IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11344
[2015] NZHC 3268

UNDER	the Judicature Amendment Act 1972, Part 30 of the High Court Rules, the Bill of Rights Act 1990, and the Search and Surveillance Act 2012
IN THE MATTER	of an application for judicial review
AND IN THE MATTER	of a search warrant issued by the District Court at Manukau on 30 September 2014
BETWEEN	NICHOLAS ALFRED HAGER Applicant
AND	HER MAJESTY'S ATTORNEY-GENERAL First Respondent
	THE NEW ZEALAND POLICE Second Respondent
	THE MANUKAU DISTRICT COURT Third Respondent

Hearing: 13-15 July 2015

Counsel: J G Miles QC, F E Geiringer and S J Price for Applicant
B Horsley and K Laurenson for First and Second Respondents

Judgment: 17 December 2015

JUDGMENT OF CLIFFORD J

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Introduction

[1] In these judicial review proceedings the applicant, Nicolas Hager, challenges the lawfulness of a search warrant issued by the District Court at Manukau on 30 September 2014 allowing the police to search his home, and of the search of his home that the police carried out pursuant to that warrant, in his absence on 2 October 2014.

Facts

[2] Mr Hager is an investigative journalist. Mr Hager's particular interests are in such subjects as intelligence agencies, the military, the police, the environment, health, the public relations industry and unethical or undemocratic parts of politics.

Mr Hager has investigated, and published, books and articles reflecting those interests. Those books and articles focus on international events, as well as events in New Zealand. Mr Hager says there are common themes in his work relating to democracy, integrity in government, transparency, freedom of information and respect for human rights.

[3] Mr Hager's work involves extensive use of information provided to him by inside sources. Those sources commonly provide such information to Mr Hager on the basis that Mr Hager will keep their identities secret, and promises to do so. Mr Hager says, and I have no reason to conclude this is not the case, that he has never disclosed the identity of one of his confidential sources, either in New Zealand or overseas.

[4] Mr Hager is the author of the book *Dirty Politics: How Attack Politics is Poisoning New Zealand's Political Environment* (*Dirty Politics*). *Dirty Politics* was published on 13 August last year during the general election campaign.

[5] *Dirty Politics* focuses on the activities of Cameron Slater and the blog he publishes, known as *Whale Oil*. The gist of *Dirty Politics* is that Mr Slater and those associated with him were running a "dirty tricks" campaign in support of the National Party; that they were doing so in coordination with, and on the basis of material obtained from, persons associated with the National Party (including senior members of the Prime Minister's staff and, in one instance, a Cabinet Minister); and that they were doing so in such a way as to conceal their connections to the National Party. After a first chapter backgrounding Mr Slater and his blog, each of *Dirty Politics*' 11 further chapters address what Mr Hager saw as a different instance of Mr Slater's tactics at work.

[6] It is something of an understatement to say that the publication of *Dirty Politics* attracted, at the time of its publication and in the months that followed, considerable attention.

[7] The significance of at least some of the issues raised in *Dirty Politics* was subsequently confirmed by the inquiry by the Inspector-General of Intelligence and

Security into certain actions of the New Zealand Security Intelligence Service relating to the disclosure of information concerning consultations between the Director of that Service and the then Leader of the Opposition, the Hon Phil Goff MP. The Inspector-General, Ms Gwyn, explained her decision to undertake the inquiry in the following terms:

> 1. On 19 August 2014, I received a complaint from Metiria Turei MP, Green Party Co-leader, regarding allegations that NZSIS documents were declassified in order to be used for political purposes. The complaint relied on allegations made in Nicky Hager's book *Dirty Politics*, published on 13 August 2014. Mr Hager had alleged that the NZSIS had acted improperly in releasing information that would not usually have been released in response to an Official Information Act request from Cameron Slater. Ms Turei requested that I investigate the allegations in the book. …
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> 2. … However, I was satisfied that there was a sufficient public interest justifying the commencement of an own-motion inquiry into the legality and propriety of the actions raised in Ms Turei's complaint. …

[8] Ms Gwyn made a number of findings critical of the NZSIS, and made a number of recommendations as regards the treatment, by NZSIS, of official information and as to the improvement of its understanding and application of its obligations of political neutrality. She recommended that the NZSIS provide an apology to the Hon Phil Goff. Her report records that the Director of the NZSIS had accepted all her recommendations.

[9] In the Preface to *Dirty Politics* Mr Hager explains why he decided to investigate Mr Slater and his blog: he had become increasingly concerned with what he saw as personalised attacks made through Mr Slater's *Whale Oil* blog on participants in and commentators on local and national politics. He goes on to describe how, some time later in 2014, he received a USB stick containing "thousands of documents" that appeared to have originated from an attack on the *Whale Oil* website. *Dirty Politics* was, Mr Hager acknowledges, based to a significant extent on that leaked material.

[10] In the days immediately following the publication of *Dirty Politics*, Mr Hager gave a number of public interviews in which he confirmed that he was aware material had been hacked from Mr Slater's computer, that the "hacker" was

personally known to Mr Hager and was the person (the Source) who had provided that material to him. Mr Hager also said that he was committed, as a journalist, to preserving the confidentiality of the Source, and that he had – before he had seen any of the leaked material – promised the Source he would do so.

[11] On 18 August material that the Source had leaked to Mr Hager began to be released publicly by a person calling himself "Rawshark", using a Twitter account called "Whale Dump". Posts to the Whale Dump Twitter account included links to a file sharing website, Wikisend, from where hacked documents could be downloaded. Those releases began shortly after Mr Hager, having been challenged by the Prime Minister to release his source material, asked the Source to release some of that material to substantiate the information in *Dirty Politics*.

[12] Section 249 of the Crimes Act 1961 makes it an offence, punishable by up to seven years' imprisonment, to access a computer system for dishonest purposes. On 19 August 2014 Mr Slater complained to the police that his computer had been accessed illegally in early 2014. The police began an investigation. The focus of that investigation was to determine the person or persons responsible for hacking Mr Slater's computer and leaking the material to Mr Hager. Mr Hager was a suspect in that investigation, on the basis that he was likely to be in possession of stolen material.

[13] Mr Slater was interviewed by the police on 29 August 2014. Mr Slater explained to the police that his blog had been the subject of a "denial of service" attack in February 2014, but he had not been able at the time to tell how much of his information had been accessed. The police obtained Mr Slater's computer from him on 15 September. It was subsequently examined by the Police Electronic Crime Lab, but no information of use to the investigation was found. In the weeks that followed, police pursued various lines of inquiry. The police investigation plan contemplated an application for a search warrant with respect to Mr Hager's home at some point. By late September the police did not consider they had made much progress with their investigation.

[14] A decision was made to apply for a search warrant of Mr Hager's home. The application for that warrant was made on 30 September. At about the same time the police were advised that, as a result of the Court of Appeal's decision in *Dixon v R*,[1] Mr Hager could no longer be seen as being in possession of stolen material, even if information obtained from Mr Slater's computer was found in his possession. The application for a warrant was therefore made on the basis that Mr Hager was an uncooperative witness, rather than a suspect. A warrant (the Warrant) was issued that day by the District Court at Manakau.

[15] The Warrant was executed on 2 October 2014. At 7.40 in the morning five police officers, and a police staff member from the Police Electronic Crime Laboratory, arrived at Mr Hager's residence in Wellington. Detective Sergeant Beal was the officer in charge. Mr Hager's daughter, Ms Wells, opened the door. Ms Wells was not dressed. She asked to be given that opportunity. Ms Wells dressed herself (in the presence of a female police officer). At about 8.05 am Ms Wells phoned her father. During that call she handed the phone to Detective Sergeant Beal. The Detective Sergeant and Mr Hager spoke briefly. Mr Hager told the officer there was nothing in his house that would help identify the Source. Mr Hager also expressed concern that the Search would interfere with his rights and obligations in relation to other sensitive projects and confidential sources.

[16] The search would appear to have commenced at about 8.20 am. Shortly after 8.30 am Mr Hager called to speak to Detective Sergeant Beal again. During that conversation, the Detective Sergeant asked Mr Hager whether he was claiming privilege. Mr Hager said he was. The Detective Sergeant explained that all material seized would be sealed but not searched without permission of a Judge.

[17] Mr Price, one of Mr Hager's legal advisers, arrived at the house shortly after the police arrived. Mr Price later asked Mr Geiringer to come to Mr Hager's home to help him. They discussed and agreed with the police certain aspects of the steps taken in response to Mr Hager's claim of privilege. The police conducted an extensive search of Mr Hager's house, including Ms Wells' bedroom, her underwear drawer, her private letters, her private photograph album and her cell phone.

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1 *Dixon v R* [2014] NZCA 329, [2014] 3 NZLR 504.

[18] The search concluded at approximately 6.30 pm. By the conclusion of the search, the police had seized two computers, one laptop, four mobile phones and a charger, a sim card, an ipod, a dictaphone, a camera, two memory cards, a hard drive, more than a hundred compact discs and more than a hundred pages of documents. They also seized, or cloned, 16 USB storage devices, and cloned one smart phone.

[19] Amongst the documents seized were not only communications, but also scraps of paper from around Mr Hager's house on which he had written down phone messages and names and contacts of people he had met. It included the names of an elderly couple he had met on a plane, a Norwegian journalist, two old friends he met at a funeral and more than 40 other people equally irrelevant to the police investigation. They also included the identities of six of Mr Hager's confidential informants, again irrelevant to the police investigation.

[20] The material seized and cloned was, with some exceptions, sealed and subsequently delivered to the High Court in Auckland without being further searched by the police. Those seized and cloned products of the Search are still held by the High Court. The police commenced proceedings in the Auckland High Court for the determination of Mr Hager's claim to privilege. Those proceedings were put on hold once Mr Hager filed this application for judicial review.

Mr Hager's claim – an overview

[21] In this application, Mr Hager claims that the Warrant and the Search were unlawful. He does so based on the principle of journalistic privilege recognised in s 68 of the Evidence Act 2006. He also relies on relevant common law principles, the rights of freedom of expression and security against unreasonable search or seizure affirmed in ss 14 and 21 respectively of the New Zealand Bill of Rights Act 1990 (NZBORA), and other aspects of New Zealand law and international covenants and conventions to similar effect.

[22] By way of relief, Mr Hager seeks declarations of illegality, the return of the seized material and NZBORA damages. This judgment does not deal with the question of NZBORA damages which, by agreement between Mr Hager and the

Crown, was an issue left to be answered once the questions of illegality had been determined.

[23] Central to Mr Hager's challenge to the lawfulness of the Warrant and the Search is the Court of Appeal's 1995 decision, *Television New Zealand v Attorney-General* (*TVNZ*).[2] That case involved a challenge to the issue and execution of a search warrant pursuant to which the police seized from TVNZ 12 hours of video taped film recording events at the Treaty Grounds on Waitangi Day, 6 February 1995. Those events, the police considered, included instances of disorderly behaviour and assault. The police applied for search warrants allowing them to search both TVNZ and TV3 premises in respect of all video or film recordings made at Waitangi Day. A search warrant to that effect was issued by a District Court Judge. The police went to the premises of both television companies and obtained the relevant tapes, copies of which were also kept by the broadcasters. Before the tapes could be used, the broadcasters challenged the lawfulness of the warrants and their execution. They argued first that there had been breaches of s 198 of the Summary Proceedings Act. They argued secondly that, even if that Act had been complied with, the issue and execution of the warrants breached their rights of freedom of expression and of freedom from unreasonable search and seizure affirmed in ss 14 and 21 of NZBORA.

[24] The High Court upheld the lawfulness of the warrant and its execution. In doing so, Fisher J formulated seven suggested criteria and five standard conditions for media search warrants.

[25] Writing for the Court of Appeal, Cooke P first disagreed with the High Court finding that the warrant was overbroad when it gave authority to the police "to seize any thing which there is reasonable ground to believe will be evidence as to the commission of the offences".[3] The President then went on to consider the relationship between statutory powers of compulsory search and the requirements of s 21 of NZBORA. He wrote:[4]

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2 *Television New Zealand v Attorney-General* [1995] 2 NZLR 641 (CA).
3 At 647.
4 At 646–647.

> Statutory powers in the field of compulsory search, whether powers to issue warrants or powers to execute them, must be exercised reasonably, as s 21 of the Bill of Rights Act underlines. As to the granting and scope of search warrants, the section reinforces and augments the common law and established canons of interpretation regarding intrusion upon private property. When media freedom may be seen to be involved, there is a further reason for restraint and careful scrutiny. The freedom of the press is not separately specified in the New Zealand Bill of Rights, our Bill differing in that respect from s 2 of the Canadian Charter of Rights and Freedoms and the First Amendment in the United States, but it is an important adjunct of the rights concerning freedom of expression affirmed in s 14 of the New Zealand Bill of Rights Act. They include "the freedom to seek, receive, and impart information …". Decisions of this Court have reflected the importance of media freedom, quite apart from the Bill of Rights. *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 176 and *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 are two of the numerous examples which could be cited.
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> With reference to search warrants, the same approach is reflected in various overseas authorities cited in the argument of the present appeal.

[26] Against that background, the Court of Appeal accepted the submission that Fisher J had gone too far in setting out his criteria and conditions. Nevertheless, it was possible to state general principles to be borne in mind when considering search warrants involving media organisations. Cooke P articulated some five such "guidelines". Applying those guidelines to the facts before him, he concluded that the appeal was to be dismissed.

[27] Mr Hager places particular reliance on the third of those guidelines, which provides:[5]

> A third guideline is that only in exceptional circumstances where it is truly essential in the interests of justice should a warrant be granted or executed if there is a substantial risk that it will result in the "drying-up" of confidential sources of information for the media.

[28] With reference to that guideline, and to the protection of the confidentiality of journalists' sources now provided by s 68 of the Evidence Act 2006, Mr Hager argues that the Warrant should not have been issued, let alone executed, against him. This was, he says, a classic case where the execution of a warrant, irrespective of the outcome of Mr Hager's claim to privilege, would result in the drying up of confidential sources of information for the media. Moreover, in applying for the

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5 Above n 2, at 648.

Warrant, the police had failed to even mention the issue of journalistic privilege under s 68 and its implication for their application. Given the importance of the public interests recognised in *TVNZ*, and now by s 68, and the very strict duty of candour the police are subject to when issuing warrants, that was a fundamental error.

[29] Mr Hager also claims that the process whereby the Warrant had been applied for, issued and executed had gone awry, in the following ways:

(a) The police had failed, prior to applying for the Warrant, to undertake a range of inquiries which provided alternative ways of obtaining information relating to the identity of the Source. Those inquiries would not have involved compelling Mr Hager to disclose that information himself, which was the purpose of the Warrant that the police sought.

(b) The police had failed more generally to discharge the duty of candour that applies to those who apply for warrants: they had failed to properly disclose the state of their investigation (inquiries under way but not completed), and had failed to advise the District Court of important considerations why the Warrant was not likely to disclose any relevant material.

(c) There were, Mr Hager argues, no reasonable grounds upon which the police could conclude that evidence of the identity of the Source might be found as a result of the Search.

(d) The Warrant, as issued, was too wide in its terms.

(e) The Search, if not in itself unreasonable, had involved clear breaches of the undertaking of non-inspection that the police had given to Mr Hager when he claimed privilege.

[30] Those conclusions are, it is argued for Mr Hager, confirmed by an analysis of the Warrant and the Search in terms of whether they were a reasonable infringement on Mr Hager's NZBORA rights. Such an analysis demonstrates the unreasonableness of the police's actions, and therefore the unlawfulness of the Warrant and the Search.

[31] The Crown responds to Mr Hager's claims by arguing first that judicial review was not the appropriate mechanism to consider them.

[32] To the extent that I conclude judicial review is appropriate, the Crown accepts that questions of journalistic privilege are relevant to the lawfulness of the Warrant and the Search. The police had been very aware of those matters when they applied for the Warrant and carried out the Search. The police responded immediately when Mr Hager claimed that privilege, and implemented pre-planned steps to respect the confidence of the Search material pending the determination by the High Court of that claim.

[33] It was not, however, necessary for the fact of that privilege, or issues relating to it – including, for example, those raised more generally by Cooke P in *TVNZ* – to be explicitly referred to in the application for the Warrant. Hence it was not necessary for those issues to be considered by the issuing officer (in this case District Court Judge Malosi). Sections 142–147 of the Search and Surveillance Act 2012 establish procedures for privileged materials to be seized, but not searched, pending subsequent adjudication by the High Court of a claim of privilege. That was the course of action that the police had deliberately and carefully taken.

[34] Nor did the police need to have a reasonable belief that they would succeed in overcoming Mr Hager's claim to privilege and, therefore, obtain *admissible* evidence relating to the identity of the Source. Rather, provided the application was not made in bad faith, that is made by the police when they knew there was little or no chance of the Judge not upholding Mr Hager's claim to privilege, they were entitled to act as they had done.

[35] The Crown rejects the relevance of the criticisms made on Mr Hager's behalf of the way in which the police had, or had not, conducted their investigation. Police actions in that regard are not justiciable. What matters is the lawfulness of the Warrant and the Search.

[36] Mr Horsley acknowledged at the hearing that, in one instance, the police had searched seized material in breach of the undertaking they had given to Mr Hager when he claimed confidentiality. In all other respects, that process had been a very typical one whereby the police, acting lawfully and reasonably, applied for and executed a search warrant.

[37] Mr Hager had used material knowing that material had been dishonestly obtained by the Source. That was an important consideration when considering issues of privilege.

[38] Taken overall, the Crown's position is there was no fundamental issue of unlawfulness involved either in the issue of the Warrant or the execution of the Search. The proper forum for considering Mr Hager's claim to privilege is the proceeding that the police has initiated in the Auckland High Court under the Search and Surveillance Act to address that claim directly.

Evidence

[39] Through the discovery process supervised by Dobson J the police had, by the time of the hearing, provided extensive discovery to Mr Hager. That process had not been straightforward, but I need not comment on that here. The disclosed materials were all appended to an initial affidavit of 27 March 2015 sworn by a legal executive working for Mr Geiringer, and by subsequent similar affidavits of 27 May, 12 June, 19 June and 10 July, reflecting the progressive nature of the disclosure ultimately made. Disclosure of material continued until shortly prior to the hearing of Mr Hager's application.

[40] Substantive affidavits were provided in support of Mr Hager's application from the following people:

(a) Mr Hager himself (x 2).

(b) Mr Bryce Edwards, a political scientist from Otago University who commented on the "public interest" aspects of *Dirty Politics*.

(c) Mr David Fisher (x 2), a journalist who commented on the impact of the search of Mr Hager's home on the ability of news media to access and communicate facts and opinion in the public interest, and on confidential informants.

(d) Mr Seymour Hersh, a Pulitzer Prize-winning investigative journalist from the United States, who addressed the same considerations as did Mr Fisher.

(e) Mr Adam Waleau (x 2), a computer security consultant who provided evidence on the adequacy of the police investigation and the prospects of the police finding evidence of the source from a search of Mr Hager's home.

(f) Mr Wayne Stringer, a retired police detective, who commented on aspects of the police investigation to the overall effect that, in Mr Stringer's opinion, it seemed that the police's actions were "akin to using a sledgehammer to crack a walnut".

(g) Ms Julia Wells, Mr Hager's daughter.

[41] As is to be expected, the affidavits all support, to varying degrees of specificity, the narrative that underpins Mr Hager's challenge to the lawfulness of the Warrant and the Search.

[42] For the police, affidavits were provided by:

(a) Detective Sergeant Beal (x 2);

(b) Detective Lynch (x2); and

(c) Detectives Donovan, Cottingham and Teo.

[43] Those affidavits record a detailed narrative of the police investigation into Mr Slater's complaint and, more particularly, an explanation of various aspects of that complaint, including the decision to apply for the Warrant, the execution of the Warrant and the consideration given by the police to the likelihood of Mr Hager claiming journalistic privilege and the procedures that police had prepared to respond to such a claim. An affidavit was also provided by a Mr Brent Whale, a computer forensic examiner. Mr Whale responded to criticisms of the police inquiry made by Mr Waleau.

Issues

[44] In framing his challenge to the lawfulness of the Warrant and the Search, Mr Hager casts a wide net. His statement of claim separately challenges:

(a) the decision of the police to apply for the Warrant;

(b) the lawfulness of steps taken by the police to obtain information relating to Mr Hager from a number of banks and from Trade Me Limited;

(c) the lawfulness of the application for the Search Warrant;

(d) the lawfulness of the issuing of the Warrant; and

(e) the lawfulness of the Search itself.

[45] By agreement the second of those questions, the lawfulness of steps taken by the police to obtain "other information", was not addressed before me. That matter will also be argued at a later date.

[46] The three separate questions, of the unlawfulness of the decision of the police to apply for the Warrant, of the unlawfulness of their application for the Warrant and of the unlawfulness of the decision to issue the Warrant, are based on a series of

overlapping propositions. Taken together, and subject to some particular issues to which I refer later, the central question which these propositions raise is whether, as the Crown argues, issues of journalistic privilege did not need to be addressed in the application for the Warrant or, therefore, considered by the Judge at that time. Rather, those issues could properly be left to the procedures provided in the Search and Surveillance Act for the consideration of Mr Hager's, anticipated, claim to privilege.

[47] Separately from those issues, Mr Hager also claims that the police did not have reasonable grounds to believe the search would reveal evidence that would assist the identification of the Source and that the terms of the Warrant were too broad.

[48] The second distinct issue raised by Mr Hager is whether the Search was conducted lawfully. Mr Hager argues that it was not, on a variety of grounds.

[49] It is by reference to those issues identified above that I will consider the arguments I heard. First, however, I need to consider the Crown's starting point: that is, its assertion that judicial review is not appropriate in these circumstances.[6]

Is judicial review appropriate?

[50] The Crown argues first that the intensive review of the police's investigation of Mr Slater's complaint that Mr Hager's application asks for is not in accordance with the measure of discretion that police have in investigating crimes. The Crown notes the decision in *Evers v Attorney-General*, striking out a claim that police had failed to investigate a complaint in a satisfactory manner.[7] It also points to English authority to similar effect.[8] Mr Hager does not, however, challenge the way in which the investigation was carried out in and of itself: his concerns are with the lawfulness of the Warrant and the Search. Different considerations arise.

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6 Prior to the hearing the parties prepared, based on the pleadings, a list of issues. That list was a helpful way of understanding the pleadings, and I have used it accordingly in structuring this judgment.

7 *Evers v Attorney-General* [2000] NZAR 372 (HC).

8 *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 (HL); *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118 (CA), [1968] 1 All ER 763.

[51] Nevertheless, and as the Crown argues secondly, judicial review of search warrants is only available in limited circumstances. The leading case on this question is *Gill v Attorney-General*.[9] *Gill* concerned a search, pursuant to a warrant under s 198 of the Summary Proceedings Act 1957, of Dr Gill's medical practice. That practice was under investigation by the Ministry of Health for suspected fraudulent claims for Ministry payments. The application was made at a time when the Ministry's investigation was still proceeding. Not all the seized materials had been reviewed and no decision had been made as to whether to lay criminal charges against Dr Gill. The filing of the judicial review proceedings had halted the criminal investigation. In finding that judicial review was, in those circumstances, not appropriate, the Court of Appeal first noted the limitations of judicial review. There was usually no cross-examination, and hence the Court had restricted fact-finding abilities. Nor was the Court persuaded that judicial review was necessary so that, as argued by Dr Gill, she could ensure that the confidentiality of her patient consultation and other records could be maintained. Had that been the real purpose of the judicial review proceedings, the Court said it could have been achieved by means of succinct, focused statement of claim.[10]

[52] The Court of Appeal explained its conclusion more generally in the following terms:[11]

> … First, [the judicial review action] was prematurely taken. The criminal investigation was in its early stages and not all of the seized material had been reviewed. Second, if criminal charges had been laid against Dr Gill, various opportunities would have arisen to challenge the validity of the warrant and/or its execution either before any trial or in the course of it. Consideration of the warrant and any evidence obtained pursuant to it could more appropriately have been tested pursuant to an application under s 344A of the Crimes Act. Issues of relevance, admissibility generally and exclusion of evidence (taking into account s 30 of the Evidence Act 2006) could therefore have been conveniently ruled on. Judicial review will rarely be appropriate where there is a readily available alternative remedy, and in particular the courts have held that they will only intervene in matters which involve the exercise of a prosecutorial discretion or investigative power in exceptional cases.

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9 *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433.
10 At [17]–[18].
11 At [19], footnotes omitted.

[53] The Court went on to acknowledge the possibility that grounds may exist in appropriate cases to challenge a search warrant by judicial review proceedings. It said:[12]

> This Court has previously entertained such challenges by way of judicial review where the defect in the search warrant is of a fundamental nature, where the matter could be said to go to the jurisdiction of the issuing officer or where some other ground of true unlawfulness (such as want of jurisdiction) is established.

[54] The Court then referred to a series of examples of such circumstances:

(a) *Auckland Medical Aid Trust v Taylor*,[13] where a warrant and subsequent search were declared unlawful because the description of the offence and of the things to be searched and seized was held to be too vague and general. That defect was, in the words of McMullin J, "more fundamental than a mere defect or irregularity arising from the misnomer of the offence and in my opinion cannot be cured by s 204".[14] The warrant failed to adequately convey the extent and limit of the search it authorised.

(b) *Tranz Rail Limited v Wellington District Court*,[15] where again the warrant was found to be invalid on the basis that it was too widely drawn, was general and lacked specificity.

(c) *A Firm of Solicitors v District Court at Auckland*,[16] where a warrant was held to be fundamentally flawed on a number of grounds, including material non-disclosure in the application for the warrant, a lack of specificity, and the absence of a mechanism for dealing with legal professional privilege.

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12 At [20].
13 *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA).
14 At 748.
15 *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA).
16 *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA).

[55] The Court of Appeal has recently confirmed the approach it took in *Gill* in *Southern Storm Fishing (2007) Ltd v Chief Executive, Ministry of Fisheries*.[17] The Ministry had undertaken a warrantless search of the business premises of Southern Storm under s 199(2) of the Fisheries Act 1996. As matters transpired, no charges were laid against Southern Storm. The company applied for judicial review on the basis that the treatment of legally privileged materials during the search was a defect of a fundamental nature, as was the scope of the search actually carried out. The Court of Appeal upheld the decision of Mallon J in the High Court declining relief.[18] In doing so the Court referred to various aspects of principles it had enunciated in *Gill*, including the following overarching observation:[19]

> We therefore consider that the use of the rather blunt instrument of judicial review should rarely be permitted to be used to challenge the issue, validity and execution of a search warrant, particularly in the course of an investigation into alleged criminal offending.

[56] On the specific question of the way privileged documents had been dealt with the Court, as had Mallon J, concluded that the approach adopted by the Ministry (glancing at all documents to determine whether privilege was involved and, if it appeared to be, putting the documents to one side) could have been improved. For example, an independent solicitor could have been present to supervise the search and seal any documents identified as including potentially privileged material. Notwithstanding, the Court concluded:

> [48] However, assuming the treatment of the legally privileged material gave rise to an issue of reasonableness, it is difficult to characterise what occurred as so deficient as to comprise a fundamental defect. It may appear anomalous, given the importance of legal privilege, to approach the matter as one of degree. It is nonetheless relevant in assessing the court's proper response in an application for judicial review seeking a discretionary remedy that the officers did take steps to try to protect privilege and any invasion was minimal. Further, there were at the time, as Mallon J said, "potential remedies available to Southern Storm outside this judicial review application which do not risk interfering with an existing investigation and which will enable the evidence as to what occurred to be fully tested". The Judge referred in this context to the possibility of an application to challenge the admissibility of evidence under s 30 of the Evidence Act 2006. Other avenues of redress may include an action for trespass or for redress under the

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17 *Southern Storm Fishing (2007) Ltd v Chief Executive, Ministry of Fisheries* [2015] NZCA 38, [2015] NZAR 816.

18 *Southern Storm (2007) Ltd v The Chief Executive, Ministry of Fisheries* [2013] NZHC 117.

19 At [24], affirming *Gill*, above n 9, at [29].

> Bill of Rights. In all the circumstances, relief was appropriately declined on this ground.

[57] On the challenge to the scope of the search, the Court concluded, in terms that reflect the limitation of affidavit-based judicial review proceedings:

> [63] The allegations accordingly boil down to a challenge of excessive scope. On the basis of the material before us it is not obvious that the scope was exceeded. To take the matter any further would necessitate resolving the dispute arising from Mr Fisken's evidence as to the permissible scope of the search as well as the issues arising out of the pleadings and the solicitor's letter. We are not in a position to resolve these and nor would it be appropriate to do so. We therefore agree with the Judge that whether the Ministry acted reasonably in taking the items they did "is better determined in a context other than judicial review where the facts can be fully tested". (footnote omitted)

[58] On that basis, and paraphrasing Mallon J's observation in *Southern Storm*, in light of *Gill* Mr Hager's application for relief should not be entertained unless it is a clear case of an unlawful search and seizure of a fundamental kind which can be readily determined on the basis of the affidavit evidence. I will consider his application accordingly. In doing so I note that, as matters currently stand, Mr Hager does not have the possibility of an application to challenge admissibility of evidence, and that he is applying for redress under the Bill of Rights.

[59] I first consider Mr Hager's claim that the Warrant was fundamentally unlawful. I will then address Mr Hager's second proposition: that is, that the Search itself, as carried out, was also unlawful.

A fundamentally unlawful warrant?

Did the police comply with their duty of candour?

The duty of candour

[60] An essential feature of our law is the adversarial nature of hearings in the courts. Where a citizen or the state seek the intervention of the law against another person, that other person has the right to know of, and participate in by opposing, that application. For obvious reasons, the police are generally not required to give notice of their intention to apply for and execute a search warrant. Their application is, therefore, without notice. Special rules apply to all without notice applications to

the courts. Under the High Court Rules, r 7.23 requires the lawyer for an applicant making an application without notice to personally certify that the application complies with the Rules. That lawyer must, before signing it, be personally satisfied that:

(a) the application and every affidavit filed in support of it complies with the Rules;

(b) the order sought is one that ought to be made; and

(c) there is a proper basis for seeking the order in an application without notice.

[61] The Rules explicitly provide that the lawyer is responsible to the Court for those matters.

[62] A lawyer for an applicant without notice therefore has a duty to make the fullest disclosure to the Court of all facts relevant to the application.[20] That duty extends to all matters relevant to the application whether or not the lawyer considers them to be important. In particular, there is a duty to disclose to the Court any defence that the lawyer is aware of and the facts on which it is based. Failure to do so may in itself furnish the ground for reviewing the order.

[63] The duty of candour the applicant for a search warrant owes to the court is a particular application of those general principles.

[64] The leading case in this area, at the time of the enactment of the Search and Surveillance Act, was *Tranz Rail Ltd v Wellington District Court*.[21] *Tranz Rail* concerned an application by the Commerce Commission for a warrant under the Commerce Act 1986. On that basis, it considered issues specific to that Act. The

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20 *United People's Organisation (Worldwide) Inc v Rakino Farms Ltd (No 1)* [1964] NZLR 737 (HC).

21 *Tranz Rail Ltd v Wellington District Court*, above n 15.

Court of Appeal, however, discussed the significance of non-disclosure in warrant applications more generally. It commented:[22]

> [21] An application for a search warrant in whatever context is almost always made on an ex parte basis – that is, without notice to the party whose premises are to be the subject of the proposed search. For this reason the judicial officer to whom the application is made is entitled to expect that the applicant will make full and candid disclosure of all facts and circumstances relevant to the question whether the warrant should be issued. A failure to make such disclosure runs the risk that any warrant obtained will be held to be invalid. The observations made by this Court in the criminal context which prevailed in *R v McColl* (1999) 17 CRNZ 136, 142-143 are just as apposite in a context such as the present:
>
> > "… the applicant should lay before the judicial officer all facts which could reasonably be regarded as relevant to the judicial officer's task. An application should not present the judicial officer with a selective or edited version of the facts. There is an obligation on the applicant to be candid and to present the full picture to the judicial officer, not just the conclusion which the judicial officer is asked to draw, supported by so much of the factual background as the applicant chooses to disclose."
>
> [22] Equally apposite are this Court's observations broadly to the same effect in *R v Burns (Darryl)* [2002] 1 NZLR 204, 209. The judicial officer, when deciding whether to issue the warrant, is an important part of a judicial process which is designed to strike the right balance between the interests of the applicant and those of the party to be searched. That balance must be struck according to the criteria pertaining to the issue of the warrant in question. In order that the judicial officer's function may be properly performed the applicant is obliged to set out, in the evidence supporting the application, all matters known to the applicant which might be relied on by the target of the warrant if that person had the opportunity to appear in opposition. This is no more than the ordinary ex parte rule applied to applications for search warrants of the present kind.

[65] The Search and Surveillance Act rationalised the law on applications for search warrants. Sections 98–99 provide:

> **98 Application for search warrant**
>
> (1) An application for a search warrant must contain, in reasonable detail, the following particulars:
>
> (a) the name of the applicant:
>
> (b) the provision authorising the making of the application:
>
> (c) the grounds on which the application is made (including the reasons why the legal requirements for issuing the warrant are believed by the applicant to be satisfied):

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22 At 788–789.

(d) the address or other description of the place, vehicle, or other thing proposed to be entered, or entered and searched, inspected, or examined:

(e) a description of the item or items or other evidential material believed to be in or on the place, vehicle, or other thing that are sought by the applicant:

(f) the period for which the warrant is sought:

(g) if the applicant wants to be able to execute the warrant on more than 1 occasion, the grounds on which execution on more than 1 occasion is believed to be necessary.

(2) The issuing officer—

(a) may require the applicant to supply further information concerning the grounds on which the search warrant is sought; but

(b) must not, in any circumstances, require the applicant to disclose the name, address, or any other identifying detail of an informant unless, and only to the extent that, such information is necessary for the issuing officer to assess either or both of the following:

(i) the credibility of the informant:

(ii) whether there is a proper basis for issuing the warrant.

(3) The applicant must disclose in the application—

(a) details of any other application for a search warrant that the applicant knows to have been made within the previous 3 months in respect of the place, vehicle, or other thing proposed to be searched; and

(b) the result of that application or those applications.

(4) The applicant must, before making an application for a search warrant, make reasonable inquiries within the law enforcement agency in which the applicant is employed or engaged, for the purpose of complying with subsection (3).

(5) The issuing officer may authorise the search warrant to be executed on more than 1 occasion during the period in which the warrant is in force if he or she is satisfied that this is required for the purposes for which the warrant is being issued.

99 Application must be verified

An application for a search warrant must contain or be accompanied by a statement by the applicant confirming the truth and accuracy of the contents of the application.

[66] Since the enactment of the Search and Surveillance Act the Supreme Court has, in *Beckham v R*,[23] confirmed the ongoing relevance of the Court of Appeal's decision in *Tranz Rail*. *Beckham* concerned an appeal against sentence based on the Court having given inadequate recognition to police breaches of NZBORA. The police had intercepted privileged communications. No relevant evidence was obtained. The argument was that those intercepts were unlawful and in breach of s 21 of NZBORA and that the sentence imposed should be reduced accordingly. The case therefore considered the significance of the privilege recognised now in s 56 of the Evidence Act. In doing so, however, the Court emphasised the importance of the duty of candour, citing *Tranz Rail*. The police had listed a telephone number in a warrant application, without telling the issuing officer that it belonged to the appellant's solicitor. The Supreme Court said:

> [126] … Detective Sergeant Lunjevich knew it was Mr Gibson's number and therefore knew that communications from Mr Beckham to his lawyer about his trial would be included in the material seized by police from Corrections if the warrant were issued. He did not refer to this in the application, nor did the application make any provision for dealing with material that was subject to solicitor/client privilege in order to protect that privilege.
>
> [127] This was a clear breach of the requirement for the applicant to be candid with the judicial officer to whom the application for the warrant was made and also failed to make provision to deal with the privileged information.[24] We agree, therefore, that the search warrant issued on 17 August 2009 was invalid, …

[67] The Court concluded that the lack of candour in the application for the warrants rendered the process leading to the issue of the warrants defective and rendered the warrants themselves unlawful.

[68] It is clear, therefore, that the common law duty of candour is extensive and demanding. A failure to discharge that duty, notwithstanding good faith, may render a warrant invalid or unlawful, and the subsequent search unlawful.

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23 *Beckham v R* [2015] NZSC 98.

24 *Tranz Rail Ltd v Wellington District Court*, above n 15, at [21]–[22]; *A Firm of Solicitors v District Court at Auckland*, above n 16, at [55]. See also Andrew Roberts *"R v Turner (Elliott Vincent)"* [2013] Crim LR 993.

The application for the Warrant

[69] In the application for the Warrant, the police first recorded the address proposed to be searched, the period of the warrant and the number of occasions (one) on which it was to be exercised, and the suspected offence on which the application was based. They then set out information in support of the suspicion that an offence had been committed.

[70] In that section of the application the police provided information relating to Cameron Slater, his blog *Whale Oil* and his complaint that the blog website, www.whaleoil.co.nz, and his Facebook, Twitter and Gmail accounts, had been unlawfully accessed in February and March of 2014. The application went on to link those events to the publication of *Dirty Politics* in the following terms:

> On Wednesday 13 August 2014, Nicky HAGER a political author released a book named "Dirty Politics".
>
> HAGER stated in the book that the book was based on data provided to him on a 8 gigabyte storage thumb drive containing SLATER's illegally accessed private communication.
>
> The 'Dirty Politics' book contains a large amount of extracts from SLATER emails, Facebook and Twitter account conversations that he has between friends, business colleagues and other associates.
>
> SLATER believes these emails and online conversations were obtained during the online accounts attacks to his accounts on 2 March 2014.
>
> Since the release of the book, there has been a significant media interest relating to SLATERS illegally obtained content.
>
> In February 2014, SLATERS' blog website www.whaleoil.co.nz was attacked by an unknown person. This attacked caused the website to be taken down from the internet for three days for repair.
>
> After the third day the website www.whaleoil.co.nz was successfully back up an[d] running.
>
> After the release of the book 'Dirty Politics' Information received by SLATER revealed the person responsible for attacking the www.whaleoil.co.nz had obtained the Internet Protocol (IP) addresses of people's computers commenting on the Whale oil blog website.
>
> [Redacted]
>
> SLATER does not know the person who compromised his Whale oil blog website or attempted to change the password on his online accounts.

> He did not consent for Nicky HAGER to publish any contents of his emails in the book 'Dirty Politics'.
>
> SLATER did not consent to having any of his email communications being published through any media outlet.
>
> In media interviews given by Nicky HAGER after the release of the book 'Dirty Politics' he has stated that he [is] aware the source of the information for the book has committed a criminal offence and has taken steps to prevent the identity of the source being known to the Police. These interviews are covered in more detail later in this application.

[71] The Warrant application goes on to outline the police investigation. That section first describes media analysis undertaken, concentrating on the various media interviews given by Mr Hager following the publication of *Dirty Politics* relating to his interactions with the Source. The narration of the first and last in time of those interviews was as follows:

> On Thursday 14 August 2014, HAGER was interviewed by Sean PLUNKET on the Radio live talk show.
>
> He denied Kim DOTCOM had anything to do with the 'Dirty Politics' book stating:
>
> > *"If where this is going is some hint that, in some way, Kim Dotcom was any way involved in my book, I'm very happy to tell you it is totally untrue,".*
>
> HAGER reiterated that he was approached by somebody but didn't want to disclose the identity of that person stating:
>
> > *"Because they would get in trouble with the police and I've promised to keep their identity a secret. But but but Sean …*
> >
> > *Because they are a hacker which as I also was absolutely up front about, I've never had hacked information before but I got it and I thought it was so important I would use it but can I say, I'll tell you what I say, I have never and I would never take information for one of my books for articles from a person who was in a political party or who was a political person. This is a highly valued principle to me."*
> >
> > …
>
> On Tuesday 23 September 2014, HAGER participated in an online National Business review question and answer session.
>
> During this session the following question was asked by the person identifying themselves as Louise MACKENZIE:
>
> > *"Do you know the identity of the hacker who stole the emails used as the source material for Dirty Politics?"*

HAGER replied with the following response:

> *"Fair question. I have never used information provided to me anonymously. There is an important reason for this. It's very important to know the motives of a source and equally important that I feel I trust them. Otherwise they could be feeding selective information or trying to use me for their own political purposes. So, yes, I met the source various times and I went ahead because I felt I was dealing with a decent person."*

[72] Various other aspects of the police inquiries are outlined, and the following conclusions are then recorded:

> CONCLUSION
>
> Based on the comments made by HAGER in the media interviews outlined in this application, I believe that HAGER has met and knows the 'hacker' personally.
>
> I believe he has made regular and recent contact with the person responsible for illegally accessing SLATERS email and social media content.
>
> I believe this contact has been ongoing from the time SLATERS online accounts were illegally accessed up until and after the release of the Dirty Politics book.
>
> Based on the comments made by HAGER in his book 'Dirty Politics' and media interviews, he is definitely aware the material was obtained illegally and has acknowledged that the hacker has committed a criminal offence.
>
> I believe based on HAGER's comment on page 12 of the Dirty Politics book, he had been in possession of the illegally accessed material provided to him on a 8 GB USB thumb drive.
>
> Even though HAGER has stated in his interviews returning the illegally accessed material, I believe HAG[E]R will still be in possession of material used to write the 'Dirty Politics' book to show provenance should there be future litigation against him. I further believe that even if material has been returned to the hacker that there will be evidential material available to identify the hacker held by HAGER on electronic storage devices and/or paper form.
>
> HAGER has stated that he knows the hacker personally and has been in regular communication prior to the books release. I believe based on this comment, HAGER will hold contact information for the 'hacker' and/or hold evidential material that will directly identify the 'hacker' or person purporting to be the 'hacker'.
>
> Although the nature of the communications was not specifically mentioned by HAGER in the public forum, I believe HAGER and the 'hacker' have been communicating either by cell phone, landline and/or internet based application.

> I believe a search of HAGER's residential property [in Wellington] will result in locating the evidential material as outlined in this application. I believe this evidential material will assist provide further enquiries to identify and locate the person responsible for illegally accessing SLATERS email and social media content.
>
> I believe that HAGER does not have any other addresses that he would retain this information knowing of the media and political interest in the information and the his source of the information. I therefore believe that a search of [his Wellington residence] will provide the evidential material.

[73] There is no explicit reference in the application for Warrant to Mr Hager's status as a journalist, to the general principles recorded in *TVNZ*, to the rights conferred on journalists under s 68 of the Evidence Act to protect certain sources, or to the recognition of those rights as now found in the Search and Surveillance Act.

The adequacy of the application for the Warrant

[74] The respondents argued that, in the circumstances, the reference to Mr Hager as a political author, combined with the attention paid to material from the media generally and what the Judge could be taken to have known herself, could be seen as drawing those issues to her attention. The respondents also relied on the presence, in the standard form part of the search warrant attached to the application, of advice to the owner of things seized of the right to claim the range of privileges recognised for the purposes of the Search and Surveillance Act. In terms of the well-established law relating to without notice applications, as reflected in the duty of candour, those are not propositions which I accept.

[75] The question here is, rather, the respondents' principal proposition: that is that those issues did not need to be drawn to the Judge's attention because of the provisions found in Subpart 5 of the Search and Surveillance Act, relating to privilege and confidentiality.

[76] I am satisfied that, but for those provisions, the omission from the application for the Warrant of any reference to the very important issues raised by applications for media warrants would have rendered the Warrant fundamentally unlawful. I consider that conclusion flows inevitably from Cooke P's decision in *TVNZ*, and from the presumptive right now found in s 68 of the Evidence Act.

[77] Section 68 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.
>
> (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.
>
> (4) This section does not affect the power or authority of the House of Representatives.
>
> (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.

[78] That is, pursuant to s 68, it is no longer for the media to establish the public interest in preserving the confidentiality of their sources. Rather, it is for the applicant for a media warrant to persuade the court that other relevant public interests in disclosure outweigh the presumptive public interest in the preservation of that confidentiality.

[79] In its report, *Search and Surveillance Powers*,[25] the Law Commission recommended that the general framework found in the Evidence Act for the recognition of privileges should be adopted in the Search and Surveillance Act. The Law Commission noted that, under the law that then applied, a warrant might not be issued in respect of material that was known or thought likely to be privileged, referring to the High Court decision of *Calver v District Court at Palmerston North*.[26] It referred to a number of other difficulties for enforcement agencies, particularly where the execution of search warrants involved intangible material that might be privileged. On the options for reform, the Law Commission concluded:

> 12.36 From the issues we have identified, we consider that a clear set of objective statutory procedures to govern the preservation of legal professional privilege in the exercise of search and surveillance powers is needed. Such an approach would establish a standard process and would reduce the need for agencies to craft detailed conditions to protect privilege in warrant applications on a case-by-case basis, although it would remain open for an issuing officer to impose specific conditions as needed on the basis of the information disclosed in the warrant application. This approach would also address the current difficulties faced by enforcement agencies carrying out computer searches where claims of privilege are made. (footnote omitted)

[80] Subpart 5: *Privilege and confidentiality* and Subpart 6: *Procedures applying to seized or produced materials*, of Part 4 of the Search and Surveillance Act contain the provisions that the respondents rely on.

[81] Subpart 5 first recognises, by reference to the scheme of the Evidence Act, a range of privileges in the context of the exercise of enforcement powers. Section 136 provides:

> **136 Recognition of privilege**
>
> (1) The following privileges are recognised for the purposes of this subpart:
>
> (a) legal professional privilege, to the extent that (under section 53(5) of the Evidence Act 2006) it forms part of the general law:
>
> (b) privilege for communications with legal advisers (as described in section 54 of the Evidence Act 2006):

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[25] Law Commission *Search and Surveillance Powers* (NZLC R97, 2007).

[26] *Calver v District Court at Palmerston North* (2004) 21 CRNZ 371, [2005] DCR 114 (HC).

(c) privilege for preparatory materials for proceedings (as described in section 56 of the Evidence Act 2006):

(d) privilege for settlement negotiations or mediation (as described in section 57 of the Evidence Act 2006):

(e) privilege for communications with ministers of religion (as described in section 58 of the Evidence Act 2006):

(f) privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists (as described in section 59 of the Evidence Act 2006):

(g) to the extent provided in section 138, and only to that extent, any privilege against self-incrimination (as described in section 60 of the Evidence Act 2006):

(h) privilege for informers (as described in section 64 of the Evidence Act 2006):

(i) the rights conferred on a journalist under section 68 of the Evidence Act 2006 to protect certain sources.

(2) For the purposes of this subpart, no privilege applies in respect of any communication or information if there is a prima facie case that the communication or information is made or received, or compiled or prepared,—

(a) for a dishonest purpose; or

(b) to enable or aid any person to commit or plan to commit what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

(3) For the purposes of this subpart, the **appropriate court** is,—

(a) in any case that involves the applicability of the rights of journalists recognised by subsection (1)(i), the High Court:

(b) in any other case, the District Court.

[82] I note the requirement for questions relating to rights under s 68 to be dealt with in the High Court. In my view, that requirement confirms the importance of those rights.

[83] Having recognised as a privilege for Subpart 5 purposes the protection provided by s 68 of the Evidence Act, the Search and Surveillance Act establishes procedures to give effect to that recognition. Section 142 provides:

142 Effect of privilege on search warrants and search powers

A person who makes a claim of privilege (being a privilege recognised by this subpart) in respect of any thing that is seized or sought to be seized has the right, in accordance with sections 143 to 148,—

(a) to prevent the search under this Act of any communication or information to which the privilege would apply if it were sought to be disclosed in a proceeding, pending determination of the claim to privilege, and subsequently if the claim to privilege is upheld:

(b) to require the return of a copy of, or access to, any such communication or information to the person if it is seized or secured by a person exercising a search power, pending determination of the claim to privilege.

[84] Sections 143 and 144 deal specifically with claims for (the absolute) legal, religious and medical privileges. Section 145 provides for the exercise of a claim for the s 68 privilege:

145 Searches otherwise affecting privileged materials

(1) This section applies if—

(a) a person executes a search warrant or exercises another search power; and

(b) he or she has reasonable grounds to believe that any thing discovered in the search may be the subject of a privilege recognised by this subpart.

(2) If this section applies, the person responsible for executing the search warrant or other person exercising the search power—

(a) must provide any person who he or she believes may be able to claim a privilege recognised by this subpart a reasonable opportunity to claim it; and

(b) may, if the person executing the search warrant or exercising the other search power is unable to identify or contact a person who may be able to claim a privilege, or that person's lawyer, within a reasonable period,—

(i) apply to a Judge of the appropriate court for a determination as to the status of the thing; and

(ii) do any thing necessary to enable that court to make that determination.

[85] Central to the respondents' arguments are the procedures for what happens when a claim of privilege is made and the right, recognised in s 142, is exercised. These procedures are found in ss 146 and 147:

> **146 Interim steps pending resolution of privilege claim**
>
> If a person executing a search warrant or exercising another search power is unable, under section 142, 143, 144, or 145 to search a thing (whether as a result of the requirements of any of those provisions, or because of a claim of privilege made in respect of the thing, or for any other reason), the person—
>
> (a) may—
>
> (i) secure the thing; and
>
> (ii) if the thing is intangible (for example, computer data), secure the thing by making a forensic copy; and
>
> (iii) deliver the thing, or a copy of it, to the appropriate court, to enable the determination of a claim to privilege by a Judge of that court; and
>
> (b) must supply the lawyer or other person who may or does claim privilege with a copy of, or access to, the secured thing; and
>
> (c) must not search the thing secured, unless no claim of privilege is made, or a claim of privilege is withdrawn, or the search is in accordance with the directions of the court determining the claim of privilege.
>
> **147 Claims for privilege for things seized or sought to be seized**
>
> Any person who wishes to claim privilege in respect of any thing seized or sought to be seized by a person executing a search warrant or exercising another search power—
>
> (a) must provide the person responsible for executing the search warrant or exercising the other search power with a particularised list of the things in respect of which the privilege is claimed, as soon as practicable after being provided with the opportunity to claim privilege or being advised that a search is to be, or is being, or has been conducted, as the case requires; and
>
> (b) if the thing or things in respect of which the privilege is claimed cannot be adequately particularised in accordance with paragraph (a), may apply to a Judge of the appropriate court for directions or relief (with a copy of the thing provided under section 146(b)).

[86] It is in reliance on those provisions that the respondents argue that in the application for the Warrant the police did not need to draw to the Judge's attention

the issues relating to media warrants identified in *TVNZ* or the rights conferred by s 68 of the Evidence Act.

[87] To assess that proposition, it is necessary to understand the background to s 68, the importance of the rights it recognises and the role of judges and other issuing officers in granting applications for search warrants.

Section 68 and the protection of journalists' sources

[88] In *Police v Campbell*,[27] a case decided before the enactment of the Search and Surveillance Act, Randerson J provided a comprehensive analysis of the evolution in New Zealand of the protection available to journalists against being compelled to disclose confidential sources of information, including as provided by s 68 of the Evidence Act. I will not repeat that analysis, but rather adopt it with gratitude. That analysis tracks the growing acceptance in New Zealand, as in the United Kingdom, of a significant public interest in the dissemination of information by journalists, and hence in the need to protect the confidentiality of the sources from which journalists obtain information.

[89] In what came to be known as the "newspaper rule", the courts first accepted that newspapers would not, in defamation proceedings, be compelled to disclose the identity of the source of the defamatory material. The preponderance of authority saw the rule as a very limited one, restricted to interlocutory proceedings and based on considerations of evidential relevance.

[90] In three related decisions in England in 1963, the argument was made that the "newspaper rule" was the expression of a more general principle, namely that a journalist should not be required to disclose the source of his information except where there were special reasons to so require.[28] At that time a special administrative tribunal had been established in England to inquire into breaches of security in connection with spying offences committed by an Admiralty clerk, John Vassall. After Mr Vassall's conviction, various articles had appeared in newspapers

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27 *Police v Campbell* [2010] 1 NZLR 483 (HC).

28 *Attorney-General v Clough* [1963] 1 QB 773, [1963] 1 All ER 420; *Attorney-General v Mulholland; Attorney-General* v *Foster* [1963] 2 QB 477, [1963] 1 All ER 767.

based on information from confidential sources relating to Vassall's activities. Three journalists, Messrs Clough, Mulholland and Foster, were ordered by the tribunal to disclose the names of their informant. They declined to do so.[29]

[91] Mr Clough replied to the tribunal's request that he disclose his source in terms which anticipate Mr Hager's explanation of his view of matters:[30]

> My Lord, perhaps I may say a very brief few words on this. I feel personally that a special correspondent, even more than a general reporter, does rest on his sources of information to a very large extent on confidences from people in defence departments. This information came from a reliable, responsible source in Whitehall and I feel that if I disclose this source of information I would be breaking a trust. I feel that my future career as a defence correspondent would be jeopardised because nobody would then feel prepared to speak to me – or for that reason any other specialist defence correspondent – on an off-the-record basis for fear that their name might be disclosed at some later date. I am afraid, Sir, that I have firmly made up my mind that I am not prepared to disclose the name of this man, although he does exist, I can assure you.

[92] When cited in the High Court for contempt, each claimed journalistic privilege by reference to the newspaper rule, arguing the rule was one of law not practice, founded on the proposition that protection of journalists' sources was in the public interest.

[93] All the courts involved confirmed that the newspaper rule was based on issues of relevance and was limited to the interlocutory stage of defamation and libel proceedings. The rule was not based on any concept of public interest: no privilege existed for journalists. The courts did recognise, however, the inherent discretion of judges to decline to compel a witness to answer a question or provide information where the court considered that to do so would not be in the public interest.

[94] In New Zealand Cooke J recognised in 1975 a public interest rationale for the newspaper rule in *Isbey v New Zealand Broadcasting Corporation (No 2)*.[31]

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29 *Clough*, above n 28, at 774.
30 *Clough*, above n 28, at 776.
31 *Isbey v New Zealand Broadcasting Corporation (No 2)* [1975] 2 NZLR 237 (SC).

[95] The basis for that rule was revisited in two cases in England and New Zealand, heard over a similar time period: *British Steel v Granada Television*[32] and *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*.[33]

[96] During a strike in the steel industry in England, Granada Television obtained confidential material that came to be known as "the Steel Papers". The Steel Papers formed the basis of a television documentary. Subsequently, British Steel sued Granada to discover the identity of the source of those papers. The High Court ruled in favour of British Steel. In doing so, Sir Robert Megarry VC found that there was no recognised public interest in the policy contended for by Granada, namely that of the press being entitled to refuse to disclose the source of confidential information. Nor should such a public interest be established.

[97] The Court of Appeal upheld the High Court, but did so in terms that appeared to offer some future to the principle of there being a public interest in the preservation of the confidentiality of journalists' sources of information. Having considered the authorities, including Watergate subpoena cases, Lord Denning concluded:[34]

> After studying the cases it seems to me that the courts are reaching towards this principle: the public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it. In support of this right of access, the newspapers should not in general be compelled to disclose their sources of information. … The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have.

[98] The principle was not absolute. There might be "exceptional cases" in which, on balancing the various interests, the court decided that the name of a confidential source should be disclosed. This was such a case, Lord Denning concluded, because: [35]

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[32] *British Steel v Granada Television* [1981] AC 1097 (HL), all three decisions reported [1981] 1 All ER 417.

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

[34] At 440.

[35] At 441.

> They [Granada Television] behaved so badly that they have forfeited the protection which the law normally gives to newspapers and broadcasters. This protection is given only on one condition, that they do not abuse their power. Here Granada have abused it. They should be compelled to discover the source of their information.

[99] *BCNZ v Alex Harvey* was heard before, but decided shortly after, the English Court of Appeal's decision in *British Steel v Granada Television*. BCNZ was sued for slander of goods: roofing tiles manufactured and distributed by Alex Harvey. In its affidavit of documents, BCNZ referred to material relating to its sources of information. BCNZ having declined to produce those documents, Alex Harvey successfully applied in the High Court for the documents to be produced for inspection. BCNZ appealed. In allowing the appeal, writing separately each of the Judges of the Court of Appeal emphasised two aspects of the newspaper rule: its strength and its public interest rationale.

[100] Richard J's words capture the flavour of the Court's view on the latter point:[36]

> … the newspaper rule is firmly grounded in public policy considerations. Although it has been said in some of the cases that a plaintiff who has his action against the news media should not be allowed to delve around to see who else he can sue … the overriding justification must, I think, be the public interest in the dissemination of information.

[101] The public interest rationale for the rule did not, however, fare at all well when *British Steel v Granada Television* was considered in the House of Lords,[37] after *BCNZ v Alex Harvey* had been determined by the New Zealand Court of Appeal.

[102] Lord Wilberforce, returning to Lord Denning's observations in *Mulholland* and *Foster*, concluded that all the authorities came down firmly against an immunity for the press or for journalists. To contend – as the Court of Appeal had clearly done – that in principle journalists enjoyed immunity from the obligation to disclose which may, however, be withheld in exceptional cases was, in Lord Wilberforce's opinion, a complete reversal of the rule so strongly affirmed.[38] Viscount Dalhousie and Fraser and Russell LJJ expressed similar views.

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36 At 172, citations omitted.
37 Above n 32.
38 At 455.

[103] As already noted, the Court of Appeal's 1995 decision in *TVNZ v Attorney-General* affirmed, following the passage of NZBORA in 1990, the importance of media freedom and the correlative caution as regards media warrants. Those considerations are reflected in the five guidelines Cooke P articulated:[39]

> One guideline, in a case where there is no suggestion that the media organisation has committed any offence and it has done no more than record events which may include the commission of offences by others, is that the intrusive procedure of a search warrant should not be used for trivial or truly minor cases. …
>
> A second guideline is that, as far as practicable, a warrant should not be granted or executed so as to impair the public dissemination of news. …
>
> A third guideline is that only in exceptional circumstances where it is truly essential in the interests of justice should a warrant be granted or executed if there is a substantial risk that it will result in the "drying-up" of confidential sources of information for the media. …
>
> A fourth guideline is that a warrant should be executed considerately and so as to cause the least practicable disruption to the business of the media organisation. …
>
> A fifth guideline for the grant of a warrant relates to the relative importance of the tapes for the purposes of a prosecution. …

[104] In *Police v Campbell*, Randerson J encapsulates the position reached under English jurisprudence by the early years of this century in the following two extracts:[40]

> [60] … In *Ashworth Hospital Authority v MGN Ltd*, the House of Lords adopted the following passage from the European Court of Human Rights decision in *Goodwin v United Kingdom*:
>
> > [39] The court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic

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39 At 647–648.

40 *Police v Campbell*, above n 27, at [60], [66] (citations omitted).

> sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with article 10 of the Convention unless it is justified by an overriding requirement in the public interest.
>
> …
>
> [66] The chilling effect of court orders requiring the disclosure of press sources has been discussed by Laws LJ at the Court of Appeal level in *Ashworth Hospital Authority v MGN Ltd*:
>
> > [101] … It is in my judgment of the first importance to recognise that the potential vice – the "chilling effect" – of court orders requiring the disclosure of press sources is in no way lessened, and certainly not abrogated, simply because the case is one in which the information actually published is of no legitimate, objective public interest. Nor is it to the least degree lessened or abrogated by the fact (where it is so) that the source is a disloyal and greedy individual, prepared for money to betray his employer's confidences. The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. The suggestion (which at one stage was canvassed in the course of argument) that it may be no bad thing to impose a "chilling effect" in some circumstances is in my view a misreading of the principles which are engaged in cases of this kind. In my judgment, the true position is that it is always prima facie (I can do no better than the Latin) contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep press sources confidential should give way.

[105] Randerson J concluded:

> [68] It is clear from the English cases and the decision in *Goodwin* that the courts in those jurisdictions have accepted that, without statutory protection, journalists' sources may be deterred from assisting the press to inform the public on matters of public interest. In turn, it has been accepted that the public watchdog role of the press might be undermined.

[106] Turning to s 68 itself, the Evidence Act was the culmination of a lengthy and detailed law reform process. Aspects of that process inform the interpretation and application of s 68. In its 1994 Discussion Paper *Evidence Law: Privilege*, the Law Commission commented:[41]

> 341 While the common law recognises the desirability of promoting the free flow of information, it does not recognise, and has never

[41] Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994).

> recognised, the existence of a specific privilege for journalists. In cases such as *Attorney-General v Mulholland* [1963] 2 QB 477, the court laid down conditions for questioning journalists: that the question be relevant, and that it be "a proper and, indeed, necessary question in the course of justice to be put and answered," as Lord Denning expressed it. But while this limited protection has often proved adequate in practice, it does not give the same degree of assurance, as does a privilege, that protection will be given and will be seen as paramount to interests such as the due administration of justice.

[107] Against that background, the Commission concluded that the general protection provided by (at the time) s 35 of the Evidence Amendment Act (No 2) 1980 was no longer adequate. The Commission did not propose that a new provision should shift the onus, which under s 35 was on the party seeking to withhold the information to satisfy the court of the necessity of doing so, but said nevertheless:[42]

> [I]t should not be necessary to have to establish in each case that the freedom of the press and the confidentiality of its sources are matters of public interest which, other things being equal, should be protected by the section. For this reason, the free flow of information (and, by implication, the freedom of the press) should be declared to be a matter of public interest.

[108] By August 1999 the Commission's position had moved on. In Volume 1 of its Evidence Report, the Commission commented as follows:[43]

> **Protection of journalists' sources**
>
> 301 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. Some limited protection is currently provided by the common law. Section 35 of the Evidence Amendment Act (No 2) 1980, which protects confidential communications generally, is also available to protect journalists' sources.
>
> 302 In its preliminary paper *Evidence Law: Privilege*, the Law Commission expressed the view that a general judicial discretion to protect confidential communications would be sufficient to protect journalists' confidential sources (para 355). Commentators agreed that an absolute privilege was not justified. However, some suggested that an express qualified privilege for the identity of a source, which puts the onus on the person seeking to have the source revealed, was preferable to relying on a general discretion. This would give greater confidence to a source that his or her identity would not be revealed. Consequently, the Law Commission has revised its original recommendation. Section

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42 At [354].

43 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999).

> 66 creates a specific, qualified privilege for journalists' confidential sources.

[109] Section 66 as proposed by the Commission was in very similar terms to s 68 as enacted.

[110] In *Police v Campbell* Randerson J, rejecting an argument that the protection conferred by s 68(1) should not be overridden except in unusual or exceptional circumstances, said:[44]

> [92] While the statute does not give any specific guidance as to the relative weight to be attached to the elements which must be assessed under s 68(2), the trend of authority both in New Zealand and in the United Kingdom is to attach substantial weight to freedom of expression in a broad sense as well as in the narrow sense of encouraging the free flow of information and the protection of journalists' sources. This is evident from the authorities already mentioned. Their importance is underlined by the enactment of s 14 of the New Zealand Bill of Rights Act guaranteeing freedom of expression. It is also illustrated in previous authorities dealing with the grant of search warrants seeking materials from the premises of the media (*Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641 (CA) at 648).
>
> [93] The court should approach its task from the starting point that the journalist's protection is established by s 68(1) and that any order under s 68(2) is therefore a departure or exception from this initial position. The presumptive right to the protection should not be departed from lightly and only after a careful weighing of each of the statutory considerations.

[111] The balancing exercise called for by s 68 has more recently been discussed by Asher J in *Slater v Blomfield*,[45] a defamation case in which Mr Slater was being sued for defamation, and in which he relied on the newspaper rule and s 68 to oppose an application that he discover the source of the relevant defamatory material published on his blog. As Asher J acknowledged, the context there was quite different to that in which matters of public interest arise. He observed:

> [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

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44 *Police v Campbell*, above n 27.

45 *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835.

> 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.

[112] In its June 2007 Report *Search and Surveillance Powers*, the Law Commission commented on the s 68 protection in the following terms:[46]

> 12.139 In determining whether the identity of journalistic sources should be protected on the exercise of enforcement powers under our proposed regime, we have considered the underlying policy rationale expressed by the Law Commission in its review of Evidence:[47]
>
> > In recognition of the public interest in press freedom, this section protects the identity of a journalist's informant from disclosure if the journalist has promised the informant that his or her identity will not be disclosed.
> >
> > 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.
>
> 12.140 This policy interest applies equally when enforcement powers are exercised:[48]
>
> > A promise of confidentiality made by a journalist to a particular source becomes meaningless in the face of a police officer armed with a search warrant that entitles him or her to look through the entire contents of the newsroom without prior warning. Sources of information will also dry up due to fears that journalists' files will be readily available to the police.

[113] Reflecting its conclusion at [12.140], the Law Commission in recommending the regime now found in the Search and Surveillance Act for the protection of journalistic material said:

> 12.146 The qualified nature of the protection should therefore be reflected in the enforcement power regime. First, where an enforcement agency seeks to search a journalist's premises for confidential material identifying sources, and the agency can make a sufficient case on public policy grounds to satisfy the issuing officer that the presumption against disclosure should be overturned, the issuing officer could authorise the search and

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46 Law Commission *Search and Surveillance Powers*, above n 25.

47 Law Commission *Evidence Law: Privilege*, above n 41, Vol 2 at [C271] and Vol 1 at [301].

48 Sanette Nel "Journalistic Privilege: Does it Merit Legal Protection" (2005) XXXVIII CIL SA 99, 111.

> seizure of the material on approving of the warrant, subject to any terms and conditions that the issuing officer thinks appropriate.[49]
>
> 12.147 Secondly, where the presumption against disclosure is not overturned on the issue of a warrant, the enforcement agency should be entitled to challenge any claim for protection made by a journalist on or following exercise of a law enforcement power, on the specified public policy grounds.

[114] Finally, and of some significance, the Law Commission concluded:

> 12.148 It is not intended that these measures should constitute the sole regulation of the exercise of enforcement powers involving journalistic material. Searches of the media have been recognised by the courts as a special category.[50]

[115] In my view, this background confirms the importance of the s 68 protections specifically, as well as the ongoing importance of the principles of freedom from unreasonable search and seizure and freedom of expression reflected in the Court of Appeal's decision in *TVNZ*. In the context of enforcement powers, the relevant provisions of the Search and Surveillance Act are to be understood similarly: they deal with the specific protection provided by s 68 which reflects the more general concerns with media warrants outlined in New Zealand. Those concerns are of continuing relevance, and any unavailability of the Search and Surveillance Act procedures does not obviate the need for them to be considered when media warrants are issued.

[116] In that context, I am satisfied that Parliament did not intend the enactment of those provisions to have the effect that a Judge issuing a media warrant that may involve journalistic privilege should not be explicitly made aware of that fact, and of the underlying principles and issues relevant in that context.

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49 Evidence Act 2006, s 68(3).

50 In *TVNZ v Attorney-General*, above n 2, Cooke P considered the freedom of the press to be an important adjunct of the rights concerning freedom of expression affirmed by section 14 of the Bill of Rights Act. The judgment confirmed that warrants against the media should only be issued in exceptional circumstances where it was "truly essential in the interests of justice" and that a warrant should not be granted or executed in a manner which impairs public dissemination of the news.

The role of judges

[117] In my view that conclusion is supported by the role of a judge when considering and granting an application for a search warrant. If nothing else, where such a warrant is applied for, the judge should be satisfied not only that the police are themselves aware of those issues, but also that they have appropriate procedures in place in practice to facilitate any anticipated claim of privilege and to ensure protection of materials seized. That is to say nothing of the possibility that, properly informed, the judge could well conclude that the issue of the warrant is simply not justified in the circumstances, irrespective of the procedures provided by the Search and Surveillance Act.

[118] The Court of Appeal's comments in *Tranz Rail*, cited in this judgment at [64], on the duty of candour reflect the importance of the role of judges in issuing warrants.

[119] The Court of Appeal went on to comment:

> [25] … A failure to observe the duty to make full and candid disclosure should not be excused too readily on the basis of immateriality. To do so would tend to undermine the duty to put the judicial officer in possession of *all* the potentially relevant facts, so that it is the judicial officer who decides what is relevant at the margins, rather than the applicant.
>
> [26] Certainly there will be cases when it can be said that although something relevant has not been disclosed the non-disclosure can have made no difference. We do not consider this to be one of those cases. The information which the Commission failed to disclose was clearly relevant to whether the issue of a warrant was necessary. It was also relevant to the judicial officer's ultimate discretion whether to issue a warrant in the circumstances and, if so, whether conditions of execution should be imposed. …

[120] The Supreme Court, in a recent decision, highlighted the need for judicial oversight the search warrant process:[51]

> A legitimate search warrant gives the police authority to conduct a search. It evidences that an independent person, acting in a judicial capacity, has

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[51] *Wilson v R* [2015] NZSC 189 at [32]-[33], [35]. A similar view on the importance of judges in issuing warrants was also reflected in the Crown Law advice to the Attorney-General on the consistency of the Search and Surveillance Bill with NZBORA, available at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/search-and-surveillance-bill-1>.

> considered the grounds presented by the police and concluded that they justify the search of named property for evidence of specified offending. …The independent scrutiny by a judicial or quasi-judicial officer of the justification(s) for a proposed search that is a feature of the warrant process provides an important protection against state abuse of coercive powers. The requirement reflects the importance that our society places upon individual liberty and property rights.
>
> …
>
> As the third branch of government, the judiciary must act independently of the other branches, and must appear to be independent. The independence of judges from the executive, both in appearance and in reality, is critical both to the proper operation of the rule of law and New Zealand's constitutional arrangements, and to the maintenance of public confidence in their operation.

[121] I am therefore satisfied that the failure of the police to disclose in the application for the Warrant the s 68 issue, and more generally the principles and issues relating to media warrants identified by the Court of Appeal in *TVNZ*, was a material failure to discharge the duty of candour. The central issues relating to the lawfulness of the Warrant were not drawn to Judge Malosi's attention. Those issues reflect fundamentally important public interests.

[122] It is also to be noted that it could be said Mr Hager does not act out of concern for protecting the identity of the Source. After all, he is adamant that no evidence of the Source's identity remains in his possession. On the other hand, the Search necessarily put into the possession of the police, I infer from Mr Hager's evidence, evidence of the identity of other confidential sources which was both protected by s 68 and, also, irrelevant for the investigation the police were conducting. In my view, the chilling effect of the issue of the Warrant and its execution needed to be seen in that context, and those matters also drawn to Judge Malosi's attention. In this context I acknowledge the unchallenged affidavit evidence of Messrs Fisher, Hersh and Ellis on the likely chilling effects of the execution of the Warrant in this case.

Conclusion

[123] I therefore conclude that the Warrant was fundamentally unlawful, and so declare. It follows from this fundamental failure to disclose relevant information that the Search was also unlawful.

[124] In reaching that conclusion, I have not specifically relied on Mr Hager's NZBORA unreasonableness assessment. Given the very clear view I have reached on the duty of candour issue, I do not consider it necessary to do so. This was, however, an intrusive search not only of Mr Hager and Ms Wells' home – including Ms Wells' bedroom and personal drawers – but also of Mr Hager's place of work where he kept his records of a wide range of his journalistic activities, not only relating to *Dirty Politics*. I note the following from *R v Williams*:[52]

> [113] … The highest expectation of privacy relates to searches of the person and particularly intimate searches, such as strip searches … In terms of searches of property, residential property will have the highest expectation of privacy attached to it … There will be some gradation even within a residential property, however. The public areas will invoke a lesser expectation of privacy than the private areas of the house … Inaccessible areas such as drawers and cupboards (particularly ones where one would expect to find private correspondence or intimate clothing) would count as private areas.

[125] In that context, I do have some reservation as to the reasonableness of the way in which the Warrant was executed, that is the way in which the Search was undertaken. Those concerns reflect issues relating to Mr Hager's claim that the Warrant was unduly broad, to which I now turn.

Warrant unduly broad?

[126] Mr Hager also claims that the Warrant, as applied for and as issued, was too wide in its terms. It also, he says, lacked the proper conditions to deal with issues of privilege and confidentiality.

[127] The Warrant stated that the Judge was satisfied that:

> …there are reasonable grounds to believe that the search of the specific places will find evidential material in respect of the offence specified above, namely:[53]
>
> (a) Evidential material comprising of documents in either electronic and/or paper form relating to the authoring of the 'Dirty Politics' book released on Wednesday 13 August 2014.

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[52] *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

[53] I assign these categories letters that were not in the Warrant, for ease of reference.

(b) Evidential material comprising of documents in either electronic and/or paper form relating to the illegally accessed content obtained from Cameron SLATER's email, Facebook and Twitter account.

(c) Evidential material comprising of communications with a person or persons who illegally accessed Cameron SLATER's email, Facebook and Twitter content.

(d) Evidential material held on the internet or other web based storage system relating to [Mr Hager's email account] and/or any other such email accounts identified as being accessed by Nicky HAGER.

(e) Evidential material comprising of any documentation which will reveal the identity of Nicky HAGER's source whether held electronically and/or in paper form.

[128] The Warrant continues:

4. This warrant authorises you at any time that is reasonable:

(a) to enter and search the specified places for the specified evidential material;

(b) to seize any of the specific evidential material, or anything else found in the course of carrying out the search or as a result of observations at the specified places, if you have reasonable grounds to believe that you could have seized the item or items under any search warrant that you could have obtained or any other power that you could have exercised. …

…

[129] Mr Hager argues that the categories of evidential material, taken as a whole, were overly broad. They amount to a "general warrant", which the courts have long declared invalid. For the purpose of this part of his argument, Mr Hager accepts that the description of evidential material to be searched for and seized in (b) and (c) were appropriate. Those described in (a), (d) and (e) were, he argues, too broad.

[130] Mr Hager submits that the generality of the Warrant is borne out by what was seized by police, as detailed above at [18]-[19]. As noted, that material included communications from, and pieces of paper relating to, other confidential sources, and people in Mr Hager's personal life. Further, the police either seized or cloned essentially every computer system and digital storage device in the house. Mr Hager submits that, at the very least, there should have been appropriate conditions in the Warrant to deal with the range of confidential and private material not relating to

Dirty Politics and the Source. It was incumbent on the police to suggest these in the application for the Warrant, or they should have been imposed by the issuing Judge.

[131] This aspect of Mr Hager's claim raises a number of complex issues relating to the search and seizure of computers and electronic devices, and the imposition of conditions on a warrant to address those issues. These matters were not argued before me, or in the written submissions, in any great detail. As such, I deal with them on a relatively limited basis.

[132] The Court of Appeal in *Tranz Rail* noted that for centuries the law has "set its face against general warrants and held them to be invalid."[54] In *Tranz Rail*, Tipping J said:

> A search warrant is a document evidencing judicial authority to search. That authority must be as specific as the circumstances allow. Anything less would be inconsistent with the privacy considerations inherent in s 21 of [the Bill of Rights Act 1990]. Both the person executing the warrant, and those whose premises are subject of the search, need to know, with the same reasonable specificity, the metes and bounds of the Judge's authority as evidenced by the warrant…

[133] These comments were recently affirmed by the Supreme Court.[55]

[134] The Law Commission in its *Search and Surveillance* report stated that a search warrant must conform to the principle of specificity in that it is to be issued with respect to a particular offence to search a particular place for particular items.[56]

[135] In *Dotcom v Attorney-General*[57] the Supreme Court last year dealt with the generality of a warrant authorising the search and seizure of computers and electronic devices. The alleged defects in the warrant in *Dotcom* were the lack of particularity with which the offences and material authorised to be seized were identified.[58] It is the latter which is relevant to Mr Hager's case. The warrants in *Dotcom* authorised search and seizure of material likely to include that which was

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54 *Tranz Rail,* above n 15, at [38].
55 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [69], [99].
56 Law Commission *Search and Surveillance Powers,* above n 25, at [4.134].
57 *Dotcom v Attorney-General*, above n 55.
58 At [3].

irrelevant and private. No conditions such as might have permitted the court to supervise sorting for relevance were imposed.[59]

[136] The majority of the Supreme Court set out an extensive summary of the law on generality of warrants and descriptions of things to be seized, both in New Zealand and overseas. That summary discusses, in particular, issues surrounding the search and seizure, under a warrant, of computers likely to contain both relevant and irrelevant information. The capacity of computers to store virtually unlimited amounts of information raises issues for their search and seizure. The Court discussed decisions regarding potential conditions being placed on such a warrant, and the circumstances in which a computer might be properly taken offsite for inspection or cloning.

[137] The majority summarised the extensive case law as follows:

> [190] The overseas and New Zealand authorities accept the need, in relation to computers, for limits upon what is searched and seized in order to respect the right to be free from unreasonable search and seizure, and also for judicial oversight of decisions to issue search warrants.
>
> [191] … searches of computers (including smart phones) raise special privacy concerns, because of the nature and extent of information that they hold, and which searchers must examine, if a search is to be effective. This may include information that users believe has been deleted from their files or information which they may be unaware was ever created. The potential for invasion of privacy in searches of computers is high, particularly with searches of computers located in private homes, because information of a personal nature may be stored on them even if they are also used for business purposes. These are interests of the kind that s 21 of the Bill of Rights Act was intended to protect from unreasonable intrusion.
>
> [192] Accordingly, for a search of any computer to be reasonable, a mutual assistance warrant must give specific authorisation for the computer to be searched in order to identify and seize the data that it is believed is evidence of commission of an offence. For a warrant to include such authority there must have been sufficient sworn grounds in the application to support its issue in that form. …
>
> [193] Where the search involves large amounts of material stored on computer hard drives, particular problems may arise. The sorting out of relevant material onsite may be impracticable and highly intrusive. Moreover, as the United Supreme Court recognised in *Riley*, particular difficulties in relation to both securing and accessing the contents of

[59] At [3].

> computers arise from protective mechanisms such as passwords, encryption and remote deletion. In view of these factors, the appropriate balance of the interests underlying s 21 will best be achieved, at least in most cases, by the removal of the computer to an offsite location for searching, as the Canadian Supreme Court accepted in *Vu* and the New Zealand Court of Appeal has accepted in the decisions to which we have referred.
>
> …

[138] In the Warrant, there is no explicit mention of computers, let alone any particular computer or device. In *Dotcom,* the majority cited a Supreme Court of Canada case where it was said a computer could amount to a separate 'place' requiring separate authorisation to be searched.[60] Here, the Warrant identifies Mr Hager's home as the place to be searched. An argument could be made, therefore, that the failure to identify the fact that the police intended and needed to search computers is itself a material defect in the Warrant. Given the reference to searching "documents in either electronic and/or paper form", I do not think that argument could succeed. That does not persuade me, nevertheless, that the application for the Warrant sufficiently identified the issues that arise where computers are to be searched and/or seized.

[139] The Supreme Court in *Dotcom* was very clear that the search and seizure of computers involves a serious intrusion into privacy interests. The Court noted the need for the warrant to give specific authorisation for a computer to be searched in order to identify and seize the data that it is believed is evidence of commission of an offence.[61] In this case it is to be noted, for example, that Ms Wells' laptop computer was searched. It has to be asked whether there was a sufficient evidential basis to allow for a search of Ms Wells' computer, as opposed to those belonging to and used by her father. That example highlights the difficulties of dealing with such questions on the basis of untested affidavit evidence. Detective Sergeant Beal, in one of his affidavits, said that Ms Wells had told the police her laptop was not used by her father and that they could search it. He went on to say that the police started to search it, but ultimately stopped when it seemed some privileged material might be there after all. In her affidavit, and completely in contrast, Ms Wells said that at no

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60 At [182], citing *R v Vu* [2013] SCC 60, [2013] SCR 657. Although *Dotcom* related to mutual assistance search warrants, I see no reason to distinguish the comments in that case on this particular point.

61 At [191]–[192].

point did she give the police permission to use her laptop in any way. Once it became clear, however, that they were going to seize the laptop, Mr Price told them that privilege was claimed in relation to its contents. In these circumstances, I am reluctant to draw hard and fast conclusions.

[140] There is also the question of whether the evidential material the Warrant allowed to be seized was too broad. I consider there are difficulties with the generality of what I have labelled as categories (a), (d) and (e). Those categories incorporated material that was likely to be both confidential and irrelevant to the investigation. For example, category (a) would enable the police to search for and seize information from informants other than the Source who contributed to *Dirty Politics*, to say nothing of material that had no relationship to *Dirty Politics* at all. I accept that categories (b) and (c) meant that it was likely most, or many, of the computers and electronic devices would be searched, or when privilege was claimed, secured and either cloned or seized for the determination of the privilege claim. Recognising that computers do store such a wide range of information, the Court in *Dotcom* accepted the need for such an approach. Narrowing the evidential material in the Warrant may not have, I accept therefore, made much of a practical difference on the day of the Search as regards computers and other electronic storage devices. It could, however, have made a difference as regards the hard copy material.

[141] The final issue here is whether conditions on search and seizure should have been imposed in the Warrant. Mr Hager submits that the police looked at documents over which he claimed privilege in order to determine whether they were relevant. One condition could have been the presence of an independent person to look at physical documents, and secure and seal potentially privileged relevant information. Such a person may not have been able to determine whether every document related to the Source or not, but could have been able to exclude some confidential information that was clearly not related to the Source (for example, where *Dirty Politics* was not discussed).

[142] The scheme of Subparts 5 and 6 of Part 4 of the Search and Surveillance Act reflect the Law Commission's recommendation that a statutory set of procedures be established to address the practicalities of protecting and upholding claims to

privilege in circumstances such as these, whilst at the same time providing for the execution of warrants. It was by reference to those provisions that the respondents argued the application for the Warrant provided all relevant information to the issuing officer. It is similarly by reference to those provisions that they would argue that no conditions were required on the Warrant. I see the two issues as being different. The first, as this judgment makes clear, raises the importance of the duty of candour and the implications of any search and seizure under a media warrant. The second is, I accept, more practically focused. That is, given the statutory scheme, and provided Mr Hager was properly provided with an opportunity to claim privilege, further conditions may have been difficult to craft. Again, as recognised in *Dotcom*, the sheer volume of material stored on computers today makes any independent review of that material, prior to its seizure, difficult if not impossible. But, again, the position could well be different as regards the other material that was here subject to search and seizure, namely Mr Hager's paper records.

[143] I do therefore have some concern that the Warrant was too broad, and that if there had been proper disclosure of the issues raised by media warrants, conditions could have been designed to better address those concerns. Again, however, the affidavit evidence is contradictory, and complex. The concerns that I have can, at best, provide limited confirmation for my conclusion as to the unlawfulness of the Warrant and the Search.

Other challenges to the Warrant

[144] Mr Hager also challenges the unlawfulness of the Warrant on the basis that there were other investigations the police could have, but did not, undertake and what he says is the inadequacy of their disclosure in the Warrant application of that fact, and of the reasons why it was unlikely the Search would provide evidence of the identity of the Source. Mr Hager similarly challenges the conclusion the police expressed in the application that they had reasonable grounds to believe such evidence would be found during the search.

[145] I acknowledge some concern with what the police said was their reasonable belief that they would discover evidence of the Source's identity. My concern is that

that reasonable belief, on the material I have been provided with, might better be characterised as a hope. In terms of *Gill*[62] these are, however, all intensely factual questions. On that basis, I am satisfied that these are issues which are not appropriate to be determined on the basis of uncontested affidavit evidence. That evidence on the contested facts was voluminous. I do not consider I am in a position to properly consider that evidence, in the absence of cross-examination. Judicial review, as is well known, is not well suited to determining contested questions of fact, particularly where those questions of fact are so central to the legal issues to be determined.

[146] I therefore decline to determine those aspects of Mr Hager's application.

An otherwise unlawful search?

[147] The police have accepted that in one regard, they did improperly search the material for which Mr Hager claimed privilege. But the police do not accept that breach of privilege rendered the Search unreasonable. Mr Hager claims some four further aspects in which the Search was unlawful. Again, those claims require the determination of competing factual narratives, recorded in the affidavit evidence. I am similarly of the view, therefore, that the determination of those claims in these judicial review proceedings would be inappropriate.

A final comment

[148] I note one final matter: I am not persuaded that the approach the police took to enabling Mr Hager to claim privilege was the preferred one. It was only during the second telephone conversation that the police asked Mr Hager if he was claiming privilege. That is not the type of facilitation that I consider the Search and Surveillance Act anticipates. Rather, when they discovered Mr Hager was not at his home, I would have anticipated that the police would have initiated contact with Mr Hager, told him that the Search, if successful, of necessity would disclose evidence protected by s 68, and have positively given him the opportunity to claim privilege.

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62 *Gill v Attorney-General*, above n 9.

Result

[149] Mr Hager has succeeded in his application for a declaration that the Warrant and the Search were fundamentally unlawful.

[150] In light of that, and of counsel's agreed deferring of the questions of the lawfulness of the information inquiries undertaken by the police, and of the question of NZBORA damages, I invite a memorandum from counsel as to the way forward.

"Clifford J"

Solicitors:
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