THE COJUANGCO CASE

THE CASE HISTORY

Peter Gillies

The recent High Court decision (on 26 October, 1988) in *John Fairfax & Sons Ltd v Cojuangco*, is of interest both for its general observations on the so-called "newspaper rule", and the application of this rule, or a discretion corresponding with that embodied in it, in the context of an application for a hearing pursuant to Part 3 r1(1) of the Rules of the Supreme Court of New South Wales

Rule 1(1) provides that a person who, after having made reasonable enquiries, is unable to ascertain the identity of a person for the purpose of commencing proceedings against that person (etc) and who believes that some person may have knowledge of the facts (etc) tending to assist in ascertaining the identity or description of the person concerned, may apply to the court for an examination of that person in order to determine the identity of the first person, or for an order compelling the production of documents (etc) bearing upon the issue. This provision is not common in Australia, but it is of obvious importance in the context of the publication of alleged defamations by the media, given that a large proportion of such actions are launched in NSW.

What the rule does of course, is provide a possible device for the obtaining from a media organisation or journalist, the sources of a published item, at the instigation of a person who believes that he or she has been defamed by this publication.

In the *Fairfax* case one Eduardo Cojuangco sought an order pursuant to the rule, for the examination of a journalist employed by Fairfax in order to determine the sources of comment made by the journalist in an article published by Fairfax in the *Sydney Morning Herald*. The article dealt with the Philippines' foreign debt (among other matters). It was headed "Corruption as an art form", and made allegations against the respondent, giving certain sources which were described generally but not by name. He thereupon applied for preliminary discovery pursuant to r1(1), in order that he could bring proceedings in defamation against the persons who had provided the information used as a basis for the comments regarding him, something which could be done only after these persons could be identified. Examination was sought of the journalist concerned. When the matter came on for hearing before Hunt J in the Supreme Court of New South Wales, the appellants (the journalist and Fairfax) contended that the application for examination should be refused on discretionary grounds r1(1) quite apart from the newspaper rule, assuming its applicability does confer a discretion on the court).

Hunt J decided in favour of the respondent (the applicant). The matter was taken on appeal to the Court of Appeal in NSW and then to the High Court. Both courts held in favour of the respondent.

The High Court commented, as mentioned, on a number of matters. Before its specific findings in relation to the application are concerned, its general comments on the newspaper rule might be referred to.

THE NEWSPAPER RULE

The High Court, in a joint judgment of all the justices sitting, commented generally on the newspaper rule. It was noted that the newspaper rule, which was invented by the English courts, may be invoked by newspaper companies and their full-time journalists (the status of freelance journalists is uncertain). It represents a quasi-privilege which may be invoked in interlocutory proceedings to resist compulsory disclosure of the sources of articles, at the instigation of persons alleging that they have been defamed and who want to sue the source. The rule, the High Court explained, is merely one of practice — it is not a rule of evidence, nor is it some more broadly based common law discretion (such as legal professional privilege, or the privilege against defamation).

Nonetheless, the newspaper rule is de facto a type of privilege. The newspaper rule is, the court noted, usually spoken of as being confined in its operation to interlocutory proceedings, rather than the trial proper. But as the court recognised, it may well be able to be invoked by a person giving evidence at the trial (a person who would otherwise be compelled to answer, in common with all other witnesses not enjoying a privilege on the particular occasion.) Logically, too, it should be able to be invoked in other contexts of compulsory disclosure. However, authority clearly recognises that it cannot be invoked before commissions of enquiry (such as Royal Commissions). The rule confers a qualified privilege only — the court has a discretion in deciding whether to extend its benefit. It may only be invoked by the print media and its journalists, not the electronic media. The reason for this discrimination is historical.

The court considered that the true basis of the rule is a policy one and not a technical one. The public has an interest in the free flow of information and comment in the print media. However, there is a countervailing public interest also in the due processes of justice — in particular, in arming the person who alleges that he or she has been defamed by a newspaper, with the means of ascertaining the unidentified source so as to proceed directly against that person. To bring these proceedings against the newspaper rather than its source, may not be effective — for example, in this case the contention was that the applicant, Cojuangco, would be met by a s22 defence [s22 of the Defamation Act 1974 (NSW)] if he sued Fairfax, which defence could not be invoked by the sources.

In determining whether the newspaper or journalist should have the benefit of the newspaper rule, the High Court said the court must balance the countervailing public (and overlapping private) interests described above. The High Court summed things up in the following passage:

> "[The competing public interest considerations] explain 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 according to the prin-

THE COJUANGCO CASE

ciple that disclosure of the source will not be required unless it is necessary in the interests of justice. So generally speaking, 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 justice between the parties."

This passage implies that the newspaper will be on strong ground both pre-trial and during trial, unless the requirements of justice dictate compulsory disclosure. (Presumably justice would not require this if the newspaper company itself is available as a target. The existence of defences available to the newspaper but not the source, however, indicates that the newspaper will not always be a suitable target.)

Elsewhere, though, the court commented that "we would not wish it to be thought that we necessarily accept that the newspaper rule always applies in interlocutory proceedings in the absence of special circumstances." It may be that "... all the applicant has to show is that the making of an order [for compulsory disclosure] is necessary in the interests of justice. But that is a question for another day." The effect of this of course is to leave the newspaper and its journalist potentially more exposed than some might have previously thought.

THE COJUANGCO APPLICATION

The court considered that the newspaper rule did not apply directly to a r1(1) examination, or application for one. This was simply because the application for such an examination does not represent the commencement of defamation proceedings against a person — it cannot because by definition the identity of the prospective defendant or defendants is unknown. However, the court considered that given that the rule vested a discretion in the court hearing such an application, it was proper to apply a newspaper rule type consideration in exercising this discretion. In light of this, the judge had exercised the discretion correctly. It was relevant to consider for example, that the s22 defence would be a live issue if proceedings were instigated against the newspaper company and not the sources (should they remain unknown). This was relevant in determining whether defamation proceedings against Fairfax were an adequate remedy. A finding (contrary to that made) that s22 would not assist Fairfax, would mean that pursuit of Fairfax would be an adequate remedy, in lieu of pursuing the sources (who could not invoke s22). It was further relevant that Fairfax had not indicated that it would renounce the defence. The court rejected the claim that Hunt J had failed to give due weight to the newspaper rule or at least the policy factors required to be weighed by it.

In concluding against the appellants and in favour of Cojuangco, (or more strictly, in holding that Hunt J had exercised his discretion in favour of Cojuangco correctly), the court noted that the latter had established that he might well be left without an effective remedy if his application was to be refused, and that as such, the interests of justice required the order. In the present context, it was not necessary for an applicant to make out special circumstances:

"What an applicant must show is that the order sought is necessary in the interests of justice; in other words, the making of the order is necessary to provide him with an effective remedy in respect of the actionable wrong of which he complains."

This he had done. The court further commented that it would be "incongruous and unjust that the appellants, having derived the advantage that comes from identifying in general terms the sources of the allegations that they make against the respondent, should now seek to deny him the opportunity of identifying precisely those sources, by invoking the newspaper rule".

COMMENT

The case highlights the unsatisfactory nature of the law in a critical area where a number of important issues and values intersect — the interests of justice, free speech, the free flow of information and comment by the media, and the protection of reputation.

The newspaper rule is in an unsatisfactory state. It is understandable that the common law has not evolved a general press journalist's privilege — the law has been reluctant to create global privileges except in truly vital areas such as legal professional privilege. In default of such a development in the media context, the courts have evolved this newspaper rule which anomalously, is described as a mere rule of practice. It is of course much more than this and represents a quasi-privilege. But it is a quasi-privilege of a most qualified and uncertain type. The discretionary nature of its application means that the press and journalists must be to a degree faint-hearted. Its restriction to defamation cases is anomalous. Its restriction to the print media is anomalous. Its restriction to the organisations and full-time employed journalists (if such is the case) is anomalous. Restricting it (at least technically) to interlocutory proceedings is anomalous (although as this case illustrates, wherever a judicial discretion is extant, as in the case of r1(1) proceedings, the substance of the rule may be invoked; and the court did comment incidentally that the rule or an equivalent discretion may be able to be invoked during the trial proper).

It is not easy to formulate answers to the problems in this area. The process of reform logically reaches into the heart of the defamation doctrine itself. Two suggestions are made. The press should be given a formal general privilege from disclosing sources, except in critical areas such as the prevention of investigation and prosecution of serious crime, and in relation to genuine national security matters. To do otherwise is of course to produce the potential for unduly circumspect journalism. However, the press should not thereby be permitted to stifle the legitimate pursuit of civil law remedies by persons aggrieved by the publication of defamatory matter. One solution might be to assimilate the legal position of the press to the source, viz, by providing that the media organisation must stand in the shoes of the source, legally speaking, claim-

THE COJUANGCO CASE

ing no greater (or lesser) legal defences than are available to the source (such as truth and fair comment). This would ensure that the prospective litigant is not without an effective remedy.

Such a change may be objected to — much will depend on the nature of the defences available in the given jurisdiction. Certainly it is understandable that a newspaper organisation in NSW might be reluctant to waive a s22 defence as the price of securing immunity for its sources.

Another possible solution is the creation of a statutory indemnity for (otherwise unprotected) sources, one conferred on them by the media organisation publishing their allegations. Such an indemnity would have to be subject to safeguards, such as belief by the source in the truth of the information supplied.

An interim solution in a case like *Cojuangco* would be the waiving by the newspaper of its s22 defence, which would mean that it would thereby become an effective target with the result that the aggrieved party would have an effective remedy without the need to resort to the sources. Such a waiver could in the typical case take the form of an undertaking not to call the journalist concerned as a witness (see the statement by the trial judge in the *Cojuangco* case subsequent to the High Court's decision, reported in the *Sydney Morning Herald* on 25 November, 1988).

The dilemma exposed by the facts in a case like *Cojuangco* is not easily resolved. It is yet another fact situation justifying the case for what has become a cliche — the need for a comprehensive reform of defamation law on a national basis.

Peter Gillies

THE STATEMENT OF JUSTICE HUNT

This statement was read in court on 25 November, 1988 by the judge in the case brought by Filipino businessman Mr Eduardo Cojuangco against journalist Peter Hastings and *The Sydney Morning Herald.*

The application made by Mr Cojuangco in this case for the disclosure of Mr Hastings's sources of information was heard almost three years ago, on December 18, 1985.

My judgment was delivered on January 16, 1986.

Appeals to the Court of Appeal and to the High Court have been heard finally and dismissed, and the orders which I made, effectively obliging Mr Hastings to disclose the identity of his sources (which he described as "a senior American bank official and prominent local businessman"), have now become operative.

It is somewhat of an understatement to say that a lot of water has passed under the bridge in the three years since those orders were made.

In the article which he wrote (published in February 1985), Mr Hastings described Mr Cojuangco as a close crony of President Ferdinand Marcos of the Philippines.

I recorded the evidence as describing Mr Cojuangco as a prominent businessman in the Philippines who had been appointed as an "Ambassador at large" by the Philippines Government.

None of this is any longer true.

Marcos has been thrown out of the Philippines, and appears no longer to be himself a political force there.

Mr Cojuangco, obviously enough, no longer holds the office of Ambassador.

I am also told that Mr Cojuangco's Philippines passport has been cancelled, and that he is no longer allowed into either the Philippines or Australia.

Those allegations may well be disputed by those who continue to appear for Mr Cojuangco, but the underlying proposition remains true that any fear held by Mr Hastings' informants of retaliation against them by the authorities in Manila if their identity is disclosed must surely be considerably less now than it was in 1985.

It is clearly open to Mr Hastings to seek from his sources a release from his obligation as a journalist to protect them from disclosure.

As I stated in my judgment in this case, such a release has often been achieved in the past by journalists, especially when encouraged to do so by the prospect of going to jail for contempt. That is the present position relating to Mr Hastings.

The newspaper company which publishes *The Sydney Morning Herald,* similarly, is in a somewhat different position now to that in which it found itself in 1985.

At that time, it declined to state unequivocally (or at all) that, despite what appeared otherwise to be a strong defence of statutory qualified privilege available to it if it were sued by Mr Cojuangco (provided that it disclosed its sources of information), it would not call Mr Hastings as a witness.

Had the newspaper made such a statement then, as I made it clear at the time, it would have become obvious that such a defence would inevitably have failed had the newspaper been sued by Mr Cojuangco, and I would have held that Mr Cojuangco was likely to obtain all the relief to which he was entitled in such an action.

There would have been no necessity for Mr Cojuangco to know Mr Hastings's sources, and his application would have been dismissed.

Since 1985, the newspaper has had the opportunity to test that ruling all the way to the High Court. It now knows that, in the absence of legislation, it can avoid the orders being put into effect against Mr Hastings only by an unequivocal statement that it does not intend to call Mr Hastings as a witness if sued by Mr Cojuangco.

That has always been the way in the past in which newspaper companies have avoided their journalists having to disclose their sources.

The price which must be paid for maintaining this claim of privilege even at the trial (in the face of repeated rulings that it no longer exists at that

THE COJUANGCO CASE

stage) has been that the defence of qualified privilege is effectively lost, and the newspaper must fight the case on the issue of truth or comment.

None of that is new. I repeat, that has always been the position. There is nothing to stop the newspaper making that statement even now.

Since the High Court gave judgment in this matter, there has been a sustained campaign by the newspaper which (whether intended or not) has every appearance of offering Mr Hastings as a martyr to the cause of what is called the freedom of the press.

I personally regard Mr Hastings as a very reputable, responsible and distinguished journalist.

I want to make it abundantly clear that I do not propose to allow this court to be used as part of that campaign by putting him in jail just to give some verisimilitude to the claim fostered by this campaign that it is only the misguided law which will send Mr Hastings to jail in this case.

As I have pointed out, the remedy here lies in the hands of both Mr Hastings and the newspaper. Mr Hastings must seek to obtain a release from his obligation of confidence.

If he does not even attempt to do so, it is his own inaction which may determine his fate. Similarly — or even more strongly — if the newspaper really cares about the claim made by its journalists that their sources should be protected, it has only to undertake not to call Mr Hastings in any action brought by Mr Cojuangco, and Mr Hastings will now be freed of any obligation to disclose those sources.

If the newspaper does not give that undertaking, then the attitude of the newspaper will be seen for the political manoeuvre which it now appears to be, to force the court to jail Mr Hastings and thereby to embarrass the legislature into the action which it seeks.

I do not myself wish to engage in any political debate about this matter, but it is worthwhile underlining these matters:

- The so-called newspaper rule has never protected the journalist's sources at the trial of the action.
- That has been laid down as the law by the High Court since at least 1940.
- The present application is in no way a whittling down of the newspaper rule. Anyone who asserts to the contrary has deliberately misstated what was made clear in my judgment.
- A free press and the free flow to the media of information in which the public has a legitimate interest or concern is of vital importance to our society.
- That importance is, however, outweighed in the very limited case only where the disclosure of the source of the information is necessary in the interests of justice.
- That has also been the law as laid down by the High Court since at least 1940. The paramountcy of the interests of justice was further underlined by the High Court in this present case.
- While the public has a substantial social concern that there should be a free flow of information to the media as its representative, it also has a substantial social concern to see that that information is accurate.
- The likelihood of its accuracy can usually be judged only by a disclosure of the identity of its source. That fundamental proposition has always been recognised.
- Just as the media continually asserts that governments should be accountable to the public, so should the media itself be accountable.
- Where the media does not assert that what it published was true, but instead relies upon the statutory defence that what it published was simply of legitimate interest or concern to the public, the public is entitled to know the position, standing, character and opportunities of knowledge of the informant in order to judge for itself the weight to be afforded to the information which he [the informant] gave.
- That has been the law since the beginning of this century.

What I want to make clear is that, if Mr Hastings has to go to jail in this case, it will be because the newspaper

DEFENDING PRESS FREEDOM WITH AN EYE TO RESTRAINT

Peter Cole-Adams

These are worrying times for those who believe a free press is a necessary pre-condition of a healthy democracy. Hardly a week goes by without journalists and publishers facing some court challenge to their ability to publish material that the people need in order to be adequately informed.

This week produced another case of what Americans call "prior restraint" — a court order aimed not at punishing publication, but at preventing or at least delaying it. This follows two cases, one in Victoria and one in New South Wales, in which journalists have been ordered to reveal sources of information.

The prior restraint case involves that resourceful and remorseless investigative reporter Brian Toohey, and his adventurous fringe magazine, 'The Eye'. Because the case is still locked up in the legal process, it is not possible to say much about the specific details of the affair.

About all that is known at present is that, earlier this week the Minister for Foreign Affairs, Senator Evans, sought and was granted, a temporary High Court injunction to prevent publication in the latest edition of 'The Eye' of material about the operations of the Australian Security Intelligence Service (ASIS).

The senator affirmed that such publication would prejudice the national interest. But as it turned out, the new edition of 'The Eye' was already available and contained no article remotely resembling that which the minister was so anxious to censor.

On Thursday, however, Senator Evans's counsel again went before the High Court and persuaded Justice Sir William Deane to extend his injunction until next Wednesday, when the case will go before the Federal Court. At least until then, and perhaps not even then, the public will have no idea

THE COJUANGCO CASE

what information Senator Evans and his advisers believe Mr Toohey has, why they are convinced he is likely to publish it, or why they believe, such publication would injure the national interest.

All we know is that Mr Toohey has been restrained from revealing the country, or any current or former ASIS officer serving in that country, involved in an intelligence operation referred to in a document that is to be delivered to the Federal Court in a sealed envelope after the name of a certain person has been deleted.

Do not misunderstand me. It is not my contention, nor that of any responsible journalist or editor I know, that there is no such thing as information that needs to be kept secret in the interests of national security (and, for that matter, in the interests of the safety of Australian intelligence officers, doing dangerous jobs overseas).

The concern is to ensure politicians and bureaucrats are prevented from playing the national security card to cover up their own ineptitudes, misjudgments and embarrassments. They have a bad habit, in invoking secrecy, of confusing the national interest with their own.

Whatever the merits of this week's action, it is disturbing that Senator Evans has twice, in his short tenure at the Foreign Affairs Department, rushed off to the court in pursuit of prior restraint (the other occasion, back in September, involved Mr Toohey and 'The Age' and the so-called Hayden paper. That affair ended in a sensible compromise whereby 'The Age' was able to publish, with only minor amendments, some interesting articles about aspects of past Australian foreign policy).

Fortunately, the courts, governments and the media now have clear and generally sensible guidelines under which to operate in dealing with information that ministers and 'public' servants would prefer to keep secret. Back in 1981, in a judgment dealing with leaked foreign affairs and defence documents that were being published in 'The Age' and 'The Sydney Morning Herald', Sir Anthony Mason (now Chief Justice of the High Court) laid down some basic principles that made it clear that publication would not be prevented simply because some bureaucrat had stamped a particular document "top secret".

"It is unacceptable in our democratic society," he said, "that there should be a restraint on the publication of information relating to a government when the only vice of that information is that it enables the public to discuss, review and criticise government action."

On the other hand, publication would be prevented where disclosure would be "inimical to the public interest because national security, relations with foreign governments, or the ordinary business of government will be prejudiced."

There is no way of knowing, of course, how a particular judge will apply these principles to particular circumstances, let alone in the unknown circumstances of the latest Toohey affair. But at least the press knows, in general, the sorts of questions it needs to ask before rushing into print with information from leaked documents.

By and large, if the Mason guidelines are interpreted reasonably liberally, editors can live with them. Whether Senator Evans is prepared to live with them is another question.

The problem raised by recent court decisions to order journalists to reveal their sources of information, even before cases come to trial, is of more urgent concern.

In Melbourne, three journalists from 'The Herald' have been ordered to reveal a source under a similar rule of the Victorian Supreme Court.

Journalists fear these judgments will undermine the limited protection given by the courts to the identity of their sources under the so-called "newspaper rule". Under this, in recognition of the public interest in having a free flow of information, courts usually refuse to order disclosure of sources in preliminary, "interlocutory" proceedings for defamation. Even during trial, they order disclosure only when it is necessary "in the interests of justice".

The value of this protection will be much lessened if sources fear that courts may order reporters to identify them so that a potential plaintiff can sue them. Investigative journalists, who must depend to some degree on confidential sources, fear their informants will dry up, frightened the disclosure of their identities will lay them open, not just to litigation, but also to intimidation, dismissal from their jobs, or even physical danger.

Interestingly, any threat to the free flow of information should worry politicians almost as much as it worries the press. An MP who makes a statement outside Parliament citing a "reliable source" (as Senator Evans did this week in explaining his decision to go to the High Court about Mr Toohey) could well be ordered by a court to disclose the identity of that source so that a would-be plaintiff could sue the source.

Governments would be wise to take a very close look at those state Supreme Court rules.

***Reprinted by kind permission of* The Age.**

STOP PRESS

After undertakings were given by John Fairfax and Sons Limited that it would not call the journalist Peter Hastings, Justice Hunt ruled on 6 January, 1989 that he was now satisfied that the newspaper's defence of statutory qualified privilege (under s22) would be likely to fail.

Accordingly, Mr Cojuangco no longer satisfied the judge that he was without an effective remedy against the newspaper. His Honour therefore set aside his earlier orders requiring both the newspaper and the journalist to reveal their sources.

The situation remains unsatisfactory however, and reform is still needed. The High Court has cast doubt on the proposition that the newspaper rule always applies in preliminary proceedings in the absence of special circumstances. Indeed, the rule has no application in proceedings prior to the commencement of an action, the very sort of proceedings as those before the court in *Cojuangco.*

The Victorian decision in *Guide Dog Owners' and Friends Association v Herald & Weekly Times* (20 September, 1988) was made under Victorian law where there is no equivalent to the NSW s22 defence of statutory qualified privilege. There the judge believed that other defences might be successful without the need for the journalists to be called to give evidence; he also noted that the case against the informants might be different to that against the newspaper.