

**ASSOCIATED DOMINIONS ASSURANCE
SOCIETY PTY. LTD. v. JOHN FAIRFAX &
SONS PTY. LTD.**

In Banco : Street C.J., Owen and Herron JJ.

Oct. 2, 1952.

PRACTICE.

**Documents — Discovery — Inspection — Libel —
Action—Affidavit—Sufficiency—Defendant's case—Re-
levance—Privilege—Claim by plaintiff—Common law
Procedure Act 1899, ss. 102, 103.**

An insurance company sued the proprietor and publisher of a newspaper for libel in respect of two articles attacking the actuarial solvency of the former. The defendant pleaded truth and public benefit. A consent order for mutual discovery and inspection in the usual form was made and affidavits of discovery filed by each party. The defendant applied to the Court for further and better discovery and pursuant to two successive orders by *McClemens J.* three further affidavits of discovery were filed on behalf of the plaintiff. The defendant thereupon applied for inspection of certain documents in respect of which the plaintiff claimed privilege, and *McClemens J.* ordered inspection of some but not others of the documents in respect of which the application was made.

The plaintiff appealed from this order.

Held, (1) that so far as discovery and inspection are concerned actions of libel stand in no different position from any other form of action at law;

(2) that unless there be evidence indicating the probability that an affidavit of discovery is untrue or misconceived the Court should not go behind it, but if there is ground for believing that such an affidavit is false or has been made under a mistaken view of the issues which will arise at the trial, discovery and inspection can be ordered, since to hold that an affidavit of discovery is always sacrosanct would be to defeat the very purpose for which the procedure of discovery and inspection is designed;

(3) that once a balance sheet becomes relevant to an issue, the books upon which that balance sheet was based are also relevant: See per *Farwell J.* in *Kent Coal Concessions Ltd. v. Duguid* (1910) 1 K.B. 904, at p. 915; and

(4) that the order of *McClemens J.* was rightly made, and the appeal should be dismissed.

**MOTION TO SET ASIDE ORDER FOR IN-
SPECTION.**

A life insurance company carrying on business in Sydney sued the proprietor and publisher of the "Sydney Morning Herald" newspaper for £100,000 for libel in respect of two articles which were published in that newspaper on 11th and 14th March, 1950, and which attacked the actuarial solvency of the plain-

tiff. The defendant pleaded truth and public benefit. On 4th April, 1951, an order for mutual discovery and inspection of documents in the usual form was made by consent and affidavits of discovery were duly filed on behalf of each party.

That of the plaintiff sworn on 28th May, 1951 discovered certain documents numbered 1-43. No objection was raised by the plaintiff to inspection by the defendant of the documents numbered 1-30 which comprised copies of documents filed in Court in the matter and the like, the correspondence between the parties and their solicitors in connection with the suit, and the following:—

- 21 Copy 1941 valuation.
Part copy 1946 valuation.
- 22 Copy Insurance Commissioner's report 1946-1950.
- 23 Copy Memorandum and Articles—Associated Dominions Assurance Society Pty. Ltd.
- 24 Copy Report and Balance Sheets for Associated Dominions 1940-1950.
- 25 Copy monthly reports to Insurance Commissioner for last 12 months.
- 26 Copy last Annual report to Insurance Commissioner.
- 27 Writ dated 14th December, 1949, in No. 3893 of 1949.
- 28 Copy declaration No. 3893 of 1949.
- 29 Letter 21st March, 1950 from Commonwealth Crown Solicitor requesting particulars.
- 30 Copy letter Harrie R. Mitchell & Evans supplying particulars.

Privilege was claimed, however, with respect to the other documents discovered which were described and identified only in the following terms:—

"Documents numbered 31-43 tied up in a bundle and marked 'B' and marked 31-43 and initialled by me the deponent".

By summons dated 18th September, 1951 the defendant sought further and better discovery of documents, inspection of documents disclosed but in respect of which privilege was claimed, and inspection of other documents not disclosed, and in particular discovery of the documents of the plaintiff showing the financial position of the plaintiff such as the books of account, bank account and other matters of a like nature. This application was heard by *McClemens J.* who on 1st November 1951, ordered further and better discovery of

documents additional to those numbered 1-30, and ordered in addition that the whole of the correspondence between the plaintiff's solicitors and the plaintiff and its officers together with counsel's briefs and opinions and copies thereof and all statements of witnesses and observations on brief be included in schedule 1 to such affidavit and be numbered, and that such of the plaintiff's books and records as showed its financial position as at the date of the publication complained of be set forth in schedule 2 to such affidavit, and that the plaintiff include in a further schedule or schedules to such affidavit any further documents and describe them sufficiently to indicate their general nature.

A second and a third affidavit sworn respectively 15th November, 1951, and 18th December, 1951, were filed on behalf of the plaintiff discovering certain documents numbered 31-51, those numbered 31-43 in these affidavits being the same as those numbered 31-43 in the first affidavit. The second and third affidavits taken together identified and described these documents in the following terms:—
 "Schedule 1. Documents and/or groups of documents numbered 31 to 33 inclusive, consisting of statements of witnesses, briefs and copy briefs to counsel, and correspondence between the plaintiff and its legal advisers.
 Schedule 2. Documents and/or groups of documents numbered 31-46 inclusive, consisting of such of the plaintiff's books and records as showed its financial position as at the date of the publication complained of".
 Schedule 3 listed in some detail the remaining documents in the plaintiff's possession power and control relating to the matters in dispute in the action.

The plaintiff claimed privilege from inspection for all of these documents. With respect to those listed in Schedule 1 the ground was that they comprised instructions to its legal advisers, letters of advice from them to the plaintiff in connection with the action, statements prepared with a view to prosecuting the same and instructing counsel, briefs and copy briefs to counsel and documents of a like nature. With respect to the documents listed in schedules 2 and 3 of the second affidavit the ground on which the plaintiff claimed privilege from inspection by the defendant was that such documents related solely to its own case and not to the case of the defendant and that such documents did not nor did any of them tend to support the case of the defendant nor did

they nor any of them cut down the case of the plaintiff.

On the application of the defendant and pursuant to the liberty to apply granted in the order dated 1st November, 1951, the matter again came before *McClemens J.* for determination of the question whether documents 31-51 had been sufficiently identified. *McClemens J.* held that they had not and on 19th March, 1952, ordered that a further and better affidavit be filed of the documents referred to in the second and third schedules of the third affidavit, excepting those numbered 47, 48 and 50, identifying such documents by marking, lettering, numbering or otherwise, sufficiently to enable the Court to determine whether the said documents or any of them if produced to the Court on call or subpoena or otherwise were the documents referred to in the affidavit.

When a fourth affidavit sworn 1st April, 1952, had been filed on behalf of the plaintiff complying with this last-mentioned order the defendant applied to the Court by summons taken out on 19th February, 1952, for an order for inspection of documents 34-51. *McClemens J.* on 5th May, 1952, ordered inspection of such of the plaintiff's books of account from which documents 21, 22, 24, 25 and 26 had been compiled as showed the financial position of the plaintiff at 30th March, 1950. The plaintiff appealed from this order.

N. A. Jenkyn Q.C. and *Dr. F. Louat*, for the plaintiff, referred to *Zierenberg v. Labouchere* (1), *Yorkshire Provident Life Assurance Co. v. Gilbert and Rivington* (2), *Arnold and Butler v. Bottomley* (3), *Sunday Times Newspaper Co. Ltd. v. Sun Newspaper Co. Ltd.* (4), *Kent Coal Concessions Ltd. v. Duguid* (5), *Roberts v. Oppenheim* (6), *O'Rourke v. Darbishire* (7), *Lauzanne v. Resch* (8), *Smith's Weekly Publishing Co. Ltd. v. Sunday Times Newspaper Co. Ltd.* (9), *Baird v. Crawford* (10), *Brookes v. Prescott* (11), and *Westminster Airways Ltd. v. Kuwait Oil Co. Ltd.* (12).

W. J. V. Windeyer Q.C. and *N. McIntosh*, for the defendant, referred to *Hunt v. Hewitt* (13), *Smith's Weekly Publishing Co. Ltd. v.*

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| (1) (1893) 2 Q.B. 183. | (8) (1925) 42 W.N. |
| (2) (1895) 2 Q.B. 148. | (N.S.W.) 149. |
| (3) (1908) 2 K.B. 151. | (9) (1923) 31 C.L.R. 552. |
| (4) (1919) 36 W.N. | (10) (1899) 20 L.R. |
| (N.S.W.) 72. | (N.S.W.) 195. |
| (5) (1910) 1 K.B. 904; | (11) (1948) 2 K.B. 133. |
| (1910) A.C. 452. | (12) (1951) 1 K.B. 134. |
| (6) (1884) 26 Ch. D. 724. | (13) (1852) 7 Exch. 236; |
| (7) (1920) A.C. 581. | 155 E.R. 931. |

Sunday Times Newspaper Co. Ltd. (14), *Jones v. Monte Video Gas Co.* (15), *Yorkshire Provident Life Assurance Co. v. Gilbert and Rivington* (16); *The Macgregor Laird* (17); *Pritchett v. Smart* (18); *Woolley v. North London Railway Co.* (19); *Osborn v. London Dock Co.* (20); *Hill v. Campbell* (21); *Thompson v. Robson* (22); *Hennessy v. Wright (No. 2)* (23); and *British Association of Glass Bottle Manufacturers Ltd. v. Nettlefold* (24).

Cur. adv. vult.

Oct. 2.

STREET C.J. In this matter I am of opinion that the appeal should be dismissed with costs. I have had the opportunity of reading the reasons prepared by my brother Owen, and desire to add nothing to them.

OWEN J. This is an appeal from an order made by *McClemens J.*, directing the plaintiff to make available for inspection by the defendant certain of the plaintiff's books of account and records scheduled in an affidavit of discovery of 1st April, 1952. In that affidavit the deponent Hayes, who is the general manager of the plaintiff, claimed that the documents in question were privileged from inspection and the question is whether, in the circumstances of this particular case, the learned Judge who made the order was entitled to go behind the statements in the affidavit and order that these books and records be made available for inspection.

The history of the case is as follows. The plaintiff is a life insurance company carrying on business in Sydney. In April, 1950, the defendant published an article which contained critical comments on the plaintiff's financial position and on its management, and urged that either the State or the Federal Government should take action to safeguard the interests of the policy holders. Amongst other things, the article stated that the plaintiff was "not actuarially solvent"; that a report of the Commonwealth Insurance Commissioner dis-

closed that it was "the only life office in Australia with a deficiency of assets compared with its actuarially calculated liabilities to the public"; that the same report showed that the company's assets were £217,544 short of its actuarial liability on 30th June, 1946, and that its true financial position was more unsound than was shown by this deficiency because it had included in its assets an amount of £119,911 under the heading of "Establishment Account". Other allegations, which it is unnecessary to detail, were made relating to one, Page, who was then its managing director, and the relationship between him and the plaintiff. The plaintiff thereupon commenced an action for libel, and the defendant pleaded truth and public benefit. In April, 1951, a consent order for discovery and inspection was made, and on 28th May, 1951, Hayes swore an affidavit of discovery. Thirty documents were included in the first part of the schedule to the affidavit as being open for inspection. They included copies of the plaintiff's reports and balance sheets from 1940 to 1950, copies of reports made by the Commonwealth Insurance Commissioner during the same period, copies of the plaintiff's monthly reports to the Commissioner, and an annual report to the same official. The second part of the schedule was in these terms: "Documents numbered 31 to 43 tied up in a bundle and marked 'B' and marked '31 to 43' and initialled by me the deponent". As to these the deponent claimed privilege from inspection "upon the grounds of legal professional privilege in so far as such documents are instructions to its legal advisers, letters of advice from them to me and to the plaintiff company in connection with the said action and statements prepared with a view to prosecuting the same and instructing counsel, briefs and copy briefs to counsel, and documents of a like nature, or that such documents relate solely to its own case and not to the case of the defendant company and that such documents do not nor do any of them tend to support the case of the defendant company nor do they or any of them cut down the case of the plaintiff company." The defendant then took out a summons for further and better discovery and for an order giving it the right to inspect documents in addition to those mentioned in the first part of the schedule to Hayes' affidavit. This summons came before *McClemens J.* and the learned Judge, for reasons with which I agree, took the view that, having regard to the issues raised by the pleadings, it was impossible

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| (14) (1923) 31 C.L.R., at p. 562, 563. | (20) (1855) 10 Exch. 698 ; 156 E.R. 620. |
| (15) (1880) 5 Q.B.D. 556. | (21) (1875) L.R. 10 C.P. 222. |
| (16) (1895) 2 Q.B., at p. 153. | (22) (1857) 26 L.J. Exch. 367. |
| (17) (1866) L.R. 1 Adn. 307. | (23) (1888) 24 Q.B.D. 445, at p. 448. |
| (18) (1849) 7 C.B. 625; 137 E.R. 247. | (24) (1912) A.C. 709, at p. 714. |
| (19) (1869) L.R. 4 C.P. 602, at p. 612. | |

to believe that the relevant documents in the plaintiff's possession in respect of which privilege was claimed could number 13 only. Accordingly, he ordered that the plaintiff make a further affidavit of discovery scheduling, amongst other things, all its books and records showing its financial position as at the date of the publication of the article complained of.

On 15th November, 1951, Hayes swore another affidavit in which he said that the plaintiff had in its possession power and control the "documents and/or groups of documents contained in schedules 1, 2 and 3" of the affidavit and numbered 31 to 51. As to the documents mentioned in schedule 1, which were numbered 31 to 33, he claimed privilege from inspection on the ground that such documents were documents passing between the plaintiff and its legal advisers and documents prepared with a view to prosecuting the action and instructing counsel. As to the documents specified in schedules 2 and 3, numbered respectively 34 to 46 and 47 to 51, he claimed privilege from inspection on the ground that such documents related solely to the plaintiff's case and not to the case of the defendant and did not tend to support the defendant's case or cut down the plaintiff's case. Schedule 2 of the affidavit was in these terms: "Documents and/or groups of documents numbered 34 to 46 inclusive". Schedule 3 referred with some particularity to a number of other documents with which the present appeal is not concerned.

On receipt of this affidavit the defendant's solicitors wrote to the plaintiff's solicitors alleging that in a number of respects this affidavit did not comply with the order which had been made for further and better discovery. In particular, they complained that the affidavit did not state that the documents to which it referred were the only documents in the plaintiff's possession relating to the case, that the documents were insufficiently identified and that, as to some of them, they appeared to have been wrongly included amongst the documents in respect of which privilege from inspection was claimed. I may say in passing that the importance of insisting that documents included in a discovery affidavit are properly identified or capable of identification is obvious, since in the absence of some such precaution unscrupulous litigants would find it easy at a later stage either to insist or deny that a particular document had been discovered.

The attention of the plaintiff's advisers having been called to the inadequacies of the affidavit,

Hayes swore a further affidavit on 18th December, 1951, in which he said that to the best of his belief the documents mentioned in the three schedules to the affidavit were the only documents in the plaintiff's possession and control relating to the matters in dispute, other than those included in schedule A to his earlier affidavit of 28th May, 1951. He said also that the "documents and/or groups of documents contained in schedule 2 and numbered 34 to 46 consist of such of the plaintiff's books and records as show its financial position as at the date of the publication complained of". Schedule 2 consisted of "documents and/or groups of documents numbered 34 to 36". Privilege from inspection was claimed for the documents in the 2nd and 3rd schedules on the ground that they related solely to the plaintiff's case and not to that of the defendant and that they contained nothing to cut down the plaintiff's case or support the defendant's case. Privilege was also claimed on the ground "that the action being one for libel in which justification has been pleaded, the defendant is not entitled to production and inspection".

The matter was again brought before *McClemens J.*, on an application by the defendant, when he ordered the plaintiff to make a further and better affidavit identifying the documents in schedule 2 "by marking lettering numbering or otherwise sufficiently to enable the Court to determine whether the said documents or any of them if produced to the Court on call or subpoena or otherwise are documents referred to in the said affidavit". As a result of this order Hayes made yet another affidavit setting out more specifically the documents in schedule 2 and stating that each of them had been initialled by him and by the justice of the peace before whom the affidavit was sworn.

In the result the plaintiff has discovered and made available for inspection copies of its reports and balance sheets from 1940 to 1950, a number of reports made by it to the Commonwealth Insurance Commissioner, copies of some reports made by that Commissioner, a copy of what is called the "1941 Valuation" and a part copy of a "1946 Valuation", but has claimed that its books and records from which those reports, balance sheets, etc., were compiled are privileged from inspection. *McClemens J.* was of opinion that in the circumstances of the case he was entitled to go behind the plaintiff's affidavits of discovery, and accordingly he ordered that the defendant

should be allowed to inspect all the plaintiff's books of account and records from which were compiled the reports and balance sheets and other documents already made available for inspection. In doing so he relied upon the remarks of *Farwell L.J.*, in *Kent Coal Concessions Ltd. v. Duguid* (25) to the effect that once a balance sheet becomes relevant to an issue, the books upon which that balance sheet was based are also relevant.

It is true, as counsel for the appellant has argued, that a defendant in a libel action who has pleaded justification is not to be allowed to go on a mere "fishing expedition" into the plaintiff's records in the hope of finding there something which may supply him with the evidence necessary to support this plea. But whether a particular expedition is a mere "fishing expedition" depends upon the meaning of that phrase. A "fishing expedition", in the sense in which the phrase has been used in the law, means, as I understand it, that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not. If, however, there is material before the Court pointing to the probability that a party to litigation has in his possession documents tending to destroy his case or to support the case of his opponent and that privilege from inspection of such documents has been wrongly claimed, an application by that opponent to be allowed to inspect them cannot properly be described as a mere "fishing expedition". In this respect actions of libel do not, in my opinion, stand in any different position to any other form of action at law. A defendant who has pleaded justification in libel is certainly not to be permitted to range at large through the plaintiff's records merely because he hopes to find there matters which will enable him to justify the libel. But if in such an action, as in any other case, ground is afforded for believing that an affidavit of discovery is false or has been made under a mistaken view of the issues which will arise at the trial, discovery and inspection can be ordered. Obviously in a libel action in which justification has been pleaded in general terms and without sufficient particularity to enable the issues to be defined, inspection will not be ordered. To make an order in such a case would be improper and unjust. The authorities cited in argument on the point are conveniently

collected in *Gatley on Libel and Slander*, 2nd ed. (1929), pp. 635-637. The same principle is to be found in the English cases dealing with the administration of interrogatories on behalf of a defendant who has pleaded justification. "The Court will not allow the defendant to administer interrogatories in order that he may be able to make out a defence of justification of which he is altogether ignorant". (*Gatley on Libel and Slander*, 2nd ed. (1929), p. 618). "The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case . . . of which at present he knows nothing . . . the rule against 'fishing' interrogatories applies": *Hennessy v. Wright* (No. 2) (26); *Russell v. Stubbs Ltd.* (27). But, in my opinion, this is not such a case. The issues which will be litigated at the hearing appear plainly enough from the pleadings and the plea of justification read in the light of the article sued upon provides its own sufficient particulars. Apart from the matters relating to the plaintiff's then managing director, as to which no question arises on this appeal, it is clear that what the defendant alleges is that for the reasons stated in the article the plaintiff was at the relevant time "actuarially insolvent". And if it appears, as I think it does here, to be more probable than not that the plaintiff's claim of privilege from inspection is false or based upon a wrong conception of the issues, I have no doubt that the Court can and should intervene, whether the action be one of libel or for breach of contract. Discovery and inspection are intended to be aids to justice and to the elucidation of the truth, and to hold that an affidavit of discovery is always sacrosanct would be to defeat the very purpose for which the procedure of discovery and inspection is designed.

It is unnecessary in this case to consider whether Mr. *Windeyes's* interesting argument as to the methods which he submits may be used by a litigant to impeach his opponent's affidavit of discovery is correct or not. At least it is clear, I think, that the powers given by s. 102 of the *Common Law Procedure Act* are not limited by the practice and procedure applicable in jurisdiction where discovery and interrogatories are linked together (*Smith's Weekly Publishing Co. Ltd. v. Sunday Times Ltd.* (28); per *Isaacs* and *Rich JJ.*). But I agree that

(26) (1888) 24 Q.B.D., at p. 448. (28) (1923) 31 C.L.R., at p. 559.

(27) (1913) 2 K.B. 200, at p. 204.

(25) (1910) 1 K.B., at p. 915.

unless there be evidence indicating the probability that an affidavit of discovery is untrue or misconceived, the Court should not go behind it. Here an examination of the documents which have been made available for inspection by the plaintiff seems to me to disclose matter which, *prima facie* at least, affords support to the plea of justification; and if these documents were compiled, as presumably they were, from the plaintiff's books and records, then those books and records themselves would equally afford *prima facie* evidence in support of the plea and should be made available for inspection. If the documents which the plaintiff has made available for inspection had contained nothing tending to cut down its case or to support the case for the defence, the mere fact that they were compiled from or based upon the plaintiff's books and records would not give the defendant any right to inspect those books and records and, to this extent, I am unable to agree with some of the reasons given by the learned Judge of first instance. But if the documents made available for inspection contain matter tending to support the defence or to cut down the plaintiff's case, I have no doubt that the books and records from which those documents have been compiled should be made available for inspection. I turn then to those documents. They show that in June, 1946, the plaintiff's Life Insurance Statutory Fund stood at £322,239. Included amongst its assets was an item of £119,911 described as "Establishment Account", and of this figure £91,111 was treated as being an asset of the Life Insurance Statutory Fund. The actuarial deficiency in that fund in 1946 is disclosed as amounting to £217,544, and this actuarial calculation is shown to have been based upon an assumption that the plaintiff's funds would earn interest at the rate of four per cent. Unless this estimate of the future rate of earning should be attained, the plaintiff's true actuarial position would have been overestimated as to assets and underestimated as to liabilities. In fact in 1948 the rate of interest actually earned was just under two and a half per cent., and in 1949 just over three per cent., facts which suggest, *prima facie*, that the actuarial deficiency in the statutory fund in 1946 would at least have grown no less at the time the article was published. And it must be borne in mind that merely to maintain the existing actuarial position of that fund in the years following 1946, the plaintiff would have had to earn four per

cent., not only on the assets of that fund, including the Establishment Account of £91,111, but also on the amount of the actuarial deficiency of £217,544. Counsel for the plaintiff has sought to meet these points by submitting that the fact that some years before the publication of the matter complained of the plaintiff's accounts showed a deficiency calculated actuarially upon an interest rate of four per cent., and that the rate of interest subsequently earned was less than the figure taken for the purposes of that calculation, affords no evidence that at the time of the publication of the matter complained of the plaintiff's position had not improved. Whether there had or had not been such an improvement in the plaintiff's financial position, and the extent of any such improvement will, of course, be a matter which will have to be ventilated and decided at the trial, and I do not, therefore, do more than say that if the plaintiff's reports and balance sheets for 1947, 1948 and 1949 are examined they do not suggest to me, at least without further explanation, that the financial position of the plaintiff's insurance business and the actuarial solvency or otherwise of its Life Assurance Fund had changed for the better.

I am of opinion that the order of the learned Judge was rightly made, and that this appeal should be dismissed with costs.

HERRON J. I likewise agree, and I do not find it necessary to add anything.

Appeal dismissed with costs.

Solicitors for the plaintiff: *Harrie R. Mitchell & Evans.*

Solicitors for the defendant: *Stephen, Jaques, & Stephen.*

O.M.L.D.

KRAMER v. DUGGAN

In Equity: McLelland J.

Dec. 6, 7, 1954; Feb. 9, 10, 1955.

FRAUD, MISREPRESENTATION AND UNDUE INFLUENCE.

Innocent misrepresentation—Sale of land—Contract—Completed by conveyance—Rescission—Damages.