IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-1312
[2018] NZHC 3057

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

Hearing:	13-14 August 2018
Appearances:	D M Salmon, J P Cundy and E D Nilsson for the Plaintiffs B P Henry for the First Defendant E J Grove for the Second and Third Defendants W Akel, JWS Baigent and K R Teague for the Fourth and Fifth Defendants
Judgment:	23 November 2018

JUDGMENT NO 6 OF PALMER J
(Discovery and oral examination)

This judgment was delivered by me on 23 November 2018 at 3:00 p.m.
pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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CARRICK DOUGLAS MONTROSE GRAHAM
Second Defendant

FACILITATE COMMUNICATIONS LIMITED
Third Defendant

KATHERINE RICH
Fourth Defendant

NEW ZEALAND FOOD AND GROCERY COUNCIL INC
Fifth Defendant

Summary

[1] Dr Doug Sellman, Dr Boyd Swinburn and Mr Shane Bradbrook sue Mr Cameron Slater, Mr Carrick Graham and Mr Graham's company Facilitate Communications Ltd (FCL) for defamation and Mrs Katherine Rich and the New Zealand Food and Grocery Council Ltd (NZFGC) for procuring defamation. In this judgment I determine a second set of interlocutory applications:

(a) I decline Mr Slater's application to exclude hacked documents obtained by the plaintiffs from Mr Nicky Hager at this stage of the proceeding because the evidence does not satisfy me they are inauthentic and they appear relevant to the applications about discovery.

(b) I grant a narrower version of the plaintiffs' applications for particular discovery by Mr Slater, Mr Graham and FCL because there are grounds for believing they have not discovered relevant documents but the original applications were too broadly framed.

(c) I grant the plaintiffs' applications for particular discovery by Mrs Rich and the NZFGC but only to a limited extent, for the avoidance of doubt and for updating purposes.

(d) I decline Mrs Rich's and the NZFGC's application for particular discovery by the plaintiffs because:

(i) The court's ability to strike out a proceeding for abuse of process is not a parameter for discovery for the purposes of its trial.

(ii) Defamation law presumes a defamatory statement damages a plaintiff's reputation in the eyes of those who may read it. The presumption cannot be rebutted by evidence of lack of consequences of harm to the plaintiff's reputation in the eyes of groups of people who may or may not have read it. Otherwise every trial of the defamation of a plaintiff would turn into a detailed evaluation of the plaintiff's reputation, which would be as unattractive as it is likely to be time-consuming.

(iii) The plaintiffs' public and academic profiles, publications, media and social media comments of the plaintiffs are not sufficiently relevant to the allegedly defamatory statements to mitigate damages.

(e) I grant the plaintiffs' application to examine Mr Slater and Mr Graham orally because I consider they have made insufficient answers to interrogatories, particularly about whether blog posts were posted on the Whale Oil website for reward.

Context of the proceeding

The proceeding

[2] The factual context of this proceeding is summarised in a previous interlocutory judgment of 2 October 2017 (the October 2017 judgment).[1] Dr Sellman, Dr Swinburn and Mr Bradbrook are public health professionals. They brought the proceeding following publication of a book, *Dirty Politics*, by Mr Nicky Hager. They

1 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [7]–[13].

allege they have been defamed in a series of blog posts by Mr Slater on his Whale Oil website and in comments on the posts by Mr Graham and FCL. They also sue Mrs Rich and the NZFGC for allegedly procuring Mr Slater, Mr Graham and FCL to publish the substance and sting of the alleged defamations.

The October 2017 judgment

[3] In the October 2017 judgment, I struck out 21 of 159 pleaded defamatory meanings as incapable of being defamatory. I declined to strike out claims as being time-barred or an abuse of process or self-evidently speculative, false or incapable of founding legal liability. I made orders regarding pleadings, defences and next steps in the trial of the proceeding.

[4] In the October 2017 judgment, in relation to an application by Mrs Rich and the NZFGC to strike out the causes of action against them, I stated:[2]

> [101] I have examined chapter seven of *Dirty Politics* and Mr Slater's leaked emails, as exhibited to the January 2017 affidavit. I agree *Dirty Politics* makes the allegations the plaintiffs say, above, it does. I agree *Dirty Politics* and the emails could support the inferences the plaintiffs say, above, they do. The most tenuous part of the plaintiffs' pleadings, on the basis of the information before me, is whether there is a link between [Mrs] Rich and the NZFGC and Dr Swinburn and Mr Bradbrook. But, on balance, I consider the allegations in *Dirty Politics* are capable of supporting an inference they were.
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> [102] I cannot, and do not, find those allegations and inferences are supported by any other evidence or are correct or that the causes of action will succeed.

Defendants' discovery and interrogatories

[5] In December 2017, each of the defendants filed answers to interrogatory questions from the plaintiffs. They also provided discovery of relevant documents in February and March 2018:

(a) Mr Slater disclosed 32 documents, other than blog posts, including 27 individual emails to or from Mrs Rich. He disclosed no correspondence with Mr Graham, no evidence of payments received and only one document containing data from the Whale Oil website.

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2 At [101]–[102].

(b) Mr Graham and FCL disclosed 172 documents including four emails from Mr Slater and 114 emails to or from Mrs Rich or NZFGC. None of the discovered emails to or from Mrs Rich pre-date the publication of *Dirty Politics.*

(c) Mrs Rich and NZFGC disclosed around 1,200 documents including 24 items of correspondence with Mr Graham. No correspondence with Mr Slater is included.

[6] Mr Slater's and Mr Graham's discovery affidavits do not give particulars of the steps taken to search for documents, as required by r 8.15(2)(c) of the High Court Rules 2016.

[7] Mr Slater's evidence in answering interrogatories is that his company Social Media Consultants Ltd (SMC) "does not accept payment for the publication of blog posts, these are my opinions".[3] Mr Graham's evidence is:[4]

> I have talked and shared information with the First Defendant on the basis that it might contribute to his knowledge or understanding of an issue. I have never procured nor instructed the first defendant to publish a Blog Post. The closest I have come to "requesting" a blog post is communicating with the first defendant that "this would be a good story".

[8] Mr Slater's evidence is that SMC received $93,840 from FCL between 3 October 2013 and 25 March 2016, there were no records before that and received two payments totalling $6,900 (GST incl) from NZFGC on 9 May 2013 and 5 November 2013, along with accommodation and airfares for a NZFGC conference on the Gold Coast.[5] Mr Graham's evidence is that FCL paid SMC $124,430 (GST incl) between 1 October 2012 and 22 June 2016 and received from NZFGC $365,814.40 (GST incl) between 30 November 2009 and 31 July 2016.[6] Mrs Rich's evidence corroborates Mr Slater's evidence regarding payments by NZFGC to SMC and has a slightly different

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3 For example, affidavit of Mr Cameron Slater of 5 December 2017, at Common Bundle (CB) 3/18/375.
4 Affidavit of Mr Carrick Graham of 7 December 2017, at CB 3/19/409 at [9].
5 Affidavit of Mr Cameron Slater of 5 December 2017, at CB 3/18/372.
6 Affidavit of Mr Carrick Graham of 7 December 2017, at CB 3/19/412–417.

figure for payments to FCL ($365,619.02 (GST incl) between 30 November 2009 and 31 July 2016).[7]

[9] Mrs Rich swore an affidavit answering interrogatories:

(a) denying she or NZFGC procured, instructed or requested any of the other defendants and/or Whale Oil to publish any of the blog posts or Mr Graham's comments, or material relating to the plaintiffs, Te Reo Mārama, the University of Otago or the University of Auckland or countering or responding to research or advocacy by them or by others relating to the regulation of the relevant industries;

(b) denying she knew who Mr Bradbrook was, before reading the statement of claim; and

(c) denying she or NZFGC had made any payments or other compensation to Mr Slater and or Whale Oil or any entity associated with them for any publications.

Plaintiffs obtain documents from Mr Hager

[10] In the meantime, the plaintiffs obtained further documents from Mr Hager who had obtained them from a hacker known as "Rawshark". These included, allegedly, further emails and documents from Mr Slater and spreadsheets of comments data from the Whale Oil website. Some of the emails were made publicly available by Rawshark on the Twitter account "Whaledump". They are adduced via affidavits filed by the plaintiffs.[8] Among the emails are:

(a) An email of 13 January 2014 from Mr Graham to Mr Slater, with the subject line "KR – Fonterra Post (first thing in the morning)", with the text of a blog post about Fonterra that was posted on Whale Oil the next day.

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7 Affidavit of Mrs Katherine Rich of 14 December 2017, at CB 3/21/438–439.
8 Affidavit of Ms Sophia Malecaut-Watts of 16 April 2018, Exhibit SMW5 at CB 4/29/679–738.

(b) An email of 13 January 2014 from Mr Graham to Mr Slater, with the subject line “Monday hit #2 KR”, with the text of another blog post about Fonterra that was posted on Whale Oil the next day.

(c) An email reply of 21 January 2014 from Mr Graham to Mr Slater, with the subject line “Sugar”, saying “Coke keeps sending stuff to KR expecting her to do something (where we come in). Hit pending.”

(d) An email of 21 January 2014 from Mr Graham to Mr Slater, with the subject line “KR Hit – TF #1”, and with the text of a blog post titled “Coke & Frucor in lawyers sights for class action”, that was posted on Whale Oil the next day.

(e) An email of 21 January 2014 from Mr Graham to Mr Slater, forwarding an email from Mrs Rich, regarding a New Zealand Herald advertisement, with the subject line “Class Action against Cola Companies”.

(f) An email of 22 January 2014 from Mr Graham to Mr Slater, with the subject line “KR hit #2 TF”, saying “Run tomorrow morning first thing? Follow-up piece coming shortly for tomorrow afternoon. 3 hits smashing him up good and proper”, with the text of a blog post about the class action against Coke and Frucor published on Whale Oil the next day.

(g) Details of an email of 23 January 2014 from Mr Graham to Mr Slater, on the subject “KR hit for today – Urgent”, with the heading of a blog post “Why is Countdown acting like the godfather” which was the title of a blogpost on Whale Oil the next day.

(h) An email of 15 February 2014 from Mr Graham to Mr Slater, headed “Countdown Hit – doozy”, stating “ASAP”, with the text of a blog post published on Whale Oil the next day.

(i) At issue in this proceeding, details of an email of 26 February 2014 from Mr Graham to Mr Slater, with the subject line "KR hit – Confirmed: Doug Sellman Gone Mad", which was the title of a blog post on Whale Oil the next day.

Further affidavits on IT, blog post drafting and OIA requests

[11] The affidavit of the plaintiffs' expert IT consultant, Mr Christopher Smith, exhibits the Whale Oil comments data.[9] His evidence is that the comments data would be available from both the Wordpress database hosted on Whale Oil's servers and a separate database hosted by Disqus, the third party commenting platform used by Whale Oil.[10] He says both of these sources are within Mr Slater's control. He gives evidence about the origin of various comments, by "LionKing", "Naylor", "Hillary Green" and "DLM" and the availability of metadata about them to Mr Slater.

[12] Mr Regan Cunliffe has provided an affidavit for Mr Slater which suggests the format of the hacked emails that were discovered shows they were stored in a way which meant they could have been edited and they omit the metadata which suggests they are not original.[11] However, that does not rebut Mr Smith's evidence. And Mr Salmon submits these opinions are extraordinary given that Mr Slater gave a statement to the Police in August 2014 that Mr Cunliffe "runs the technical side of Whale oil",[12] and so must have been in a position to check whether the documents are fake.

[13] The plaintiffs also obtained emails from Mr Peter Clague, which were disclosed to him in the context of a private prosecution against him by his ex-wife. She retained Mr Chris Patterson, who represents Mr Graham and FCL in this proceeding. The emails show Mr Patterson engaged Mr Graham to provide public

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9 Affidavit of Mr Christopher Smith, of 16 April 2018, at CB4/30/823–889.

10 Affidavit of Mr Christopher Smith, of 16 April 2018, at CB4/30/814 at [13]–[15].

11 Affidavit of Mr Regan Cunliffe at CB4/33/1049 at [5]–[6] and [11]. Mr Cunliffe says he has assessed documents including all the emails appended to the Affidavit of Ms Sophia Malecaut-Watts of 16 April 2018 at Exhibit SMW5 referred to at [10] above, except for SEL.01.0375 "Nestle Strategic Communications Report" and SEL.01.0227 "Advertisement – Class action against cola companies".

12 Sixth Affidavit of Ms Sophia Malecaut-Watts of 27 July 2018 at CB 4/38/1113. Dr Swinburn has sworn an affidavit dated 9 August 2018 pointing to additional information suggesting Mr Cunliffe appears to be a business associate of Mr Slater's.

relations services in 2012 including for "blogger fees". One of Mr Graham's invoices was for services including "Draft and facilitate 3x online posts".[13]

[14] And the plaintiffs obtained copies of requests by Mr Graham under the Official Information Act 1982 (OIA) to the Hawke's Bay District Health Board and Ministry of Health.[14] They show Mr Graham and FCL made extensive requests for official information including regarding Mr Bradbrook and Te Reo Mārama, of which Mr Bradbrook was a director.

Repleading

[15] On 9 August 2018, just before the hearing on 13 August 2018, Mr Graham and FCL filed a third amended statement of defence, including new defences. At the hearing, Mr Henry advised Mr Slater would be repleading his defence of qualified privilege in terms of the new public interest defence identified this year by the Court of Appeal in *Durie v Gardiner*.[15]

Further interlocutory applications

[16] On 13 and 14 August 2018, I heard the current round of interlocutory applications:

(a) an application by Mr Slater to exclude documents;

(b) applications for further discovery:

(i) by the plaintiffs for particular discovery by all the defendants;

(ii) by Mr Graham and FCL, and Mrs Rich and NZFGC, for particular discovery by the plaintiffs;

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13 Affidavit of Sophia Malecaut-Watts of 16 April 2018, at CB 4/29/764.

14 Affidavit of Sophia Malecaut-Watts of 16 April 2018, at CB 4/29/799–810. And see affidavit by Dr Swinburn dated 9 August 2011 at [7].

15 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.

(c) an application by the plaintiffs for orders Mr Slater and Mr Graham must attend court to be cross-examined in relation to their interrogatories; and

(d) an application by the plaintiffs for Mr Slater's, Mr Graham's and FCL's defences of honest opinion to be struck out or further particulars given.

1 Exclusion of documents

Relevant law

[17] The Evidence Act 2006 governs the admissibility of evidence. Under s 7 the fundamental principle is that all relevant evidence, which has a tendency to prove or disprove anything of consequence to the determination of the proceeding, is admissible. Evidence that is not relevant is inadmissible. Section 8 requires a judge to exclude evidence if its probative value is outweighed by the risk the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong it.

[18] Under s 2 of the Evidence Act, a hearsay statement is a statement that was made by a person other than a witness and is offered in evidence to prove the truth of its contents. Under s 18, a hearsay statement is admissible if the circumstances relating to the statement provide reasonable assurance the statement is reliable and the maker of the statement is unavailable as a witness.

Application and submissions

[19] Mr Slater applies for an order that all the documents the plaintiffs obtained from Mr Hager or from publications by Rawshark be excluded as evidence at trial. The grounds for Mr Slater's application are that the documents are not authentic and their use without providing the originals of the documents constitutes an abuse of process. Mr Henry, for Mr Slater, relies on the Court's inherent jurisdiction. Mr Grove, for Mr Graham and FCL, supports the application and disputes the authenticity of documents obtained from Mr Hager, submitting they are inadmissible as hearsay under the Evidence Act.

[20] Mr Salmon, for the plaintiffs, submits that, in August and September 2014, Mr Slater complained to the Police, and sought a High Court injunction, on the basis: his email, Facebook and Twitter accounts had been hacked; Mr Hager had published *Dirty Politics* based on Mr Slater's emails, and Whaledump had begun publishing his private emails and other data. He submits the documents obtained from Mr Hager are plainly relevant and all available evidence indicates they are authentic, including corroboration of some from documents discovered by the defendants. He submits Mr Slater is in the extraordinary position of seeking to have documents excluded while refusing to disclose documents that will confirm their authenticity. He submits Mr Cunliffe's evidence is irrelevant and is inadmissible opinion evidence as he does not purport to be an expert and is not independent from Mr Slater.

Should the hacked documents be excluded?

[21] Mr Henry's and Mr Grove's submissions that the hacked emails are not genuine, and presumably were altered some years ago, do not stand up well against Mr Slater's previous complaints, including in affidavits in previous proceedings, that material "sourced from my emails" was hacked by Rawshark and provided to Mr Hager.[16] Mr Slater and Mr Graham, as parties to the hacked emails and the owners of the comments data, are in the best position to provide direct evidence of their authenticity. Mr Cunliffe's affidavit elides any direct conclusion on the question of genuineness, suggesting only that it is technically possible the emails are not genuine. Nor is there a current affidavit from Mr Slater on that issue although he has had plenty of opportunity to provide one. I am not persuaded they are not genuine.

[22] Neither do I consider the documents are inadmissible as hearsay statements. Most of them appear to be statements by likely witnesses so are not hearsay. And, for present purposes, they are not relied upon for the truth of their contents but to support an inference that Mr Slater, Mr Graham and FCL were undertaking "hits" on targets by commission and, therefore, their discovery has been insufficient. For what purpose they will be relied on at trial, if any, is not yet clear.

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16 Affidavit of Sophia Malecaut-Watts of 27 July 2018, at CB 4/38/1134 at [25]-[28]

[23] Obviously, further evidence at trial would be helpful to establish the provenance of the hacked emails, if they will be relevant to the issues at trial. No doubt the plaintiffs will consider whether to call evidence from Mr Hager, as the defendants suggest. But that just reinforces that the provenance of the hacked documents and the implications of that for their reliability can be the subject of submission at trial, in the context of the evidence as it will then be. The decision-maker can decide what to make of them at that stage. I decline to rule them inadmissible at this stage.

2 Discovery

Relevant law

[24] Rule 8.19 of the High Court Rules 2016 provides:

> **8.19 Order for particular discovery against party after proceeding commenced**
>
> If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—
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> (a) to file an affidavit stating—
>
> (i) whether the documents are or have been in the party's control; and
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> (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and
>
> (b) to serve the affidavit on the other party or parties; and
>
> (c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

[25] Documents sought must be relevant to the issues in the proceeding.[17] Asher J in *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* observed "the threshold embodied in 'grounds for belief' [that a party has not discovered documents that

[17] For example, *Robert v Foxton Equities Ltd* [2014] NZHC 726, [2015] NZAR 1351 at [8].

should have been discovered] is not that high" and "all that is necessary is to show that there is some credible evidence which assessed objectively indicates that the documents that are sought exist".[18] In *Lighter Quay Residents' Society Inc v Waterfront Properties (2009) Ltd*, Katz J helpfully summarised the relevant principles applying to r 8.19 recently as follows:[19]

> (a) Existence of the document does not have to be established on the balance of probabilities on a "more likely than not" basis. A lower threshold is required, which may vary given the relevance of the documents and issues of proportionality.
>
> (b) While there is a presumption that affidavits of documents filed are conclusive, an application under r 8.19 is a proper way to circumvent the conclusiveness rule. The party seeking further discovery has to establish that the existing affidavit of documents is incomplete.
>
> (c) Whether a document "should have been discovered" should be determined by reference to the "adverse documents" test in r 8.7, or any stricter test imposed under tailored discovery pursuant to r 8.8.
>
> (d) A four-stage approach is convenient:
>
> (i) Are the documents relevant, and if so how important will they be?
>
> (ii) What are the grounds, and what is the probative value of those grounds, for the belief that the documents sought exist?
>
> (iii) Is discovery proportionate?
>
> (iv) Weighing and balancing these matters, is an order appropriate?
>
> [17] The applicants bear the burden of establishing that the relevant grounds exist.

Should Mr Slater, Mr Graham and FCL provide particular discovery?

[26] The plaintiffs seek orders that each of the defendants provide discovery of three detailed schedules of specified information. Mr Salmon, for the plaintiffs, submits the content of the hacked emails of Mr Slater can be summarised as follows:

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[18] *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760, [2015] NZAR 600 at [12].

[19] *Lighter Quey Residents' Society Inc v Waterfront Properties (2009) Ltd* [2017] NZHC 818 (footnotes omitted).

(a) Mr Graham routinely prepared blog posts for the benefit of his clients, a number of which were described as "KR hits".

(b) Mr Slater published the blog posts prepared by Mr Graham on Whale Oil, usually without any editing.

(c) Mr Graham and "KR" (inferred to be Mrs Rich) were working for the benefit of clients who included Coke, Frucor, Fonterra and DB Breweries.

(d) Mr Graham proposed services to Nestle that included "aligned content on social media platforms".

(e) Mr Slater, Mr Graham and Mrs Rich corresponded by email regarding "targets".

(f) Mr Graham/FCL paid Mr Slater for the publication of "hits".

(g) Mr Graham used the email address lionkingonfire@gmail.com to correspond with Mr Slater and others.

(h) When challenged Mr Graham denied that he used the pseudonyms "LionKing" and "Naylor".

[27] Mr Salmon says the defendants failed to disclose any of Mr Slater's emails or documents on which that summary is based and none of the comments data from either source available to Mr Slater. He points to the emails and Mr Clague's documents as evidence Mr Graham did prepare blog posts, contrary to the evidence of Mr Graham and Mr Slater. He says information to be provided by a third party, Voyager, almost certainly confirms one of the ISPs from which comments were posted on Whale Oil blogs was that of Mr Graham, yet Mr Graham failed to disclose any emails from the relevant email accounts associated with those comments. Mr Salmon says Mr Graham and FCL failed to disclose any documents relating to the tobacco companies on whose behalf he says they were acting, nor payments received from them, nor the OIA requests and response to and from the Hawkes Bay District Health Board. He says what the defendants knew about what tobacco companies, for example, were paying them, is relevant to defences of honest opinion and what is in the public interest as well as to damages. Mr Salmon submits it is inadequate that the defendants have disclosed "almost no" documents about the services provided in exchange for payment by FCL to SMC and by NZFGC to SMC and FCL, and no documents with third parties who were allegedly paying for or benefitting from the services.

[28] Mr Henry, for Mr Slater, submits Mr Slater denies ever expressly accepting payment for publication of blogs, which is consistent with the responses of the other defendants. He submits Mr Hager's material is misleading, distorted and designed to provide a one-sided perspective.

[29] Mr Grove, for Mr Graham and FCL, submits the plaintiffs' application rests on the assumption further relevant documentation must exist in reliance on the hacked documents. Mr Grove says Mr Graham admits making comments under the username "LionKing" and information about ISPs is being provided by Voyager so it is unclear what further information is required. He submits the schedule of other usernames allegedly used by the same ISP as LionKing is inadmissible and has no probative value and the relevant information presumably rests with Mr Slater or Disqus. He questions the relevance of correspondence between Mr Graham and FCL and clients which do not relate to the blog posts or the LionKing comments.

[30] I have already declined to rule the hacked documents inadmissible on grounds of inauthenticity. For the present purpose of considering whether further discovery is warranted, I take them into consideration regardless of whether they are ultimately admissible at trial. Indeed, further discovery may assist to determine any further questions of their genuineness.

[31] I consider the plaintiffs have met the threshold for particular discovery from Mr Slater, Mr Graham and FCL, which is "not that high" according to *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd*. The evidence to which the plaintiffs point suggests at least some of the information sought exists. There are grounds for believing Mr Slater, Mr Graham and FCL have not discovered documents relating to:

(a) emails and documents about blog posts concerning the plaintiffs;

(b) information concerning the comments at issue in this proceeding, including metadata from the Wordpress database and the Disqus database available to Mr Slater and emails or comments from the accounts and ISPs to which Mr Graham has access;

(c) OIA requests and responses regarding the plaintiffs and Te Reo Mārama; and

(d) invoices and details of services they provided to clients that were relevant to the plaintiffs.

[32] Particular discovery will have to comply fully with the requirements of r 8.16. I also consider that the details of the services, including terms of services, provided by Mr Slater, Mr Graham and FCL that relate to the subjects of the relevant blog posts and comments are discoverable. If these defendants undertook to provide services to clients that were generically expressed but potentially encompassed attacks on the plaintiffs by blogpost and comment, that is potentially relevant to their defences and damages and must be disclosed.

[33] However, I am concerned the discovery orders the plaintiffs seek are too broadly framed and may capture information not relevant to the proceeding. I make a somewhat narrower set of orders relating to Mr Slater, Mr Graham and FCL, as set out at the end of this judgment. In particular, I do not consider that all research or advocacy regarding regulation of the alcohol, food and beverage and tobacco industries are necessarily relevant to issues in this defamation case. Such material must only be disclosed if relevant.

[34] As I have noted, there may be reason to think the defendants have not complied with standard discovery. Discovery obligations are ongoing, so if there are further relevant documents that fall within their obligation under r 8.7, the defendants also remain under a continuing obligation to disclose those even if they fall outside the categories specifically subject to particular discovery orders.

Should Mrs Rich and NZFGC provide particular discovery?

[35] Mr Salmon's submissions above are also directed to the plaintiffs' application for particular discovery from Mrs Rich and the NZFGC, though he acknowledges their response is more nuanced. Ms Baigent, for Mrs Rich and the NZFGC, submits they have already provided full discovery and further discovery is unnecessary, unjustified and oppressive. She points to Mrs Rich's affidavit denying requesting publication by

the other defendants on Whale Oil and denying paying Mr Slater or Whale Oil for publications. She also points to Mrs Rich's further affidavit of 11 May 2018 confirming she and the NZFGC had discovered all documents within their control up to commencement of the proceedings, subject to certain objections and clarifications. She submits the plaintiffs' submissions do not rely on credible evidence indicating Mrs Rich and the NZFGC have failed to disclose documents they assess as relevant. She submits the breadth of the request is oppressive and in the nature of fishing.

[36] I consider the scope of particular discovery justified against Mrs Rich and the NZFGC is much narrower than that against the other defendants. Mrs Rich's affidavit is clear in denying she or NZFGC procured the other defendants to publish the relevant blog posts or comments or paid them for any publications. There are only three areas where additional information appears to me to be required.

[37] First, a more precise account of the terms and scope of services between Mrs Rich and/or the NZFGC and Mr Slater, Mr Graham and/or FCL, including any associated documents, appears to be relevant.[20] It may be the terms and scope of services clearly exclude such publications or they might include more generic services which could potentially encompassed attacks on the plaintiffs by blogpost and comment. That would be directly relevant to Mrs Rich's and NZFGC's role. It can be clarified, for the avoidance of doubt, by a further affidavit and particular discovery of any relevant documents.

[38] Second, as noted above, discovery obligations are ongoing so Mrs Rich and the NZFGC are obliged to discover any further relevant documents after the date of commencement of the proceeding. They need to update discovery for that purpose.

[39] Third, as required as noted below, Mrs Rich could also usefully clarify by further affidavit that she has made reasonable enquiries to obtain knowledge of the answers to her interrogatories, state what the enquiries were and what belief she holds as a result as to whether any third parties hold documents that would be discoverable if held by defendants.

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[20] More precise than the answer to the question at paragraph 19(d) in the schedule to the Affidavit of Katherine Rich of 6 December 2017.

[40] Discovery must, of course, fully satisfy the requirements of rr 8.16 and 8.19 including identification of documents not currently within the party's control and an explanation of when they ceased to be in the party's control and who now has control. I note documents discovered may only be used by the parties for the purposes of this litigation.[21]

Should the plaintiffs provide particular discovery?

[41] In the October 2017 judgment, I held, in summary:[22]

> I do consider the law of defamation includes a requirement for a minimum threshold of harm to reputation. The law presumes harm to reputation to have occurred on publication of a defamation. But a defendant may rebut the presumption by showing any harm to reputation is less than minor. I apply that threshold to the meanings pleaded here as outlined in the annex to this judgment.

[42] In their statement of defence to the second amended statement of claim, Mrs Rich and the NZFGC plead the plaintiffs have suffered less than minor damage to reputation, there has been no real tort arising from the publications and the proceedings are not necessary to vindicate the plaintiffs' reputations. They plead an extensive variety of facts about the public and academic profiles, publications, media and social media comments and funding of, and access to government by, the plaintiffs. They rely on those matters in mitigation of damages.

[43] Mrs Rich and the NZFGC apply for orders that the plaintiffs provide particular discovery of an extensive schedule of documentation in connection with, in summary: public funding the plaintiffs applied for and received; publications of and conferences attended by the plaintiffs; posts made, correspondence with named third parties, lecture documentation and other documentation by the plaintiffs referring expressly or implicitly to Mrs Rich and/or the NZFGC in a number of different categories; and documentation relating to the appointment of Mrs Rich to the Health Promotion Agency.

[44] Mr Akel, for Mrs Rich and the NZFGC, submits:

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21 High Court Rules 2016, r 8.30(4).

22 *Sellman v Slater*, above n 1, at [3] and see further [63]-[65].

(a) The scope of discovery is determined by reference to issues raised by the pleadings, which are extensive, so the information sought is proportionate to the claim being defended.

(b) The documents sought are relevant to whether the plaintiffs have suffered nor or less than minor damage to reputation. That applies either on the approach to less than minor harm identified in the October 2017 judgment or under the approach of the Court of Appeal in England and Wales in *Jameel (Yousef) v Dow Jones & Co Inc*, which he submits is still live here.[23] Mr Akel submits the plaintiffs' reputations must be considered at the time of the real or hypothetical reading of the allegedly defamatory statements, over seven years, consistent with the October 2017 judgment's adoption of the multiple publication rule.[24]

(c) The documents sought will also be relied upon in mitigation of damages, following the English Court of Appeal in *Burstein v Times Newspapers Ltd*.[25] Mr Akel submits the impact on the reputation of the plaintiffs should be judged with reference to right-thinking people closely related to the plaintiffs' involvement – the segment of the plaintiffs' lives that is the subject of the defamation, which depends on the readership of the blog.

[45] Mr Salmon submits the documents sought include virtually all documents relevant to the plaintiffs' funding, publications, conference papers and advocacy. He submits they are not relevant because:

(a) The approach in *Jameel* is based on documents in the possession of the plaintiffs whereas Mr Akel's approach is not. And *Jameel* does not provide an affirmative defence but a basis for strike out, which has already been determined.

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23 *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] 2 WLR 1614.
24 At [40].
25 *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 (EWCA).

(b) The documents are not relevant to the level of harm suffered by the plaintiffs because the law infers harm in the eyes of those who may read the allegedly defamatory statements and the information sought to be discovered by the defendants is not relevant to that. Defamation law never goes into the way someone's life is run to measure reputation.

(c) A defamation plaintiff need not prove special damages. The Court in *Burstein* would have allowed the defendants to rely at trial only on relevant confined background context directly connected to the publications at issue.[26] Mrs Rich's and NZFGC's pleadings are wholly disconnected from that. The fact the plaintiffs have continued to pursue their careers falls significantly short of constituting directly relevant background context and is not a basis for discovery.

(d) Discovery of such a wide extent of material would be oppressive and out of all proportion to its value to the Court. The courts tightly control the extent to which defendants can use a defamation proceeding to torture plaintiffs.

[46] The purpose of standard discovery under r 8.7 is to ensure all information of actual and direct relevance is available to parties to litigation.[27] Mr Akel is correct in his submission that the pleadings set the parameters for discovery. If the pleaded case is wide-ranging, discovery may be too. However, I do not accept the submission that the power of a court to strike out proceedings as an abuse of process, including under the approach in *Jameel*, is a parameter for discovery for the purposes of trial of the proceeding. The New Zealand cases where defamation claims have been struck out on that basis have been just that: pre-trial strike-outs. If the parameters of the pleadings do not make information discoverable in a proceeding, the court's power to strike it out does not alter that.

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[26] *Burstein v Times Newspapers Ltd*, above n 25, at [40]–[41].

[27] *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614, (2016) 27 NZTC 22-084.

[47] Neither do I consider the "more than minor damage" approach I took in the October 2017 judgment, following *Thornton v Telegraph Media Group Ltd* and *Lachaux v Independent Print Ltd* in England, and *CPA Australia Ltd v New Zealand Institute of Chartered Accountants,* provides a basis for the discovery sought here.[28] There is a rebuttable presumption that a defamatory statement damages a plaintiff's reputation.[29] I held in the October 2017 judgment that, if a publisher can show the statement has caused less than minor harm to the plaintiff's reputation, that defence will defeat a claim of defamation.[30] A defendant can rebut the presumption by showing few people have actually read the statement or all those who read it did not think worse of the plaintiff or, perhaps, by showing the nature of the statement or reputation of the publisher is such that the statements could not have harmed the plaintiff's reputation. If a plaintiff had evidence in its possession of that they would be obliged to disclose it.

[48] But defamation law presumes a defamatory statement damages reputation in the eyes of those who may read it. The presumption cannot be rebutted by showing the plaintiff's reputation is unaffected in the eyes of groups of people who may or may not have read the statement. As Davis LJ suggested in *Lachaux v Independent Print Ltd*, there is a distinction between the harm caused to reputation by defamation and the damaging consequences of that harm.[31] The lack of identifiable damaging consequences will generally not be helpful in a defamation proceeding. That is the reason for the presumption.[32] Otherwise every trial of the defamation of a plaintiff would turn into a detailed evaluation of the plaintiff's reputation amongst various groups of people. Such a prospect is as unattractive as it is likely to be time-consuming.

[49] The principles governing damages for defamation are similar. The Court of Appeal's decision on defamation damages in *Williams v Craig* is currently under

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28 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985; *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334; *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854, (2015) 14 TCLR 149.

29 *Sellman v Slater*, above n 1, at [63]–[69].

30 At [69].

31 *Lachaux v Independent Print Ltd*, above n 28, at [27].

32 *Lachaux v Independent Print Ltd*, above n 28, at [28].

appeal to the Supreme Court.[33] But it emphasised the conventional approach to damages for defamation has been to assess the gravity of the defamatory statement and extent of publication.[34] It has not been to interrogate the actual reputation of the plaintiffs in the eyes of particular groups of people, and the effect of the defamation on that.

[50] Mr Akel relies on one of *Gatley's* categories of evidence that can be given in mitigation of damages: "facts relevant to the contextual background in which the defamatory publication came to be made", following *Burstein v Times Newspapers* decided by the Court of Appeal of England and Wales.[35] In the leading judgment, May LJ traversed the potential for damages to be reduced for defamation directly and causally provoked by the plaintiff's conduct.[36] But he warned of caution because "[i]t will, generally speaking, normally be both unfair and irrelevant if a claimant complaining of a specific defamatory publication is subjected to a roving inquiry into aspects of his or her life unconnected with the subject matter of the defamatory publication."[37]

[51] In *Turner v News Group Newspapers Ltd*, Keene LJ subsequently stated such evidence "has to be evidence which is so clearly relevant to the subject-matter of the libel or to the claimant's reputation or sensitivity in that part of this life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates".[38] In the same case, Moses LJ characterised the purpose of this approach as "to ensure that the claimant was properly vindicated and fairly compensated".[39] He warned against plaintiffs being "terrorised into submission" by too broad a view of what is relevant to a claimant's conduct or reputation.[40]

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33 *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1; *Craig v Williams* [2018] NZSC 61.
34 At [31], citing *John v MGM Ltd* [1997] QB 586 (CA) at 607–608.
35 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [33.29].
36 *Burstein v Times Newspapers Ltd*, above n 25, at [24]–[25].
37 At [40]
38 *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540, [2006] 1 WLR 3469 at [56].
39 At [87].
40 At [90].

[52] Here, the allegedly defamatory statements are directed at the plaintiffs and their positions on matters of public policy relating to the regulation of alcohol, tobacco, sugar and fat. If any of the plaintiffs' conduct directly and causally provoked the statements, documents about that would be discoverable, should have been discovered and still should be if they have not. And specific funding of the plaintiffs that is the subject of specific allegedly defamatory statements may also need to be discovered as relevant to defences. As Mr Salmon noted at hearing, the plaintiffs will have to review that in relation to the repleaded defences of Mr Graham and FCL. The same may be true for the other defendants.

[53] But Mrs Rich and the NZFGC seek discovery of information that go a long way further than that. I do not consider the public and academic profiles, publications, media and social media comments of the plaintiffs are so clearly relevant to the subject matter of the statements that there would be real risk of a decision-maker assessing damages on a false basis if they did not know of them. An order of the type sought would fall into the roving inquiry into aspects of the plaintiffs' lives, unconnected with the subject matter of these specific allegedly defamatory statements, against which Lord Justice May warns. I decline the application.

3 Oral examination of Mr Slater and Mr Graham

Relevant law

[54] Under r 8.34 a party may file a serve a notice requiring another party to answer specified interrogatories relating to any matter in question in the proceeding. The interrogatories must ordinarily be answered within 10 working days, unless a judge rules otherwise. Under r 8.39, a statement in answer to interrogatories must set out the interrogatories and the answers and "must deal with each interrogatory specifically, either—

(a) by answering the substance of the interrogatory without evasion; or

(b) by objecting to answer the interrogatory on 1 or more of the grounds mentioned in rule 8.40(1) and briefly stating the facts on which the objection is based."

[55] Under r 8.40 a party may object to answer an interrogatory on the grounds only that it does not relate to a matter in question, is vexatious or oppressive, the information sought is privileged or the sole object is to ascertain the names of witnesses. Rule 8.42 provides:

> **8.42 Insufficient answer**
>
> If a party fails to answer an interrogatory sufficiently, a Judge may, in addition to acting under rule 7.48,—
>
> (a) if the party has made an insufficient answer, order the party to make a further answer verified by affidavit in accordance with rule 8.38; or
>
> (b) order the party, or any of the persons mentioned in rule 8.41(1)(b) to (d), as the case requires, to attend to be orally examined.

[56] I endorse Associate Judge Gendall's confirmation in *Crusader Meats New Zealand Ltd v New Zealand Meat Board* that answers to interrogatories should be specific, as accurate as reasonably possible and made to the best of the party's knowledge, information and belief.[41] An answering party needs to make enquiries to obtain knowledge of the answer and state what enquiries have been made and what belief he or she holds as a result.[42]

Application and submissions

[57] The plaintiffs apply for orders that Mr Slater, Mr Graham and FCL attend the Court to be orally examined in relation to their responses to the plaintiffs' interrogatories or, alternatively, make statements verified by affidavit answering further interrogatories.

[58] Mr Salmon submits Mr Slater's and Mr Graham's responses to interrogatories to date have been incomplete and evasive, and Mr Slater's have failed to respond to the questions and are plainly inaccurate in light of the plaintiff's evidence that Whale Oil did publish content for reward. He submits oral questions over half a day or a full

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41 *Crusader Meats New Zealand Ltd v New Zealand Meat Board* HC Wellington, CIV 2004-485-2147, 13 May 2008 at [22]–[23].

42 At [24].

day are likely to save time in gaining the information sought, given the inadequacies of the responses to date.

[59] Mr Henry submits Mr Slater has provided sufficient explanation to the interrogatories to date, further interrogatories would be answered and outstanding questions can be dealt with at trial. Once the plaintiffs have disclosed the extent of their public funding, Mr Slater will provide further particulars. Mr Grove submits Mr Graham consents to answering further interrogatories but objects to oral examination as overkill.

Should Mr Slater and Mr Graham be examined?

[60] I have examined Mr Slater's and Mr Graham's answers to interrogatories. I am concerned their statements that Whaleoil did not publish blogposts for reward are not consistent with the evidence to which the plaintiffs point, which suggests that was done in specific instances. They are inconsistent with reasonable inferences from the emails obtained by the plaintiffs. And they are inconsistent with Mr Graham belatedly accepting he did do so in respect of blog posts about Mr Clague once evidence of that was adduced. I am also concerned a number of other aspects of the interrogatories may not have been properly responded to, regarding: who was the author of the blog posts; the involvement of each of the defendants in their preparation; downloading of blog posts; authorship of the comments; and payments received. I consider Mr Slater and Mr Graham have made insufficient answer to the interrogatories.

[61] I consider the most efficient means to elicit answers to the plaintiffs' questions is for Mr Slater and Mr Graham to attend Court for up to one day to be orally examined. I am satisfied that is likely to be more effective than going through what may be several more unproductive rounds of exchanges of correspondence or waiting for trial. Oral examination should occur after the discovery ordered above has been provided. The questions they are to be asked are to be related to the responses to the interrogatories, or discovery provided since the original interrogatories, and relevant to the issues at trial.

4 Other applications

[62] Two other applications were to be heard at the hearing:

(a) Mr Slater, Mr Graham and FCL pleaded defences of truth and honest opinion to all causes of action against them. The plaintiffs sought orders striking out Mr Slater's and Mr Graham's and FCL's defences of trust and honest opinion. Alternatively, the plaintiffs applied for them to give particulars specifying what they allege are statements of fact and the facts and circumstances on which they rely in support of the allegations the statements are true.

(b) Mr Graham applied for particular discovery by the plaintiffs concerning, in summary: funding and remuneration they received from any governmental source; audits and investigations of such funding; research papers and articles by Mr Sellman since 2000; disciplinary complaints against Mr Bradbrook; and publications by the plaintiffs mentioning Mr Graham or FLC from 2000.

[63] However, on 9 August 2018, just before the hearing, Mr Graham and FCL filed a third amended Statement of Defence, including new defences. And Mr Henry advised at the hearing that Mr Slater would have to file a new amended statement of defence to substitute the new public interest defence for qualified privilege.

[64] Mr Salmon acknowledged Mr Grove's submission that documents regarding when the plaintiffs gained knowledge of the defamatory statements should be discovered. That should be addressed by the plaintiffs. Otherwise, he submitted Mr Graham's and FCL's third statement of defence would need to be assessed before Mr Graham's application for discovery could be properly addressed. It was agreed at the hearing this application would be put aside. It can be revisited after the s 35 conference I order below.

[65] Similarly, the application to strike out affirmative defences falls away with the filing and impending filing of new affirmative defences. I record that, if the previous sets of pleadings by Mr Slater, Mr Graham and FCL had remained extant, I do not

consider they should have been struck out but they would have needed to be amended to provide greater specificity of particulars in relation to the defences. I will hear counsel as to whether this remains an issue at the s 35 conference I order below.

Result

[66] I make the following orders:

Excluded documents

(a) I decline Mr Slater's application to exclude hacked documents obtained by the plaintiffs from Mr Nicky Hager at this stage of the proceeding.

Discovery

(b) Mr Slater, Mr Graham and FCL will provide further particular discovery to the plaintiffs and other defendants, within 15 working days of this judgment, of:

(i) documents passing between them, and between them and third parties including any of NZFGC's members, relating to:

(1) any of the plaintiffs or Te Reo Mārama;

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

(3) the services provided by Mr Slater, SMC, Mr Graham or FCL (including invoices for the services), including in relation to the alcohol, food and beverage or tobacco industries, which relate to the subjects of the blog posts or comments that are the subject of this proceeding;

(ii) documents and data that are or have been in Ms Slater's control, concerning numbers of downloads of each blog post, details of

user comments and any requests under the OIA or Privacy Act 1993 and responses; and

(iii) documents and data that are or have been in Mr Graham's and/or FCL's control regarding: comments Mr Graham made on Whale Oil including from specified accounts; ISPs he used; OIA and Privacy Act requests and responses; and correspondence with the organisers of conferences in which the plaintiffs participated.

(c) Mrs Rich and the NZFGC will provide further particular discovery to the plaintiffs and other defendants, within 15 working days of this judgment, of:

(i) the terms and scope of services from Mr Slater, Mr Graham and/or FCL in the relevant time period;

(ii) any further relevant documents after the date of commencement of the proceeding;

(iii) the reasonable enquiries made to obtain knowledge of the answers to her interrogatories, what the enquiries were and what belief is held as a result as to whether any third parties hold documents that would be discoverable if held by defendants.

(d) I decline Mrs Rich's and the NZFGC's application for particular discovery by the plaintiffs.

Oral examination

(e) Mr Slater and Mr Graham will attend Court to be orally examined for up to one day, on a date determined by the Registrar after 15 working days of the date of this judgment.

Costs

(f) If costs cannot be agreed between the parties they have leave to file written submissions of no more than five pages within 10 working days of the date of the judgment.

Section 35 conference and timetable

(g) Any defendants who wish to do so must file and serve an amended statement of defence within 15 working days of this judgment.

(h) By consent at the hearing, the Registrar will set down a conference under s 35 of the Defamation Act 1992 for a half a day before me at the first available opportunity after 20 working days from the date of this judgment. The parties will file memoranda of counsel three days before that conference including: their estimates of the hearing time required to try the case; any elections for it to be heard by a jury; which issues they consider may be resolved without trial, and how (including by correction or voluntary apology); any admissions of fact they consider desirable by any party; any further interlocutory issues; and any other issues relevant to bringing the proceeding to trial.

Palmer J

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