KLW Holdings Ltd v Singapore Press Holdings Ltd
[2002] SGHC 150

Case Number : OS 332/2002, RA 81/2002

Decision Date : 16 July 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Prakash Mulani and Sean Say (J Koh & Co) for the appellants/plaintiffs; Hri Kumar and Vinod Sabnani (Drew & Napier LLC) for the respondents/defendants

Parties : KLW Holdings Ltd — Singapore Press Holdings Ltd

Civil Procedure – Disclosure of documents – Libel suit – Application for pre-trial discovery of interview notes and working drafts of newspaper article – 'Newspaper rule' – Nature of rule – Whether rule applicable in Singapore – Whether different considerations applicable in pre-trial discovery – Whether to grant application – O 24 r 6 Rules of Court

Judgment ***Cur Adv Vult***

GROUNDS OF DECISION

Background To The Application

1. KLW Holdings Ltd ("KLW") owns a subsidiary company known as Barang Barang Pte Ltd ("Barang Barang"). This subsidiary was, at all material times, in the business of retailing home furnishing products. Sometime about 2000 KLW had bought over Barang Barang from its founding partners, Mr. Sonny Boey and Mr. Alvin Chua. The two former partners continued their ties with the company by signing service contracts with it, but these agreements were terminated (with ensuing litigation between the two partners and Barang Barang). Payments due from KLW to the two partners in respect of the purchase of Barang Barang were terminated by KLW. There were allegations by KLW that the two former partners were in breach of the purchase agreement because they had set up business in competition with Barang Barang. Arising from these events, the Business Times, a newspaper owned by Singapore Press Holdings Ltd, published a story on 22 February 2002. KLW is unhappy over two aspects of the published story, which, it says, created the impression that KLW defaulted in its payments to Mr. Boey and Mr. Chua from the outset. Mr. Mulani, counsel for KLW submitted that the payments were stopped because of the alleged breach of agreement by the two former partners. Secondly, KLW alleges that the Business Times story suggested that KLW defaulted because it was in financial difficulties. Singapore Press Holdings denies that the Business Times story is in any way libelous.

2. KLW applied by way of this Originating Summons for pre-trial discovery of documents against Singapore Press Holdings. The documents required were described in the applications as:

> "a. notes of interview, in documentary or mechanical form, with the maker of the statements 'there was a clause that said the two men had to be paid for their stakes first. But since the takeover, KLW has been defaulting on the payment,' appearing in the article, and
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> b. working drafts of the article made in the course of publishing the said article".

The Broad Issues

3. There was no disguise that the purpose of the discovery application was to ascertain the source from which the Business Times obtained its information. It is obvious that KLW intends to take whatever action that it may be advised against the source. The assistant registrar dismissed the application and KLW appealed against that decision before me. Mr. Hri Kumar submitted on behalf of Singapore Press Holdings that KLW is not entitled to the discovery sought because it is, in substance, an application for an order that Business Times discloses its source of information. Mr. Kumar relies on the "newspaper rule" developed by the common law courts in England that protects the identity of a newspaper's source. Secondly, Mr. Kumar says, that even if we do not recognise such protection in Singapore, the court has a discretion in deciding whether such discover may be ordered. Thirdly, he submitted, even if discovery of the identity of the source is permitted, the documents required by KLW are irrelevant and that the information sought by KLW ought to have been asked for by way of interrogatory rather than a discovery of the specified documents.

4. KLW's application was made under O 24 r 5, which provides as follows:

> "1. The Defendants shall within 14 days of the order to be made hereon, give discovery of the following documents pertaining to the article entitled "*KLW in tussle with Barang Barang founder*" appearing in The Business Times on Friday, 22 February 2002, viz.: -
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> a. notes of interview, in documentary or mechanical form, with the maker of the statements "*There was a clause that said the two men had to be paid for their stakes first. But since the takeover, KLW has been defaulting on the payment,*" appearing in the said article, and
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> b. working drafts of the article made in the course of publishing the said article.
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> 2. The said discovery shall be made by way of a list of documents, together with an affidavit verifying the said list, filed and served upon the Plaintiffs within 14 days of the order made hereon, stating whether the listed documents are or at any time have been in the Defendants' possession, custody or power and, if not now in their possession, custody or power, when they parted with the same and what has become of them."

The "Newspaper Rule"

5. Counsel have conveniently referred to Mr. Kumar's mainline objection as the "newspaper rule". It appears from the reported authorities that the origin of this "rule" is vague. The rule has sometimes being conveniently regarded merely as a rule of practice (as per Lord Denning in *Att. Gen v Mulholland* -see below). In *Broadcasting Corporation Of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163 it is described as "an exception from the general rule that a party to a suit must make discovery of and produce for inspection all documents relevant to the action and answer all relevant interrogatories. The rule is that newspapers will not be compelled to disclose sources of information in pre-trial discovery, including both production of documents and answers to interrogatories". *Per* McMullin J. This rule was examined in some detail in *British Steel Corporation v Granada Television Ltd* [1980] 3 WLR 774. The facts there are fairly simple. Granada Television (the defendant) aired a documentary programme about the steel strike in Britain about that time. Confidential documents belonging to the British Steel Corporation (the plaintiff) were used in the programme. It was not

disputed that the person (or persons) who released those documents to Granada Television was in breach of his duty of confidentiality. Alexander Irvine QC, counsel for Granada Television made no attempt to suggest that the defendant received or used the documents in ignorance of their confidential nature. It was thus accepted for the purpose of the proceedings there that the defendant used the documents with the knowledge that it was in contravention of the British Steel Corporation's rights. Sir Robert Megarry V-C heard application by the British Steel Corporation at first instance. The plaintiff had sought, among other prayers, an order that Granada discloses the names of those who supplied it with the confidential documents. The primary proposition of Irvine QC, as summarised by Sir Robert Megarry, was that "the court has the discretion to refuse to order disclosure where disclosure would be in breach of some ethical or social value, and that the confidential relationship between newspapers or other media of information and their sources of information was an ethical or social value which the court ought to protect by refusing to order any disclosure". Sir Robert Megarry's order for disclosure was taken by Granada to the House of Lords, when it failed to persuade any of the Justices of Appeal in the Court of Appeal to its cause. Irvine QC's solitary success was to secure the dissent of Lord Salmon who was of the view that the "newspaper rule" had been too well established that "it would be wrong to sweep the immunity away" [1980] 3 WLR 774, at 846. Woodhouse J (and the two other appeal court judges) in the *Broadcasting Corporation Of New Zealand* case was in full agreement with Lord Salmon but he went further to express that the time had come to extend the rule even to disclosure at trial (See [1980] 1 NZLR 163, 169.)

6. The *British Steel Corporation* case follows closely to the modern juristic landmark, *Norwich Pharmacal v Customs And Excise Commissioners* [1974] AC 133. That was a case in which the court held that the defendants were obliged to reveal the names of illicit importers of a drug known as *furazolidone* on the ground that the illegal activity infringed the plaintiff's patent. The application was allowed on the ground that a person who is involved in a tortious act, even though innocuously, is obliged to assist those who are injured by that act, and must, therefore, disclose the names of the wrongdoers. So, strictly speaking, these two important cases were not dealing specifically with the newspaper rule although strong dicta on the rule are to be found in all the judgments in the *British Steel Corporation* case. Counsel also made reference to numerous other cases in various jurisdictions including, Hong Kong, Canada and Australia, that had considered the application of the newspaper rule; but none of them are from Singapore. The courts are not all of like mind on the question as to whether the rule exists or should exist, and if so, the basis for its existence.

7. I have set out above what the so-called "newspaper rule" is, but it will be helpful to examine a short passage from the judgment of Lord Denning M.R. in *Att. Gen v Mulholland* [1963] 2 QB 477, 490 in which he talks about the basis of that rule in these words:

> "The courts will not as a rule compel a newspaper in a libel action to disclose before the trial the source of its information. The reason is because, on weighing the considerations involved, the balance is in favour of exempting the newspaper from disclosure. The person who is defamed has his remedy against the newspaper and that is enough, without letting him delve round to see who else he can sue. It may rightly be said, as Buckley L.J. said in *Adam v Fisher* (1914) 30 TLR 288, CA, that the public has an interest to see that the newspapers are not compelled to disclose their source of information; unless, I would add, the interests of justice so demand. But that rule is not a rule of law; it is only a rule of practice which applies in

> those particular cases. It is made more general now and applies not only to newspapers but to other persons in the particular circumstances covered by RSC Ord 31, r 1A. It seems to me that whenever a case arises when the interests of justice or of the public require that there should be disclosure and the judge so rules, the newspapers must disclose the source of their information; they have no privilege in law to refuse."

That the precise reasons for this rule is not clear is evident from diverse judicial comments such as that of Lindley LJ in *Hennessy v Wright (No. 2)* 24 QBD 445, 449 and the Court of Appeal in *Hope v Brash* [1897] 2 QB 188 also referring to the rule as a "rule of practice" as did Lord Denning in the *Mulholland* case. In cases, such as *British Steel Corporation,* where attempts were made to rationalize the rule, the usual approach was to regard the public interest as the basis for its existence. The public interest at stake, in the opinion of the judges who adopted this approach, is the "public interest in the free flow of information" (See Lord Salmon's judgment in the *British Steel Corporation* case, and that of the Hong Kong Court of Appeal in *Sham John v Eastweek Publisher Ltd* [1995] 1 HKC 264. The Canadian courts in *Reid v Telegram Publishing Co Ltd* [1961] 28 DLR (2d) 6, and *Wismer v MacClean-Hunter Publishing Co Ltd* [1954] 1 DLR 501 (not followed in the later *Reid* case), and also the Australian decision in *McGuinness v Attorney-General For Victoria* 63 CLR 73, considered the rule in terms of public policy, which is really not quite the same thing as the public interest. In the case of the latter, an objective comparison of competing public interests (such as that between the desirability of a free flow of information and the needs of administering justice).

8. If the rule exists by reason of public policy or, in the public interest, then it can only be examined and established according to the circumstances of the individual jurisdiction. For my part, I see no need to adopt either public policy or public interest as the direct or main ground for recognising or not recognising the "newspaper rule" in our jurisdiction. I hold this view because I think that the issue may be dealt with sufficiently without reliance on public policy or a comprehensive balancing of public interests. Public policy, as all lawyers know, is an unruly horse - best left to be tamed in the stable of the legislature. I shall elaborate shortly as to the question of the public interest.

9. The privilege of exemption from the court's power to order disclosure in civil cases, has been granted, as far as I know, only under the Legal Profession Act. That privilege is extended not to the lawyer but to his client. Journalists, like members of respectable callings such as priests and doctors, have not this privilege. It is a privilege borne of a necessity towards the administration of justice; especially so in an adversarial system of litigation such as we have. The confidentiality between doctor and patient, or between priest and parishioner, is one aspect of their relationship (admittedly, a very important one) but it is not as all encompassing as that between the lawyer and his client. Confidentiality between the client and his lawyer is inherent, and arises as a matter of course, in the litigation process (and where potential litigation can be contemplated), and forms the very essence of that relationship. Furthermore, where the privilege is specifically created by statute, as in the case of the solicitor and his client, the material question is whether the courts may or ought to confer the same privilege to other categories of persons. I think not. The authorities from England and its antipodes rely on a rule that was recognised to be applied for over a hundred years, and which in turn, was based on a balance of public interests, (and possibly on grounds of public policy as well). The public interest that appears to be a matter of great persuasion in the judgments that Mr. Kumar relies on is the interest of the public to a free flow of information, and freedom of the press. Mr. Kumar further submitted that the sources of information to the press will dry up if confidentiality of their identity cannot be maintained. He argues that "investigative journalism has proved itself a useful

adjunct of the freedom of the press". In my view, this aspect of the public interest cannot be considered in isolation and must be evaluated against the corollary interest of the public in having a responsible press. But if Sir Robert Megarry thought that the term "investigative journalism" is a cant phrase, so too, I think would phrases such as "freedom of the press" and perhaps, also "responsible press" be. Tempting as it is to do so, I would decline to examine the meaning of those terms in this judgment because, as I have said, it is not necessary to do so. I am also loathe to apply a rule merely because it had stood for over a hundred years in England. From what I have stated above, it will appear that the so called "newspaper rule" was founded on public policy and public interest considerations, all of which must be discerned and evaluated in the circumstances of each individual jurisdiction. In the Hong Kong case of *Sham John v Eastweek* in overruling the judge at first instance, Nazareth JA in the Court of Appeal was of the view that the balance of public interest should be between the balancing of "the interest in upholding the administration of justice, the bringing of wrongdoers before the court, and the prevention of injustice" against the "free flow of information" [1995] 1 HKC 264, at 275. The Court Of Appeal there came down decidedly in favour of the free flow of information. I cannot find myself agreeing with that view. A free flow of information cannot mean an unstoppable flow of information. I fear that such a view will only encourage the unseen character assassin and other mischief makers. I doubt if the press would condescend to be used in that way. No argument was advanced to persuade me that if the rule is not recognised, the newspaper's sources of information would cease to come forward. I think that any such fear is more imagined than real. In most libel actions the plaintiff's grievances and compensation would have been adequately resolved through victory over the defendant publisher, and there is usually no need to go further; let alone go ahead before the action and the determination of whether there is in fact libel. The "newspaper rule" has had no history in our jurisdiction for me to consider adopting purely as a matter of practice. It is also well documented that its boundaries are ill-defined even in those jurisdictions that recognise it. So, for the avoidance of doubt, I will hold that there is no "newspaper rule" here. But that is not to say that the applicant is entitled to the information it sought - at this stage.

Pre-Trial Discovery

10. The views that I had expressed above generally relates not only to the discovery of information in the course of an action, where it may be presupposed that in ordering discovery the court will always have regard to the questions of relevancy and admissibility, but also to the pre-trial stage. It suffices for me to say that therefore, even in the course of an action (whether at an interlocutory stage or at trial) the court may not order disclosure of the identity of a newspaper's informant unless it thinks that it is relevant to do so. The present application before me is a pre-action discovery application. Slightly different considerations apply. *Prima facia*, in such circumstances, the courts are entitled to lean in favour of confidentiality. What is spoken in confidence ought to be kept in confidence. Confidentiality must, therefore, be observed unless the greater interests of justice demand otherwise. The burden of proof lies with the applicant.

11. Counsel for the plaintiff and defendant engaged themselves in an extensive debate over the scope and application of the Australian High Court decision in *John Fairfax & Sons Ltd v Cojungco* [1988] 165 CLR 346. The five-judge court delivered a single judgment holding that the media and journalists have no privilege against the disclosure of their sources of information where justice requires. However, it carried out a balancing exercise of the tension between the public interest to have a free flow of information and "the public interest of the litigant in securing a trial of his action on the basis of the relevant and admissible evidence", and concluded that that "is why the courts have refused to accord absolute protection on the confidentiality of the journalist's source of information, whilst at the same time imposing some restraints on the entitlement of a litigant to compel disclosure of the identity of the source. In effect, the courts have acted on the principle that disclosure of the source will not be required unless it is necessary in the interests of justice. So,

generally, disclosure will not be compelled at an interlocutory stage of a defamation or related action and even at the trial the court will not compel disclosure unless it is necessary to do justice to the parties"(*ibid* at page 354). I respectfully endorse this view and will only add that the term "in the interests of justice" ought to be regarded cautiously, and with regard to the specific rules pertaining to relevancy and admissibility of evidence.

12. Hence, the privilege, or otherwise, of a journalist from disclosing his source of information is only one aspect of question. A person may only be compelled to disclose confidential information only when the applicant can persuade the court that he has a right to that information. That right was well proved in the *Norwich Pharmacal* and *British Steel Corporation* cases. In the present case before me, the plaintiff applicant claims that the defendant has libeled it. It wants to know who gave the information to the defendant that was used in the libel, but the defendant disputes that their publication was libelous. Whether it is or not is the big question for the trial. The disclosure of the source is presently not relevant. In the *Norwich Pharmacal* and *British Steel Corporation* cases the applicant was able to identify the connection between the information held by the defendant to the injury it suffered and continues to suffer unless positive steps are taken to stop it. Nothing close to that has been put before me and, furthermore, until a real and substantive connection is made, there is no basis at this stage to assume that the notes and drafts of the journalist would be relevant to the alleged libel. I therefore hold that even if it is assumed that the identity of the informant is relevant at this point, the journalist's notes and drafts cannot be relevant. The issue may, of course, emerge again at trial when more facts become available, but that is another story.

13. The plaintiff is, of course, entitled to pray for an order for disclosure as part of the reliefs sought should the trial judge rule in its favour. There being no evidence before me that the plaintiff will be prejudiced if it has to wait until then, the orders sought by it should not be allowed and the assistant registrar was therefore correct in dismissing the plaintiff's application, whose appeal I now dismiss. I shall hear the question of costs at a later date if the parties are unable to agree costs themselves.

Sgd:

Choo Han Teck

Judicial Commissioner