IN THE SUPREME COURT OF QUEENSLAND No 10633 of 1998

Brisbane

[Clarke & Ors v Qld Newspapers P/L & Anor]

BETWEEN:

ROSS DAVID CLARKEEDWARD ALEXANDER KANN JOHN DOMINIC TIOGO Plaintiffs

AND:

QUEENSLAND NEWSPAPERS PTY LTD ACN 009 661 778 First Defendant

AND:

NEWS LIMITED ACN 007 871 178 Second Defendant

REASONS FOR JUDGMENT - ATKINSON J

Judgment delivered 1 December 1998

CATCHWORDS:

PRACTICE AND PROCEDURE - inspection of documents - whether defendants compelled to produce a copy of intended publication after reference made to article in affidavit - whether article needed to prepare application for interlocutory injunction - Rules of Supreme Court O.35, rr.13,14,15,16.

Counsel: B D O'Donnell QC for the plaintiffs
P D T Applegarth for the defendants
Solicitors: Clarke & Kann for the plaintiffs
Thynne & Macartney for the defendants
Hearing dates: 13, 26, 27 and 30 November 1998

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1 On 13 November 1998, an application was made for an interim injunction to restrain publication in the "Courier Mail" of an article concerning Clarke and Kann. The circumstances in which the application arose were that at about 11:30am on 13 November 1998 Paul Whittaker, a journalist employed by the defendants, rang the offices of Clarke and Kann Solicitors and spoke to the managing partner's assistant. Mr Whittaker told her that he was from News Limited which published newspapers including the "Courier Mail", and that he was calling about the matter of John McNamee and referred to a bill of costs. He wished to speak to Mr Ross Clarke, the managing partner of Clarke and Kann, or Stephen Collins. Mr Whittaker said he was publishing an article about the McNamee matter and he wanted to know if Mr Clarke would make a comment about it. The assistant told him that Mr Clarke was interstate and she attempted to put him through to Mr Collins but could not do so.

2 Mr Collins then telephoned Mr Spence of Thynne and Macartney as he knew that Mr Spence acted for the defendants in matters of this kind. He told Mr Spence that he had received advice that the defendant, Queensland Newspapers, proposed to run a story concerning the firm of

Clarke and Kann Solicitors, that the material related to documents filed in the Court to which access had been obtained by a reporter and that a response had been sought from Clarke and Kann. Mr Collins advised Mr Spence that Clarke and Kann required an undertaking from Queensland Newspapers not to publish any material concerning the allegations made by Mr McNamee in Originating Summons No. 10386 of 1998 (the "application").

3 The partners at Clarke and Kann are respondents to the application which was returnable on 30 November 1998. It was an application in which Mr McNamee and Northhaus Pty Ltd sought the preparation and delivery of an itemised bill of costs in respect of a matter in which Clarke and Kann acted for them and for reference of that bill to taxation. Affidavits had been filed by Stephen Charles Russell, now acting as solicitor for Mr McNamee, and John David McNamee, which contain allegations of fact with which the partners at Clarke and Kann take issue. Clarke and Kann had not at that time filed any affidavit material. The plaintiffs took the view that if the untested allegations contained in the affidavits of Mr McNamee or Mr Russell were published, irreparable harm would be suffered by them. Mr Collins advised Mr Spence that if an undertaking was not provided, an application would be made to the Supreme Court to restrain any publication of those allegations.

4 Mr Spence swears that he was informed by Mr Gareth Evans, Editorial Manager of Queensland Newspapers, that the material in question was believed to be true and that its publication was in the public interest. Mr Evans said that the respondent would seek to defend any proceedings brought for alleged defamation arising from the story on the grounds of, inter alia, truth and public benefit and qualified protection or excuse pursuant to the respective provisions of the *Defamation Act* 1889 (Qld). Mr Spence later telephoned Mr Collins and advised him that no undertaking would be given.

5 The main complaint made by the plaintiffs was that the allegations against them were serious and damaging, that they had been filed in Court but that they had not yet had any opportunity to respond to them. Neither had they yet had an opportunity to respond to Mr Whittaker. The application was brought on in great haste without either side having a proper opportunity to prepare material for argument. Accordingly, I ordered that an interim injunction issue to enable the plaintiffs to give a considered response by filing affidavit material in the other proceedings if they so wished.

6 The orders made were:

1. That until 12 noon on Friday, 27 November 1998 or further or earlier order, the first and second defendants be restrained from publishing:

a) extracts from the affidavits of John David McNamee and Stephen Charles Russell in Application No. 10386 of 1998;

b) any report of or comment by any person whether inside or outside court about the contents of the affidavits of John David McNamee and Stephen Charles Russell filed in Application No. 10386 of 1998;

2. Further that on or before 4:00pm on Monday, 23 November 1998 the plaintiffs serve on the solicitors for the defendants herein a copy of any affidavit material which they have filed or intend to file in Originating Summons 10386 of 1998;

3. The defendants serve on the plaintiff on or before 4:00pm on Wednesday, 25 November 1998 a copy of any article containing the matters referred to in paragraph 1(a) and 1(b) of this Order.

4. All parties have liberty to apply before Justice Atkinson on one (1) clear day's notice.

5. Costs of today be reserved.

7 The notice of motion seeking an interlocutory injunction was adjourned until 9:00am on 27 November 1998. The liberty to apply was granted particularly because the factual circumstances might change and also because of the rushed nature of the application before the Court on 13 November 1998 meant that neither party had had proper opportunity to prepare argument with regard to the orders that were made.

8 In the meantime, on 18 November, Mr Whittaker wrote to Mr Clarke putting detailed questions to him and Mr Collins for their response before midday on Friday, 20 November. On 20 November, the defendants' solicitors wrote to Clarke and Kann stating that they proposed to make further application to the Court pursuant to the liberty to apply with a view to having the Court vacate that part of the order wherein the defendants were required to serve on the plaintiffs a copy of any article containing the matters referred to in paragraphs 1(a) and 1(b) of the order.

9 On 23 November, the plaintiffs sent Mr Whittaker a detailed reply to his questions put on 18 November. On 25 November, Mr Clarke filed an affidavit in Originating Summons No. 10386 of 1988 giving a detailed response to the affidavits filed by Mr McNamee, Mr Russell and Mr Graham. On 26 November, an application was made before me pursuant to the liberty to apply to vacate paragraph 3 of the Order. Counsel for the defendants sought leave to read and file an affidavit of Mr Spence which, after setting out the events which, had occurred since the last hearing, contained the following paragraphs:

"10. I have perused the draft story prepared by Mr Paul Whittaker in this matter for further possible publication in the Courier-Mail. I have also read the Affidavits of Stephen Charles Russell, John David McNamee and Michael Anthony Graham in application no. 10386 of 1998. Having read the

Affidavits and the draft story of Mr Whittaker, the draft story of Mr Whittaker:—

(a) is based on material contained in the Affidavits of Mr McNamee, Mr Russell and Mr Graham;

(b) relates to the subject matters contained in questions 1, 2 and 4 of Mr Whittaker's letter of 18 November 1998 ("DPS2");

(c) reports Clarke and Kann's responses to those questions, and, in particular that:—

- Clarke and Kann deny McNamee's claim, and say that during the long history of the matter McNamee had never complained about overcharging.

- Clarke and Kann deny the accuracy of Mr McNamee's version of events and question why Mr McNamee's son, who was present during his father's discussions with Mr Clarke has not filed an Affidavit corroborating his father's version of events.

- Clarke and Kann say that Mr Graham's assessment was based only on the material which he had seen and Mr McNamee's version of events, and that his report makes no mention of the impact which further evidence would have on his assessment.

(d) does not report the contents of what is said by Clarke and Kann to have been a without prejudice conversation between Mr Russell and Mr Collins.

11. I am informed by Mr Gareth Evans, Editorial Manager of Queensland Newspapers Pty Ltd and do verily believe that the further publication of the draft story of Mr Whittaker will be dependent upon a number of considerations including:—

(a) expansion of the story to include the contents of Affidavits which may be filed by Clarke and Kann or by the applicants in O.S. 10386/98;

(b) amendments to the story occasioned by legal advices from myself as retained solicitor for Queensland Newspapers Pty Ltd;

(c) sub-editing and/or amendment of the story occasioned by space considerations within any particular page or edition of The Courier-Mail.

12. I am further informed by Mr Evans and do verily believe that if the draft article is published and becomes the subject of proceedings then the defendants intend to defend those proceedings on the ground of, inter alia:—

(a) truth and public benefit;

(b) qualified protection or excuse."

10 The plaintiffs by written notice required the defendants to produce for inspection the draft story referred to in paragraph 10 of Mr Spence's affidavit pursuant to Rules of the Supreme Court O.35 r. 13. The application was adjourned until 27 November 1998. On that date the plaintiffs pressed the notice for production of the draft article and the defendants sought the vacation of the direction made on 13 November that they produce a copy of the article which they intended to publish.

11 On 30 November 1998 when the application in O.S. 10386 of 1998 came on for hearing before Fryberg J, both parties were represented by counsel and the application was opposed. Affidavits were read by both parties. Those were an affidavit of Mr McNamee filed 6 November 1998, affidavits of Mr Russell filed 6, 9 and 27 November 1998, an affidavit of Michael Anthony Graham filed 9 November 1988, and an affidavit of Mr Clarke filed 27 November 1998. All of those affidavits, with the exception of the

affidavit of Mr Russell filed 27 November 1998, had already been read in this matter. After hearing argument for approximately an hour, Fryberg J indicated that he was minded to refer the matter to the civil list and requested the respondents[1] in those proceedings to prepare further affidavit material and the matter was adjourned. At this stage, the proceedings were taken to be heard in Court pursuant to s. 261(1) of the *Supreme Court Act* 1995 (Qld) which provides:

> "When, upon an opposed application coming on to be heard before a judge in chambers, either party appears by counsel or solicitor the matter shall be adjourned into court, without any costs of the adjournment, and shall be heard in open court, unless all parties consent to its being heard in chambers[2]."

The affidavit material was therefore read in Court.

12 Section 13(1)(c) of the *Defamation Act* 1889 provides that:

> "It is lawful -
>
> (c) to publish in good faith for the information of the public a fair report of the public proceedings of any court of justice, whether such proceedings are preliminary or interlocutory or final, or of the result of any such proceedings, unless, in the case of proceedings which are not final, the publication has been prohibited by the court, or unless the matter published is blasphemous or obscene."

That defence is now likely to be relied upon by the defendants herein in addition to the defence sworn to by Mr Spence.

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1 The plaintiffs in these proceedings.

2 As to the history of this section, see McPherson, B.M., *Supreme Court of Queensland*, p. 194.

13 Subsequent to the hearing in Court, the parties reached an agreement to settle the matter and it appears from the Court file that the following orders were made by consent:

> "1. Adjourn application into Chambers;
>
> 2. Order affidavits read today be placed in a sealed envelope and marked not to be opened except by order of the Court or a Judge;
>
> 3. Summons dismissed."

Such an order does not act retrospectively. What happened in Court happened in public and has not been the subject of a non-publication order.

What is the relevant duty of disclosure at this stage in the proceedings?

14 Order 35 r.4 provides that a party to an action has a duty to disclose to each other party each document that:

(a) is in the possession or under the control of the first party; and

(b) is directly relevant to an allegation in issue in the cause.

Under O.35 r.7 the time for delivery of documents pursuant to the duty of disclosure arises when the defence is delivered unless an earlier order is made or 28 days after a request in writing for a copy is delivered.

15 Order 35 r. 13 provides that a party may, by written notice, require another party in whose pleadings, particulars or affidavits mention is made of a document:

(a) to produce the document for the inspection of the party making the requirement or the solicitor for the party; and

(b) to permit copies of the document to be made.

16 Under O.35 r. 14(4) the Court or a Judge may order a party to any proceeding to disclose to another party a document or class of documents where there are special circumstances and the interests of justice require it[3]. For circumstances to be special in the context of this rule, they need to be exceptional[4].

17 Order 35 r.15 provides that the Court or a Judge may order that a party be relieved, wholly or to a specified extent, of the duty of disclosure. If a party does not disclose a document in accordance with O.35, a notice or an order of the Court then r. 16 provides that the party:

(a) may not tender the document, or adduce evidence of its contents, without leave of the Court or a Judge at the trial; and

(b) is liable to process of contempt or sequestration for the failure; and

(c) may be ordered to pay the costs or a part of the costs of the cause[5].

No suggestion was made by the plaintiffs that any relief was sought against the defendants other than that set out in O.35 r. 16(a).

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3 Rules of the Supreme Court O.35 r.14(4)(a).

4 *Lampson (Australia) Pty Limited v Ahden Engineering (Aust) Pty Limited* (unreported, Supreme Court of Queensland, Moynihan J, 28 May 1998) at p. 9.

5 Rules of the Supreme Court O.35 r.16.

18 In order to avoid the effect of O.35 r.16(a), counsel for the defendants sought and was granted leave to read and file another affidavit by Mr Spence similar in all respects to that set out earlier in these reasons except for paragraph 10 which provided:

"10. I am instructed by Mr Gareth Evans, Editorial Manager of Queensland Newspapers Pty Ltd and verily believe that any article to be published concerning the plaintiffs will:

(a) be based on material contained in the Affidavits of Mr McNamee, Mr Russell and Mr Graham filed in application no. 103 86 of 1998;

(b) relate to the subject matters contained in questions 1,2 and 4 of Mr Whittaker's letter of 18 November 1998 ("DPS2");

(c) report Clarke and Kann's responses to those questions, and, in particular that:—

- Clarke and Kann deny McNamee's claim, and say that during the long history of the matter McNamee had never complained about overcharging.

- Clarke and Kann deny the accuracy of Mr McNamee's version of events and question why Mr McNamee's son, who was present during his father's discussions with Mr Clarke has not filed an Affidavit corroborating his father's version of events.

- Clarke and Kann say that Mr Graham's assessment was based only on the material which he had seen and Mr McNamee's version of events, and that his report makes no mention of the impact which further evidence would have on his assessment.

(d) will not report the contents of what is said by Clarke and Kann to have been a without prejudice conversation between Mr Russell and Mr Collins."

The defendant therefore no longer sought to adduce evidence of the contents of the draft story.

19 A further reason that it would be inappropriate to require disclosure at this stage of the draft article referred to in Mr Spence's affidavit is that his affidavit was filed in support of the defendants' application not to have the document made available for inspection. To require disclosure would be to defeat the purpose of the application. As was held by the Full Court of the Supreme Court of South Australia in *Beneficial Finance Corporation Limited v Price Waterhouse*[6], to require production of a document in such circumstances:

> "... was to adopt a literal interpretation at the expense of the requirements of justice and fairness. The rule should not be construed so as to oblige a party to produce a document which it has referred to in the context of an affidavit sworn to support an objection to the production of the document."

20 The question remains as to whether the defendants should be ordered to produce the article which it is intended to publish or any draft articles. There is no evidence that any article which it is intended to publish is presently in existence.

21 As the time for disclosure under O.35 r.4 has not yet arisen, an order can only be made under O.35 r.7(2)(a) and r. 14(1). Such on order can only be made in the instant case if there are special circumstances and the interests of justice require it[7]. These criteria are cumulative and both must be satisfied before an order is made. In my view those criteria are not satisfied.

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6 (1996) 68 SASR 19 at 39, 49-50.

7 O.35 r.14(4)(a).

22 Not the least of the difficulties is that there is no evidence that the article intended to be published yet exists. At the time Mr Spence swore his affidavits, the author of the story had not yet had the opportunity to incorporate into the article the material which appears in Mr Clarke's affidavit filed in Originating Summons No. 10386 of 1998 which seriously disputes the allegations filed on behalf of Mr McNamee in that matter. Neither has the article been through the process of being reviewed before publication by the defendants' legal advisers.

23 Apart from these practical difficulties which might be met by an extension of time for compliance, there are reasons of principle why special circumstances do not exist to require production of the article for inspection by the plaintiffs prior to the hearing of their application for an interlocutory injunction.

24 The type of case in which the application is made is significant. This is an application for an interlocutory injunction to prevent publication of an article concerning the plaintif's in the "Courier Mail". The law that applies to such an application was set out by Moynihan J in *Shiel v Transmedia Production Pty Ltd*[8]. The usual considerations for the grant of an interlocutory injunction are whether there is a serious question to be tried and if there is to determine the matter on the balance of convenience[9]. However Moynihan J said at 203:

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8 [1987] 1 Qd.R. 199. See also *Australian Broadcasting Corporation v Hanson* (unreported, Court of Appeal in the Supreme Court of Queensland, 28 September (1998), at p.6. Should the law be as stated by Hunt J in *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, the result would be no different.

9 *Shiel v Transmedia Production Pty Ltd* at 203.

> "There is however now a formidable body of decided cases, English and Australian, which support a proposition that particular considerations apply to an application for an injunction restraining the apprehended publication of allegedly defamatory matter."

25 Although there is such power, the power is exercised with great caution and only in very 3 clear cases. The reasons for this appear to be two-fold. Firstly because the law will not intervene to interfere with freedom of speech except when it is abused and secondly, because it is ultimately 3 for a tribunal of fact to decide whether the publication is defamatory and if so whether a relevant defence applies and what damage may or may not have been suffered[10]. The outcome of these questions may be that the publication in issue was lawful and the plaintiffs are not successful in the action.

26 The relevance of the law relating to the grant of an interlocutory injunction to the 3 application for preliminary discovery of the proposed defamatory material was considered by Beach J. in *XX and YY v Pan Macmillan Australia Pty Ltd*[11]. The judge rejected an application 3 for preliminary discovery by two applicants who apprehended that the book "The First Stone" written by Helen Garner which the defendant intended to publish, may be defamatory of them. In examining the relationship between the prospect of success on an application for an interlocutory injunction and preliminary discovery, his Honour referred to the decision of the Full Court of the Supreme Court of

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10 See *Bellino v Australian Broadcasting Commission* (1998) Aust Torts R 9/81-479 at p.65, 171.

11 unreported, Supreme Court of Victoria, 4758 of 1995,16 March 1995.

Victoria in *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd*[12], where the Court held:

> "In the case of an application to restrain a libel, the very great importance which our society and our law have always accorded to free speech means that equity exercises great care in granting injunctive relief and does so only where it is very clear that it should be granted."

His Honour specifically endorsed the following passage from *National Mutual Life*[13]:

> "In our opinion, his Honour's approach to the question whether the court should enjoin the publication or republication of defamatory matter, and the tests applied by him, were correct. It would be pointless for our reasons to set out again in extenso all his Honour's remarks as to the broad principles to be applied. We wish however to emphasize our express agreement with two passages in his reasons for judgment. In the first of them his Honour said at [1989] VR 747 at 753-754:
>
> 'As was stated in the majority judgment of the court of Appeal in *Bonnard v Perryman*, at 284: "Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions." See also the cases cited and the discussion of them in *Stocker v McElhinney (No 2); Gabriel v Lobban; Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344 and *Lovell v Lewandowski* [1987] WAR 81."
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> "Counsel for the television defendants took me to certain passages in the authorities which suggested that interlocutory relief should be granted in the rarest of

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12 [1989] VR 747.

13 [1989] VR 747 at 763.

circumstances, and that had been limited to cases where it could be seen that, if a jury accepted a plea such as justification, its verdict would be set aside as perverse: cf *Canada Metal Co Ltd v Canadian Broadcasting Corporation* (1975) 55 DLR (3d) 42, at 43. I cannot accept that the power of this court to grant interlocutory relief can be so restricted, and I would adopt, without here repeating them, the perceptive comments of Dr Spry in is work, Equitable Remedies, 3rd ed, at 321-323, cited with approval by Kennedy J in *Lovell v Lewandowski*, at 90."

In our opinion, the correct approach in Victoria to an application to restrain publication or republication of defamatory matter is, and always has been, to make the broad enquiries traditionally made by a court of equity, viz - whether there is a substantial question to be investigated at the trial, and whether the balance of convenience, sometimes called the balance of justice, favours the grant of an injunction. In other words, the principles applicable are those which are applicable to all applications for interlocutory injunctions, and a recent statement of the general principles is to be found in *Murphy v Lush* (1986) 65 ALR 651, at 653; 60 ALJR 523, at 524. In the case of an application to restrain a libel, however, the very great importance which our society and our law have always accorded to what is called free speech, means that equity exercises great care in granting injunctive relief and does so only where it is very clear that it should be granted. It has been said in high places, and said on high authority from the Bench, that it is by no means rarely a benefit to society that a hurtful truth be published. It has been felt, we think, that it is usually better that some plaintiffs should suffer some untrue libels for which damages will be paid than that members of the community generally, including the so-called news media, should suffer restraint of free speech. The judges over the centuries have also been well aware how easy it would be for a tyrant to stifle all opposition by deciding what was genuine 'free speech', to be allowed, on the one hand and what was an unjust or unfair or dishonest taking advantage of free speech, to be repressed, on the other hand. When the court enjoins, it must be extremely clear that no unacceptable repression is taking place. It has thus been laid down that it is only in a clear case that the court will intervene by injunction."

27 Beach J concluded[14]:

> "It follows from what I have said that even if it was established to my satisfaction that the book contained material in it defamatory of the applicants I would refuse any application for an injunction restraining its publication. Expressed another way, weighing up the right to freedom of speech on the one hand against the hurt which may be caused to the applicants if defamatory material is published of and concerning them on the other, in the circumstances of this case the scales come down heavily in favour of the preservation of freedom of speech. I consider it is highly unlikely that any injunctive relief would be granted to the applicants to prevent publication of the book, there is in my opinion no basis for granting preliminary discovery pursuant to O.32 r.5."

28 There is no doubt that there is jurisdiction in the Court to order the production of an article which is proposed to be published and which is alleged to be defamatory. However the Court should be very circumspect in the circumstances in which such an order is made, particularly where the subject of the proposed publication comes to know of it because he or she is asked to respond to allegations made about them. In my view, the power to order production at this stage of the proceedings is, as is the power to order an interlocutory injunction, a power to be exercised with great caution. Cooke P delivering the judgment of the New Zealand Court of Appeal in *Auckland Area Health Board v Television New Zealand Limited*[15] said:

> "We do not doubt that there is also jurisdiction to order the production of proposed script for the examination of the Court and the other party, as Smellie J held in *Ron West Motors Limited v Broadcasting Corporation of New*

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14 *XX & YY v Pan Macmillan* at p.4.

15 [1992] 3 NZLR 406 at-407.

> *Zealand*[16], but it likewise is a wholly exceptional jurisdiction to be exercised only in cases where there is a well-grounded fear that the publication will be clearly unlawful. The reason for this limitation is of course that is not part of the function of the Court to act as censor."

29 The Court in that case refused to allow inspection of the proposed publication because its analysis of the affidavits showed that a general description and considerable particulars of the proposed program had been supplied and that what were apparently the main criticisms or allegations were put to the plaintiff, at least by way of primary examples, and his replies where to appear in the program[17].

30 It is clear in this case that a general description and considerable particulars of the proposed article have been supplied and that what are apparently the main criticisms or allegations had been put to the plaintiffs and the replies are to be appear in the article. Further, in this case the plaintiffs have had the opportunity to have the publication delayed while they swore affidavit material in response to the affidavit material which is the source of the allegation to be published. In the circumstances there cannot be a well-grounded fear that the material will be clearly unlawful[18]. Nor in these

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16 [1989] 3 NZLR 433.

17 This case has been referred to with approval on numerous occasions in New Zealand and in Gatley on "Libel and Slander" (9th ed. 1998 at paragraph 25.4 footnote 13, paragraph 30.34 footnote 12).

18 See also *Holley v Smyth* [1998] 1 All ER 853; *Takhar v South Australian Telecasters Ltd*, (unreported, Supreme Court of South Australia, Perry J, 26 May 1997); *Raymont v Friends United International Pty Ltd*,

circumstances do the interests of justice now require the production of draft articles or the article to be made available for inspection.

31 The plaintiffs relied on a single judge decision from New Zealand which was referred to by the Court of Appeal, that is *Ron West Motors Limited v Broadcasting Corporation of New Zealand*[19] where Smellie J ordered production of the script to allow the plaintiff the right to challenge the defence of justification which was to be pleaded to demonstrate to the Court where the matter to be published was false. His Honour held that without the script the plaintiff cannot really begin to prepare its argument let alone present it effectively at the substantive hearing.

32 However, that view is not consistent with the test set down in *Auckland Area Health Board*[20] that it is a wholly exceptional jurisdiction nor the test in O.35 r. 14(4)(a) of the Rules of the Supreme Court that there must be special circumstances. If the arguments of the plaintiffs were accepted in this case then it would be routine to require production of a proposed publication when an application for an interlocutory injunction was made. That would no longer be the exercise of an exceptional jurisdiction or only done in special circumstances and in the interest of justice and would undermine the principle set out in *Shiel v Transmedia Production Pty Ltd*[21] that the

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(unreported, Federal Court of Australia, von Doussa J, 23 March 1998).

19 [1989] 3 NZLR 433 at 447.

20 [1992] 3 NZLR 406.

21 [1987] 1 QdR 199 at 205.

law will not intervene to interfere with freedom of speech except when it is abused. In the circumstances, Smellie J talks about the plaintif's right to challenge the defence of justification. However, the true test is set out in *Shiel v Transmedia Production Pty Ltd* quoting from *Stocker v McElhinney (No.2)*[22] where His Honour said:

> "If on the evidence before the judge, there is any real ground for supposing that the defendant may succeed upon any such ground as privilege, or truth and public benefit ... , the injunction will be refused."

33 Since the affidavits filed on behalf of the applicants in O.S. No. 10386 of 1998 make it inevitable that there is on the evidence before me a real ground for supposing that the defendants may succeed on such grounds as privilege or of truth and public benefit, and as the plaintiffs have had the opportunity to respond both to that affidavit material and to the detailed allegations put to them by the author of the proposed article, in the circumstances of an application for an interlocutory injunction to prevent an apprehended defamation, the jurisdiction to order delivery of a document prior to the defence should not in this instance be exercised. There are no special circumstances in this case and the interests of justice do not require it. Accordingly I vacate paragraph 3 of the Court's direction made on 13 November 1998.

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22 (1961) 79 WN (NSW) 541 at 543-544 per Walsh J.