IN THE MOOT COURT OF APPEAL
OF NEW ZEALAND **MCA 238/2015**

BETWEEN **LATER**

Appellant

AND **JOC**

Respondent

SUBMISSIONS FOR APPEAL

Dated 23 AUGUST 2015

Katherine Eichelbaum | Caitlin Anyon-Peters

Counsel for the Appellant

MAY IT PLEASE THE COURT, Counsel for the Appellant submits:

Standing (Senior Counsel – Katherine Eichelbaum)

1. Submission One: The trial judge correctly selected the *Slater* test to determine standing.[1]

1.1 Standing is granted under s 210 of the Criminal Procedure Act to any journalist acting under a code of ethics or bound by the Broadcasting Standards Authority or Press Council complaints procedure, or, any other person reporting upon the proceedings with the permission of the court.

1.2 On the second ground, Inspectah Deck J determined the following requirements for the courts to grant standing under s210(1)(b):

a) The medium used by the journalist disseminates the information to the public or a section of the public;
b) What is disseminated is news and observations on news;
c) Publication of news is regular and not occasional;
d) A significant element of their publishing duties involves the generation and/or aggregation of news, information and opinion of current value.

2. Submission Two: The trial judge incorrectly applied the test to the facts

2.1 The Law Commission's paper, "The News Media Meets 'New Media'" emphasises a lack of Parliamentary intention to exclude bloggers or modern forms of news media from this legislation.[2] Therefore facts specific to the form of blogging must not be weighted so heavily as to exclude online media on the basis of its inherent characteristics.

2.2 Counsel submits that Inspectah Deck J failed to consider relevant facts of Later's particular blog, including: a very significant readership of 200,000 views per day, the regular nature of posts, and the ability to break news stories. Furthermore the efforts undertaken to vet articles before publication were downplayed by the learned judge.

2.3 These considerations, as well as relevant policy factors relating to the necessary flexibility of courts in evolving frontiers of law, point to a higher "class" of blogging which is similar if not the same in purpose and function to news. There are also differing interpretations of what constitutes "current value".

2.4 I submit that there was also a failure to consider Later's role as an expert commentator for the New Zealand Herald Spy column, which may more easily satisfy requirements of the test.

2.5 *Robertson* also supports that a presumption of open justice must form the basis of a decision.[3] In this case, open justice is favoured through the special position of news media in law.

---

[1] *Slater v Blomfeld* [2014] 3 NZLR 835 (HC).
[2] The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age (NZLC R128, 2013).
[3] *Robertson v Police* [2015] NZCA 7 at [13].

3. Submission Three: In the alternative, the test used was not correct.

3.1 The trial judge may have been too prescriptive with the very general statutory direction of "any other person reporting on the proceedings with the permission of the court".

3.2 Counsel submits that this is more rightly viewed as a clear signpost from Parliament that the Courts are to exercise discretion and allow a wider ambit for media involvement. Support for legislative intent to protect open justice and freedom of speech can be found in *RM v Police*.[4]

3.3 In *Slater* a broader test is considered: that a person may qualify as a journalist once a certain level of work or content is achieved, and that it is more important to consider whether the body of work has been accurate.[5] No evidence has come to light to suggest the Appellant has created inaccurate work previously.

4. Submission Four: Policy concerns.

4.1 Counsel submits that the public is greatly advantaged by access to web media – including instant updates and breaking news. There is also strong public interest in fresh, unmoderated views; therefore these principles should be upheld by the relevant statutory provisions.

4.2 Internet law is a rapidly growing sphere; there exists a huge diversity of content and quality due to the intangible nature of online media. Therefore counsel submits that the law must reflect this through increased flexibility.

4.3 Modern marginalisation of traditional media should lead to increasing acceptance of contemporary forms; this must extend to courts to ensure a fair reflection of public interests.

Suppression Order (Junior Counsel – Ms Anyon-Peters)

5.0 The test to grant a suppression order was correctly selected by the learned trial judge, Inspectah Deck J. This test was laid out in *Robertson v Police.*[6]

6.0 Submission 1: Publication of the respondent's name is not "likely to cause extreme hardship", as per s200(2)(a) of the Criminal Procedure Act 2011.

6.1 For s200(2)(a) to be satisfied, an outcome of "extreme hardship" must be more than likely, in other words, more than a mere possibility.[7] This definition was applied correctly by the learned trial judge.

6.2 To determine a threshold for "extreme hardship" as in s200(2)(a), definitions in *Robertson v Police*,[8] and *Waititi*,[9] have been drawn on. Therefore, "extreme hardship" is where the

---

[4] *RM v Police* [2012] NZHC 2080 at [14-16].
[5] As above, n 1 at [62].
[6] At [39]-[42].
[7] *Beacon Media Group Ltd v Waititi* [2014] HZHC 281 at [21].
[8] *Robertson*, above n 3, at [49].
[9] *Waititi*, above n 8, at [27].

hardship (likely) caused significantly outweighs factors of public interest and freedom of expression, and are beyond ordinary consequences of publication.

6.3 With respect, the respondent's connection to "well-known" individuals was given too much weight by the learned trial judge. S200(3) expressly prohibits suppression solely on the basis of celebrity status causing "extreme hardship", and this should equally apply to this case.

6.4 Family history of depression alone is not sufficient to meet the threshold for extreme hardship.[10] Any hardship would fall within the "natural consequences" of publication.[11]

7.0 Submission 2: Publication of the respondent's name is also not "likely to create a real risk of prejudice to a fair trial", as per s200(2)(d).

7.1 For s200(2)(d) to be satisfied, there must be a likely "real risk of prejudice to a fair trial".

7.2 The learned trial judge was correct to see no link between the trial of Mr Smith and the publication of the identity of the respondent.

7.3 With respect to the impending trial of JOC for charges of misappropriating funds, counsel agrees with the learned trial judge that there are sufficient procedures in place to protect the impartiality of both judge and jury.

8.0 Submission 3: In the alternative, if the Court finds a s200(2) threshold has been met, the interests of the public still outweigh any consequences of publication of identity.

8.1 S200 of the Criminal Procedure Act restricts discretion to grant suppression compared to the previous s140 of the Criminal Justice Act 1985, which was unlimited. The intention of Parliament is clear: a more stringent test reflects the presumption of open justice in criminal proceedings and prevents special treatment being given to well-known individuals.[12]

8.2 The starting point for discretionary assessment is the presumption of open justice. Thus publication is the norm, and suppression should only be given in exceptional circumstances.[13]

8.3 The offending of misappropriating funds is very serious. Money was taken from a charitable trust and there would be great public interest because of this.

8.4 In addition, the article written by the appellant raised the respondent's relationship with a renowned sportsman, which is of high public interest. It is submitted the relationship is a key reason for the respondent seeking suppression, but is not a matter that concerns the Court.

8.5 The O'Connell trust, as victims of the offending, have also filed affidavits requesting suppression not be granted. The court should give due weight to this request.

---

[10] *Robertson*, above n 3, at [63].
[11] *Robertson*, above n 3, at [49].
[12] *RM v Police*, above n 4, at [15]; *Robertson*, above n 3, at [45], *Waititi*, above n 8, at [5].
[13] *Robertson*, above n 3, at [44].