portable hard-drive as "just over 1 Tb of juicy dirt". In the context of such extremely perjorative assertions, whether the pleaded honest opinion was genuine is likely to be very much an issue.

[119] Thus, because of the extreme nature of the allegations, the defences of truth and honest opinion that are raised, and the s 39 notice alleging a plan to attack Mr Blomfield by four named persons who are alleged to be sources, there is a public interest in the disclosure of the identity of those sources to enable the defences to be properly evaluated at trial.

[120] It is now necessary to consider the matters to be weighed against that public interest.

Likely adverse effect of the disclosure on the informants or any other person

[121] This factor set out at s 68(2)(a) of the Evidence Act directs the Court to consider any likely adverse effect of the disclosure on the informants.

---

[60] *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*, above n 5, at 171.

[122] Mr Slater has in his affidavits and writings made it clear that he regards Mr Blomfield as a man capable of physical violence. Mr Spring in his affidavit claims that he has received threats from Mr Blomfield on numerous occasions. However, the only detail he gives is that he had been sent text messages to run him out of New Zealand and advises that if he did not stop pursuing him for money he would have a public relations nightmare on his hands. He claims that a close relative of Mr Blomfield is a criminal convicted of assaults, who has also threatened him. Mr Slater suggests that the respondent may seek to "bully and intimidate" his sources if they are disclosed.

[123] However, there is no evidence that Mr Blomfield has endeavoured to bully and intimidate Mr Spring and the others who have already been disclosed as sources. One of the exhibits produced by Mr Blomfield is a vigorous exchange of emails between him and Mr Spring where Mr Spring appears to be sending Mr Blomfield aggressive and abusive texts. By and large Mr Blomfield takes a relatively defensive position.

[124] Mr Blomfield has no convictions for violent offending. I do not accept Mr Slater's suggestion that he is a person to be feared. Mr Slater referred to an incident and a court case, but Mr Blomfield was discharged. There is nothing to suggest he would resort to intimidatory tactics, and I put that to one side as an adverse effect.

[125] There are also none of the adverse effects that can apply to informants when they are genuine whistleblowers who place at risk their employment, revenue, promotion, friendship or family goodwill in providing the information. There is no legitimate sensitivity to the information. On the evidence adduced, the alleged sources are persons who had a business association with Mr Blomfield which has long since terminated, and who are angry with him. There is no question about them losing or being damaged in their jobs or otherwise suffering economic or reputation consequences. There are no delicate family relationships or friendships at stake. Given that the alleged sources seem unlikely to have any ongoing relationship with Mr Blomfield, or with any other party that might react adversely to any news that

they were sources, if they were sources, it is not possible to discern any likely adverse effects.

[126] The only possible adverse effect is that the sources, whoever they may be, may be shown to have been party to the making of potentially defamatory statements. In these circumstances I do not consider that to be an adverse effect that carries particular weight.

[127] In summary, no significant adverse effect that would result from the disclosure of the identity of the informant has been identified.

The public interest in the communication of facts and opinion to the public by the news media and its ability to access sources of facts

[128] Whereas the likely adverse effects referred to in s 68(2)(a) are directed to the particular circumstances of the informant or other person, the factor referred to in s 68(2)(b) of the public interest in the communication of facts and the ability of the news media to access sources, is of a more general nature. It focuses on the public interest in the ability of the news media to receive information freely and access sources. This factor would appear to have particular relevance where the facts and opinion that are the subject of the communications are of public interest and significance.

[129] This is not a whistleblower case. There are no political issues, or matters of public importance at stake. Mr Blomfield is not a public figure. There is no evidence that his company, now in liquidation, is the subject of ongoing public interest. The claims against him have not appeared to attract significant public interest. The overall impression given by the extensive material that has been provided is that the three named persons involved in the informing, Mr Spring, and possibly Mr Powell and Ms Easterbrook, were in a dispute situation with Mr Blomfield arising out of a failed business venture. There is a good deal of material from the informants which shows a certain personal animosity towards Mr Blomfield. There is nothing to indicate that the informers have been driven by altruistic motives.

[130] I accept Mr Miles' general submission that there is little public interest in protecting informants intent on pursuing personal vendettas or when conducting personal or commercial attacks. In these circumstances I do not consider that denying Mr Slater the protection of s 68(1) will deter members of the public from communicating confidential material to the media of public importance or interest. While I have held there is a public interest in the disclosure of the sources in this case, there is little public interest in protecting them.

[131] The way in which the sources have acted is also relevant in assessing the weight to be placed on the need to protect them. It was said in *X Ltd v Morgan-Grampian (Publishers) Ltd* in the context of a case decided under s 10 of the Contempt of Court Act 1981 (UK) by Lord Bridge:[61]

> But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing inquiry.

[132] In that case the House of Lords on facts very different from this case 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. The House of Lords considered it essential that the identity of the informant be disclosed to prevent severe damage to the plaintiff's business and to the livelihood of their employees.[62]

[133] Mr Blomfield alleges that his filing drawers and hard-drive were stolen. This issue has not been addressed by Mr Slater in any detail. He confirms he had these items in his possession, but denies that they were stolen. While Mr Slater denies having been party to the unlawful taking of the hard-drive and other materials, he offers no detail.

---

61 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 (HL) at 44.

62 At 45.

[134] In the ordinary course of events persons do not legitimately come by the personal hard-drive and filing cabinets of other persons. Even if Mr Slater was not party to any illegality, it seems likely that the information was obtained illegally by the sources, and this diminishes the importance of protecting the source. There is less public interest in encouraging persons who are in a private dispute with others from going to the media with unlawfully obtained confidential material to hurt them. This material prima facie is in that category. This is a factor which supports a public interest in disclosure, and that further diminishes the public interest in protecting the source.

[135] The public interest in protecting the informants must be categorised as low.

Weighing the factors

[136] In carrying out the balancing process I consider it appropriate to bear in mind the policy reason behind the protection provided by s 68. It is to promote the free flow of information, a vital component of any democracy. That concern does not arise in a significant way in a case such as this which has developed from a private disagreement between business associates, and involves allegations involving private actions which appear to give rise to no significant public interest.

[137] On the one hand I consider that there is a public interest in a full airing of all matters relating to this claim. That includes allowing all information that might assist Mr Blomfield in refuting the defences of truth and honest opinion, and pursuing his s 39 allegation that a group of named persons have with Mr Slater set out to attack him with no genuine opinion that the claims were true. There is a real public interest in those who claim that they are defamed being able to fully explore the circumstances of the defamation and what happened subsequently, and what the sources were reporting to the publisher at the relevant time. However, this is far from conclusive, and must be weighed against the other factors stated in s 68(2).

[138] As against this public interest, there is no significant adverse effect arising from any disclosure of the informants that can be discerned. The public interest in the free disclosure of information to the news media by protecting sources is not a

major factor. This is not a whistle blower case. Moreover, any concern at the chilling effect of disclosure of sources is lessened when the subject matter of the material originally disclosed has the mark of a private feud, and features abusive and vindictive language. Any public interest in protecting sources must be further diminished when there is evidence that a personal vendetta appears to be driving the disclosures. Further, where the material provided by the sources appears to have been unlawfully obtained, that is a further factor lessening the public interest in the free flow of information.

[139] I consider that the weighing comes down clearly for removing the protection of s 68(1). I make an order under s 68(2) that the protection of s 68(1) is not to apply to Mr Slater in the proceeding.

Summary of conclusions

[140] The definition of a journalist in s 68(1) of the Evidence Act 2006 can include a blogger. The definition does not impose quality requirements and does not require the dissemination of news to be in a particular format. The focus is on the medium disseminating new or recent information of public interest.

[141] The relevant time for assessing whether s 68(1) applied to Mr Slater and the Whale Oil website was the time when the sources made their disclosures which resulted in the publications at issue.

[142] The Whale Oil website was a news medium in that it was disseminating new and recent stories of public interest. While its style and focus can be criticised, it was breaking news to a significant section of the New Zealand public.

[143] Whale Oil was published with a significant degree of regularity, and required a sufficient degree of work and effort for it to be in the normal course of Mr Slater's work for him to receive information from informants for publication.

[144] Mr Slater promised to protect his sources.

[145] Therefore, Mr Slater was a journalist and Whale Oil a news medium, and he could invoke the protection in s 68(1).

[146] Section 68(1) did not apply to Mr Spring as his identity had already been disclosed. Section 68(1) applies to prevent only disclosure of sources that have not been revealed.

[147] Rule 8.46 of the High Court Rules, which can be used to prohibit interrogatories seeking sources of information in defamation proceedings, does not apply as it is in the interests of justice that the sources be disclosed.

[148] Therefore, Mr Slater's appeal succeeds in part. The Judge was incorrect to hold that s 68(1) did not apply to Mr Slater (although not in relation to the informant, Mr Spring), but correct to hold that Mr Slater could not invoke the protection in r 8.46 of the High Court Rules.

[149] Mr Blomfield's application for an order under s 68(2) that s 68(1) is not to apply to Mr Slater is granted for these reasons:

(a) Having regard to the issues there is a public interest in disclosure of the identity of the informants.

(b) There are no likely adverse effects of the disclosure on the informants save the possibility of civil action against them by Mr Blomfield, which is not a significant factor.

(c) There is no wider public interest arising from any public importance of the issues or the persons involved, because (i) this arises from a private dispute, and a requirement to disclose is unlikely to have a chilling effect on other whistleblowers and informants who should not be discouraged from going to the media; (ii) the disclosures are extreme and vindictive and have the hallmarks of a private feud; (iii) the documents disclosed by the sources by providing Mr Blomfield's

hard-drive and other documents appear to have been obtained illegitimately.

[150] On balance the public interest in disclosure outweighs any adverse effects on the informants and the ability of the media to freely receive information and access sources.

[151] Therefore Mr Blomfield succeeds on overview and there is an order that s 68(1) does not apply, and Mr Slater must answer the interrogatories and comply with discovery in the usual way.

Result

[152] The appeal is allowed in part in relation to whether Mr Slater is a journalist. Mr Slater is prima facie entitled to invoke s 68(1) in relation to sources other than Messrs Spring.

[153] The appeal is dismissed in respect of the determination that r 8.46 of the High Court Rules does not apply.

[154] The s 68(2) application succeeds. Under s 68(2) I order that s 68(1) is not to apply to the disclosures sought in these defamation proceedings. Mr Slater must comply with the interrogatories and discovery requirements relating to sources.

Costs

[155] Mr Blomfield is to file any submissions relating to costs within 14 days. Mr Slater is to reply within a further 14 days.

……..

Asher J