Free Speech and Protecting Journalists' Sources: Preliminary Discovery, the Newspaper Rule and the Evidence Act

Patrick George, Partner at Kennedys, considers recent developments in the protection of journalists' sources.

1. Introduction

On 3 February 2010, The Age newspaper published an article under the headline '*Fitzgibbon's $150,000 from Chinese developer – former Defence Minister cultivated over years*'. It alleged that Ms Helen Liu, whom the newspaper referred to as a Chinese Australian businesswoman, had made substantial payments to the former Defence Minister, Mr Joel Fitzgibbon, as part of '*a campaign to cultivate him as an agent of political and business influence.*'

This is the remarkable case of *Helen Liu v The Age,*[1] which involved a preliminary discovery application by Ms Liu in the Supreme Court of New South Wales to establish the identity of the sources for the article. In 2012, her Honour Justice McCallum ordered The Age and the journalists to give discovery of '*all documents that are or have been in their possession which relate to the identity or whereabouts of the sources*'.[2]

That judgment was appealed to the Court of Appeal and was dismissed;[3] a special leave application was made to the High Court and refused;[4] and the proceedings returned before McCallum J for enforcement of the preliminary discovery order.

At that stage, The Age undertook not to rely upon the defence of qualified privilege that might apply to the article. On that basis, McCallum J stayed the order[5] and made orders for costs in Ms Liu's favour of the first hearing on the ordinary basis and the second hearing on the indemnity basis[6]. Ms Liu appealed to the Court of Appeal which allowed the appeal and re-exercised the discretion and removed the stay.[7] The Age sought special leave to appeal to the High Court which was refused.[8]

As a result, the proceedings have returned in 2017 before McCallum J for enforcement of her Honour's order, made in 2012 from an article published in 2010.

By way of contrast, in *Tony Madafferi v The Age*,[9] The Age published 12 articles, between March 2014 and April 2015, concerning Tony (Antonio) Madafferi and the Calabrian community in Australia. He claimed that the publications conveyed very serious defamatory imputations against him of violent criminal conduct, including murder, extortion and drug trafficking, and alleging that he is the head of the Mafia in Melbourne.

Mr Madafferi brought proceedings in the Supreme Court of Victoria against The Age and sought disclosure of the sources. The Age claimed confidentiality over the sources on the basis that they had promised all confidential sources not to disclose their identities. In December 2015, the court refused to grant the application. The proceedings subsequently settled.

2. Competing Public Interests

The purpose, of course, behind an application for preliminary discovery is to identify the prospective defendant where the plaintiff is unable to identify the person, possibly because they have published material anonymously, which is often the case on social media, or as a confidential source, and the media refuses to disclose their identity.

In her initial judgment in *Helen Liu's* case, McCallum J observed '*the present case sits poised uncomfortably on the fault-line of strong, competing public interests*'.[10]

In essence, the public interest in the administration of justice is competing against the public interest in freedom of speech.

In *Helen Liu's* case, Her Honour noted that the argument of The Age and its journalists was that they obtained documents which revealed the making of corrupt payments by Helen Liu to a Federal Member of Parliament. They contended that the documents were obtained from sources who entertained real and substantial fear

1 *Liu v The Age Company Ltd* [2012] NSWSC 12.
2 *Liu v The Age Company Ltd* [2012] NSWSC 12 at [213].
3 *The Age Company Ltd v Liu* [2013] NSWCA 26.
4 *The Age Company Ltd v Liu* [2013] HCA Trans 205.
5 *Liu v The Age Company Ltd* [2015] NSWSC 276.
6 *Liu v The Age Company Ltd* [2015] NSWSC 605.
7 *Liu v The Age Company Ltd* [2016] NSWCA 115.
8 *The Age Company Ltd v Liu* [2016] HCA Trans 306.
9 [2015] VSC 687.
10 [2012] NSWSC 12 at [168].

of reprisal in the event that their identities were revealed, contrary to the undertakings given to them by The Age and their journalists. Accepting those contentions without qualification, her Honour said there would be a strong case for refusing the discretionary relief sought by the plaintiff.[11]

Conversely, she noted that Helen Liu's argument was that a person or persons conducting a vendetta against her had provided documents to the journalists which had been deliberately forged or falsely attributed to her. Accepting those contentions without qualification, her Honour said to refuse the relief sought would perpetuate the fraud and that would plainly be a strong reason for exercising the court's discretion in favour of the plaintiff.[12]

The determination of the preliminary discovery application in *Helen Liu's* case was complicated by the parties' conflicting factual contentions which could not satisfactorily be resolved in the course of preliminary proceedings.[13]

On appeal, the Chief Justice strongly commented that The Age's attempt to embark on an examination of the merits of the plaintiff's claim on the basis that it was a relevant matter for discretion was inappropriate. Bathurst CJ said: '*Although I would have thought it abundantly clear, let me emphasise that applications for preliminary discovery are interlocutory applications, where it is quite inappropriate for contested issues of fact between the parties to be litigated, much less decided upon.*'[14]

3. The Court Rules for Preliminary Discovery

Rule 5.2 of the Uniform Civil Procedure Rules 2005 (NSW) ('**UCPR**'), '*Discovery to ascertain prospective defendant's identity or whereabouts*', is the relevant provision.

The essential elements of this rule require the applicant to show the court:

(1) The applicant has made reasonable enquiries (R 5.2(1)(a));

(2) Having made those enquiries, the applicant is unable to sufficiently ascertain the identity or whereabouts of a person (the person concerned) for the purposes of commencing proceedings against the person (R 5.2(1)(a));

(3) The applicant has the purpose of commencing proceedings against the person (R 5.2(1)(a));

(4) Some person other than the applicant may have information or may have or have had possession of a document or thing that tends to assist in ascertaining the identity or whereabouts of the person concerned (R 5.2(1)(b)).

If satisfied, the court may make an order for examination of the person with the relevant information and/or an order that the person with the relevant information must give discovery of all documents that are or have been in that person's possession relating to the identity or whereabouts of the person concerned (R 5.2(2)).

In making inquiries, what is reasonable to satisfy the court is a question of fact in all the circumstances. The availability of other means of ascertainment, for example, the *Freedom of Information Act*, does not in itself make it unreasonable to claim an alternative remedy under this rule. The cost, delay and uncertainty of alternative measures is relevant to the '*reasonable inquiries*' component.[15] The test is an objective one and is not determined by the applicant's belief that the inquiries which were made were reasonable.[16]

To enable an objective assessment to be made on whether reasonable inquiries have been carried out, it is necessary for an applicant to disclose to the court the substance of the inquiries which have been made and the result of those inquiries. However, that does not mean that every detail of each inquiry has to be revealed. It is enough if the applicant discloses what inquiries have been made and their results.[17]

A recent example of a preliminary discovery application for the purpose of supporting an injunction occurred in *Rinehart v Nine Entertainment Co Holdings Co Ltd.*[18] The applicant sought preliminary discovery of the program '*House of Hancock*' which was scheduled to be broadcast on the Sunday following the application. The application was made under Rule 5.3 of the UCPR to enable the applicant to determine whether or not she was entitled to make a claim for relief from the court against Channel Nine.

The issue on the application was whether it was in the interests of justice to make the order sought for preliminary discovery. It was not a case of confidential sources. The court considered that there was a possibility of a serious defamation, that the applicant could not determine whether she had a claim for relief unless she saw the material, that the claim for relief upon which she relied was to be pre-publication injunction, and that her reputation was important to her business and that her business was substantial.

11 [2012] NSWSC 12 at [169].
12 [2012] NSWSC 12 at [170].
13 [2012] NSWSC 12 at [168].
14 [2013] NSWCA 26 at [102]-[105].
15 *Roads & Traffic Authority of NSW v Australian National Carparks Pty Ltd* [2007] NSWCA 114 at [14].
16 *St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360.
17 *The Age Company Limited v Liu* [2013] NSWCA 26 at [52]-[53].
18 [2015] NSWSC 239.

Channel Nine had opposed the application on the basis that the court should in exercising its discretion have regard to the importance of the principle of free speech and leaving it unfettered. The Judge was not persuaded that the right to free speech was so powerful and the order so detrimental that it was sufficient to outweigh the balance in favour of making the order.

4. The Newspaper Rule

In the course of proceedings before trial in a defamation case (and subject in New South Wales to the applicable principles set out in the Defamation List Practice Notes), parties will provide discovery by Affidavit of Documents and Answers to Interrogatories in relation to matters in issue.

However, there is a special exception in the discovery process in favour of publishers, proprietors and editors of newspapers as defendants known as the '*Newspaper Rule*'.

The Newspaper Rule operates to protect the identity of a journalist's confidential sources from disclosure in interlocutory proceedings before the trial,[19] where disclosure would be relevant to the issues for trial in the action.

The justification for the Newspaper Rule is the assumption that the responsibility of the newspaper for the republication of what is said to it by an informant is '*necessarily co-extensive*' with the responsibility of the informant for what has been published in the newspaper ('**the Coextensivity Principle**').[20] The responsibility, and therefore liability, for publication should be coextensive as between the informant and the newspaper and the courts have considered it is generally undesirable and unnecessary for plaintiffs at the interlocutory stage of the proceedings to have disclosure of the identity of the sources.[21]

The Newspaper Rule is a rule of court practice, not a rule of law or evidence and does not provide an absolute privilege or absolute protection in the confidentiality of a journalist's sources.

The Newspaper Rule does not protect the promise of confidentiality by the newspaper or its journalists to the source and the communications between them concerning the supply of the information. This material may be essential at least for the newspaper to establish the claim for protection under the Newspaper Rule.[22]

Significantly, it does not protect the information provided to the journalist unless disclosure of that information would reveal the identity of the source.[23] A practical measure in such circumstances is for the identity material to be redacted where possible.

There is a competing public interest, however, in the administration of justice which requires that cases be tried by courts on relevant and admissible evidence.[24] The Newspaper Rule places a restriction on the entitlement of a plaintiff to compel identification of the newspaper's sources prior to the trial, but is subject to the court's discretion in the circumstances of the case.

5. Effective Remedy

The court will exercise its discretion to order disclosure where it is necessary in the interests of justice.[25]

The court recognises the importance of the free flow of information to journalists, but it must balance the public interest in a free press and in freedom of information against the right of an individual to have an effective remedy in respect of defamatory imputations published in the media.[26]

In defamation proceedings against a newspaper, the rule of practice enables the court to refuse to order disclosure of sources if it appears that the applicant has an '*effective remedy*' against the newspaper or journalist without the necessity of ordering discovery.[27]

The assessment of whether the applicant has an effective remedy may be influenced by the defences pleaded by the newspaper to the claim.

In *John Fairfax & Sons Ltd v Cojuangco,*[28] an article was published in The Sydney Morning Herald newspaper under the headline '*Corruption as an Art Form*' concerning a Phillipino businessman, Eduardo Cojuangco. Mr Cojuangco sought preliminary discovery from John Fairfax and Sons Ltd ('**Fairfax**') under the then applicable court rules enabling an order for disclosure of confidential sources prior to commencement of proceedings.

Justice Hunt in the Supreme Court of New South Wales in the exercise of his discretion ordered disclosure. His Honour accepted that the court rules enabling an order for preliminary discovery prior to commencement of proceedings displaced the Newspaper Rule which therefore did not have direct operation as a rule of practice to this application. He held that the respondent newspaper, was not pursuant to the preliminary discovery application, a defendant

19 [2015] VSC 687 at [28].
20 *Liu v The Age Company Ltd* [2016] NSWCA 115 at [121].
21 *Liu v The Age Company Ltd* [2016] NSWCA 115 at [121].
22 *Liu v The Age Company Ltd* [2010] NSWSC 1176 at [45].
23 *Wran v Australian Broadcasting Commission* [1984] 3 NSWLR 241 at 252-253; *Liu v The Age Company Ltd* [2016] NSWCA 115 at [122].
24 *John Fairfax & Sons Ltd v Cojuangco* [1988] 165 CLR 346 at 354.
25 *John Fairfax & Sons Ltd v Cojuangco* [1988] 165 CLR 346 at 354-355; *Liu v The Age Company Ltd* [2016] NSWCA 115 at [123].
26 *Liu v The Age Company Ltd* [2016] NSWCA 115 at [123].
27 *Madafferi v The Age Company Ltd* [2015] VSC 687 at [30].
28 [1988] HCA 54; [1998] 1998 165 CLR 346.

in defamation proceedings and the application was not an interlocutory proceeding in the action.[29]

On appeal ultimately to the High Court, the question was whether a statutory qualified privilege defence under section 22 of the *Defamation Act* 1974 (NSW) that was open to be pleaded entitled the Judge to order disclosure of the identity of the sources if the defendants did not relinquish that defence. The High Court held that it was necessary for a Judge to consider whether the plaintiff was left without an effective remedy if an order was not made. The court said that the Judge was not being called upon to decide whether the statutory defence would succeed, but '*form a conclusion that the defence might well succeed on the materials before him*'.

The focus on the statutory qualified privilege defence arose because Hunt J expressed the view that the issue was not whether the applicant was likely to succeed against the newspaper, but whether he was likely to obtain the relief to which he was entitled if he was restricted to suing the newspaper. Therefore, the applicant would have an effective right of action against the newspaper, in the sense that he was able to obtain against it all the relief to which he was entitled, even if, as a result of the truth of what was republished by the newspaper, he was likely to fail against both the newspaper and informant for that reason.[30] In contrast, the statutory qualified privilege defence was available to the newspaper separately from the sources and the Coextensivity Principle upon which the Newspaper Rule was based in that circumstance would not apply.

In principle, the preliminary discovery application is for the very purpose of seeking to establish the identity of the source so that the applicant might take proceedings against that person, whereas the Newspaper Rule operates in proceedings where the newspaper is already a defendant and because of the Coextensivity Principle, need not disclose the identity of the source until the trial.

Nevertheless, the policy considerations for the existence of the Newspaper Rule are relevant to the exercise of the judicial discretion conferred by the court rules governing preliminary discovery applications. The applicant therefore has to demonstrate that the order sought is necessary in the interests of justice rather than being precluded from the disclosure unless he or she makes out a case of special circumstances.[31]

The High Court identified two particular features of the circumstances in that case favouring disclosure. First, a striking feature of the publication was that the imputations had a solid basis of support in the views of prominent and informed but unidentified sources. The imputations were conveyed with an aura of authority and authenticity that would be lacking if they rested on no more than the assertions of the journalist. The court held that it would be incongruous and unjust that Fairfax, having derived the advantage that comes from identifying in general terms the sources of the allegations that they make against Mr Cojuangco, should seek to deny him an opportunity of identifying precisely those sources by invoking the Newspaper Rule.

Secondly, that the defamation was of a very serious kind that might gravely compromise Mr Cojuangco's reputation and as a prominent business personality, he should be given the opportunity of discovering the precise identity of the sources and deciding upon such action as he then considered appropriate.

The High Court dismissed the appeal and the proceedings returned to Justice Hunt for enforcement of the order.

However, Fairfax then applied to set aside the order as it undertook not to call the journalist to give evidence at the trial of any defamation action against it. Hunt J agreed and set aside the order on the basis that the plaintiff now had an effective remedy. He held that the practicable application of the High Court's '*might well succeed*' formulation of the test was that there was a substantial or real or good chance that the defence will succeed, regardless of whether that chance is less or more than 50%.[32] However, he held that a defence of statutory qualified privilege could not succeed if the journalist was not called and that the plaintiff had an effective remedy if he might obtain the same compensation from the newspaper as from the source.[33] He considered it was not sufficient that a plaintiff wished to vindicate his or her reputation against the source or obtain '*additional satisfaction*' by '*having the compensation paid by one rather than the other tortfeasor*'. Such matters did not lead to the plaintiff potentially suffering monetary loss.[34]

Mr Cojuangco appealed against Hunt J's order setting aside disclosure. In the Court of Appeal, Fairfax refined its undertaking and undertook not to rely upon the statutory qualified privilege defence at all. On that basis the Court of Appeal (Mahoney and Handley JJA, Kirby dissenting) held that Mr Cojuangco's appeal should be dismissed.[35]

29 *John Fairfax & Sons Ltd v Cojuangco* [1988] 165 CLR 346 at 356.

30 Reapplication of *Cojuangco* [1986] 4 NSWLR 513 at [525]; *Liu v The Age Company Ltd* [2016] NSWCA 115 at [131].

31 *John Fairfax & Sons Ltd v Cojuangco* [1988] 165 CLR 346 at 357.

32 Application of Eduardo Murphy Cojuangco (No 2) (Supreme Court) (NSW) Hunt J, 6 January 1999, unreported, LexisNexis BC8902633 at [24].

33 Application of Eduardo Murphy Cojuangco (No 2) (Supreme Court) (NSW) Hunt J, 6 January 1999, unreported, LexisNexis BC8902633 at [26].

34 Application of Eduardo Murphy Cojuangco (No 2) (Supreme Court) (NSW) Hunt J, 6 January 1999, unreported, LexisNexis BC8902633 at [25]-[26].

35 *Cojuangco v John Fairfax & Sons Ltd (No 2)* [1990] ADef R51-005.

Mahoney JA held that once Fairfax had abandoned its qualified privilege defence, the interests of justice did not require a preliminary discovery order because Mr Cojuangco had an effective remedy against Fairfax without the necessity of such an order. Handley JA held that effective remedy in this context meant a remedy against the newspaper '*no less effective*' than an action against the sources. This meant that the plaintiff in the action against the newspaper must not be faced with any defence in addition to those that would be available to the sources if they were sued.

There have been a number of decisions which have considered the meaning of effective remedy since. Importantly, it can be seen that the question of whether a preliminary discovery order should be made falls to be determined by the circumstances of each case and not necessarily on the basis of whether the newspaper undertakes not to rely upon a statutory qualified privilege defence which could not be pleaded by the sources.

In the *Herald & Weekly Times Limited v Guide Dog Owners and Friends Association,*[36] the court held that the meaning of 'effective remedy' was that if a plaintiff was able to succeed in the proceeding against an existing newspaper defendant, there would be no justice in him or her not obtaining the same judgment against another party. However, if the chance of success was put in real jeopardy by a defence not equally available to another potential defendant whose identity was not known to the plaintiff, the interests of justice would require discovery of that other party for the purpose of joinder.

In *West Australian Newspapers Limited v Bond*,[37] the court considered that if a plaintiff in pending proceedings would be left without an effective remedy against the defendant in those proceedings, or that there was a real (as distinct from a fanciful) prospect that the plaintiff would be left without such a remedy unless the defendant was ordered to disclose the identity of a confidential source, that circumstance would ordinarily be a powerful (if not the decisive) factor favouring the exercise of the court's discretion at the interlocutory stage to order disclosure.[38]

In *Hodder v Queensland Newspapers Pty Ltd,*[39] the court held that the identity of the source must be required for some reason other than '*mere relevance*' having regard to the criterion for the favourable exercise of the discretion that it be necessary in the interests of justice.

6. Potential Defences

If a defendant puts in issue the identity and integrity of its sources by way of defence, the defendant may be acting inconsistently with its entitlement to enforce the Newspaper Rule (or Journalist's Privilege under the *Evidence* Act to be considered below). For example, if the defendant positively raises the identity and integrity of its confidential source to assert, as part of a qualified privilege defence, that it had acted reasonably in its publication of the article, the weight attributable to the public interest in disclosure for the proper administration of justice may be correspondingly increased.[40]

In *Bateman v Fairfax Media Publications Pty Ltd*,[41] the defendant pleaded defences of honest opinion under Section 31(3) of the *Defamation Act 2005* and fair comment at common law. The defences were based upon comment of a stranger. The defendant refused to provide particulars identifying the persons whose opinion or comment the matter complained of was alleged to be, but at the same time invoked the Newspaper Rule. The plaintiff sought to strike out those defences while the defendants contended that the Newspaper Rule excused them for the time being up to trial from complying with the requirement to provide proper particulars of the defence. McCallum J decided that the defendants should be put to an election whether to provide the particulars required under the Rules identifying the persons whose opinion or comment the relevant matter was alleged to be, failing which there should be an order striking out the relevant parts of the defence.[42]

A similar issue arose in *Cowper v Fairfax Media Publications Pty Ltd*,[43] where an application was filed to strike out the defence and particulars of the statutory qualified privilege defence under section 30 of the *Defamation Act 2005*, where the defendant refused to provide the names of sources pursuant to section 126K of the *Evidence Act 1995*. The court refused to strike out the defence prior to the trial, but said that the absence of the sources was a matter that may be raised subject to any ruling of the trial judge with the jury, but it was not a matter which ought to give rise to the striking out of the claim for reasonableness for statutory qualified privilege.

7. Limitation Periods

A compelling consideration in terms of effective remedy is the limitation period of 12 months to commence any defamation action from the time of publication of the matter complained of.[44] Although there is

36 [1990] VR 451.
37 [2009] WASCA 127.
38 [2009] WASCA 127 at [94].
39 [1994] 1 QDR 49 at [56]-[57].
40 *Madafferi v The Age Company Ltd* [2015] VSC 687 at [67].
41 [2014] NSWSC 400.
42 [2014] NSWSC 400 at [27].
43 [2016] NSWSC 1614.
44 *Limitation Act 1969* (NSW) Section 14B.

discretion in certain circumstances to extend the limitation period up to 3 years, the practical reality is that a plaintiff generally only has 12 months to commence proceedings for defamation.

If the plaintiff does not know the identity of the source, he or she will be unable to commence those proceedings against the source before being statute barred. On the one hand that means that the only effective remedy thereafter is against the newspaper and it would be futile to order disclosure after expiry of the limitation period. However, not knowing the identity of the source may be a ground for extension of the limitation period. If no proceedings have been commenced against the newspaper within 12 months, the only effective remedy would be against the source, subject to an extension of the limitation period.

8. Helen Liu

In *Helen Liu*'s case, McCallum J held that as the newspaper did not relinquish its statutory qualified privilege defence and the common law defence of qualified privilege in respect of publication of political discussion pursuant to *Lange v ABC*[45], her Honour was satisfied that those defences might well succeed[46] and accordingly, the plaintiff may not have an effective remedy against the newspaper.[47]

It is relevant that The Age submitted in the course of the application Helen Liu had attacked the reasonableness of the journalist's conduct by reason of which she could not at the same time contend that she would not have an effective remedy against The Age and the journalists. In other words, she believed that the qualified privilege defences would not succeed.

This arose out of the fact that the journalist had changed the wording of translations obtained by The Age of two letters received from the sources and which were attributed to the plaintiff in the articles. The first article had the following quote attributed to the plaintiff: '*Joel Fitzgibbon has become a Federal MP. If the Labor Party becomes the dominant party, he will become a Cabinet Member … The money we pay him is worthwhile.*'

The letter was in the Chinese language except for the name Joel Fitzgibbon and a signature attributed to the plaintiff, both of which were in English. The Age obtained a translation of the letter and the translation said: '*Joel Fitzgibbon has become a Federal Minister.*' The journalist changed the word 'Minister' to 'MP'. There was a second letter which referred to Mr Fitzgibbon as a Federal Minister. In the article, it was changed to read Federal (MP). At the date of that letter, Mr Fitzgibbon was not even a Shadow Minister.

The journalist admitted that he knew the description of Mr Fitzgibbon in the letters was wrong, but he put it down to language difficulties or a case of the author of the letters deliberately overstating Mr Fitzgibbon's title so as to impress the recipients. Her Honour held that the decision to omit the incorrect description of Mr Fitzgibbon as a Federal Minister while informing readers that the documents had been translated by a '*nationally accredited translating firm*' would be potentially problematic in respect of the reasonableness of the conduct of the newspaper and the journalists in publishing the articles.

Her Honour made the point that the determination of whether there was an effective remedy was an objective one regardless of the plaintiff's belief that the defence would not succeed and that belief was scarcely relevant to the task let alone determinative which was for the Judge to assess prospectively without knowing what the final evidence would be or what would be revealed by further interlocutory steps such as discovery and interrogatories.[48]

Her Honour also considered that if Ms Liu was unable to identify the sources, she would in effect be left without the opportunity to pursue a remedy which would see the issue of the alleged forgery of the documents fully litigated and determined and that she would be unable to seek in vindication of her reputation to nail the lie.[49]

In the extraordinary circumstances of *Helen Liu's* case, after the first round of appeals including a special leave application to the High Court, Fairfax returned before McCallum J to seek a stay of the order on the basis that it offered an undertaking not to rely upon the defences of qualified privilege. Her Honour, noting the undertaking, and considering costs may be adequate compensation for the prejudice suffered, stayed her earlier order.

In the Court of Appeal, the court held that her Honour had fallen into error and re-exercised the discretion and refused the stay. The court held, inter alia, that given the knowledge that Fairfax had of the course taken in *Cojuangco's* case, it was important that it put its best case forward in the first interlocutory application and by not providing the undertaking at that time '*flouted the principle that a litigant should put its best case forward and had failed to discharge its duty to assist the court to further the overriding purpose of the Civil Procedure Act and the Rules to facilitate the just, quick and cheap resolution of the real issues in the proceedings*'.[50]

In McColl's JA's view, '*to entertain Fairfax's stay application and undertake in effect, the re-litigation of*

45 [1997] HCA 25.
46 [2012] NSWSC 12 at [154].
47 [2012] NSWSC 12 at [156].
48 [2012] NSWSC 12 at [140].
49 [2012] NSWSC 12 at [159]-[160]; *John Fairfax & Sons Ltd v Cojuangco* [1987] 8 NSWLR 145 at [151].
50 *Liu v The Age Company Limited* [2016] NSWCA 115 at [215].

the preliminary discovery application, albeit with the goal posts moved to suit Fairfax, countenanced an approach to litigation by Fairfax which was not in the interests of justice, and fell foul of the principles of case management.'[51]

The court also held whether, absent disclosure of documents sought to be shielded by the Newspaper Rule, a potential plaintiff has an effective remedy turns not only on the likely recovery of damages but upon any difficulty in proof occasioned by the non-disclosure. The nature of the documents Fairfax based the articles on was relevant to whether Ms Liu should have had access to the documents. By attributing the articles to documents allegedly either written by Ms Liu or sourced to her company's records, Fairfax accorded to the imputations an '*aura of verisimilitude'* which Ms Liu should be given the opportunity to test, both by confronting her accusers and having the best opportunity to demonstrate the documents they provided are forgeries.[52]

In the Court of Appeal, Helen Liu also submitted that she had a cause of action against the sources under the *Australian Consumer Law* which she did not have against the newspaper and its journalists because of the immunity which exists under that legislation in their favour as information providers. Significantly, Ms Liu would bear the onus of proof of the misleading and deceptive conduct cause of action against the sources but absent the identification of those sources, she would not have an effective remedy in respect of that cause of action because Fairfax had a complete defence which was not available to the sources. The Court of Appeal did not deal with this issue because it was not raised before McCallum J on the stay application but remains an issue of difference under the Coextensivity Principle for future cases.

9. Journalist Privilege under the Evidence Act

Under Section 126K of the *Evidence Act* 1995 (NSW) ('**Evidence Act**'), a journalist is not compellable to disclose the identity of a confidential source unless on the application of a party, the court determines that the public interest in the disclosure of the identity of the source outweighs the likely adverse effect of disclosure upon the source or others and the free flow of facts and opinion to the news media.

Section 131A of the *Evidence Act* extends the application of this privilege to the pre-trial stage of proceedings. The equivalent provisions in the Evidence Acts in other States or jurisdictions include the Commonwealth, Victoria, the Australian Capital Territory and Western Australia[53].

The protection provided by the *Evidence Act* replaces the common law's uncertainty under the Newspaper Rule with a journalist prima facie entitled to assert a statutory privilege.[54] The Act alters the emphasis in the balance that the common law had achieved in favour of protection of confidential sources only as a matter of practice.[55] The general purpose underlying the statutory privilege is the importance of the free flow of information in a democratic society.[56]

Further, the Newspaper Rule at common law generally only applies in interlocutory proceedings. Prior to the introduction of the statutory privilege, the practice was, when the identity of sources was relevant, to generally permit the plaintiff to seek disclosure during evidence at the trial if the journalist gave evidence. Now neither the journalist nor his employer is compellable to answer that question at trial and may object to do so by asserting the privilege under Section 126K(1) of the *Evidence Act* if the journalist '*has promised an informant not to disclose the informant's identity*'.

However, when the journalist does not give evidence or the privilege is successfully claimed at trial, issues may arise about whether that claim of privilege provides a sufficient basis to exclude *Jones v Dunkel*[57] reasoning because a witness has failed to give evidence that on the question of reasonableness of publication, he or she could be expected to give.[58]

The circumstances in which the court's power to override the privilege is to be exercised are defined. Section 126K(2) of the *Evidence Act* identifies the factors to be taken in to account in undertaking the balancing exercise and is only displaced on the application of the opposing party who carries the primary onus.

Section 126K(2) provides that the court may order that the privilege not apply if it is satisfied, that having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs:

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

51 [2016] NSWCA 115 at [219].

52 *Liu v The Age Company Limited* [2016] NSWCA 115 at [219], [223].

53 Division 1A of Part 3.10 of the *Evidence Act* 1995 (Commonwealth); *Evidence Act* 2008 (Vic) sections 126A, 131A; *Evidence Act* 2011 (ACT) sections 126K, 131A and *Evidence Act* 1906 (WA) sections 20H-20M.

54 *Ashby v Commonwealth of Australia* [2012] FCA 766 at [17].

55 [2012] FCA 766 at [23]; *Madafferi v The Age* [2015] VSC 687 at [39].

56 *Ashby v Commonwealth of Australia* [2012] FCA 766 at [18].

57 *Jones v Dunkel* (1959) 101 CLR 298.

58 *Madafferi v The Age* [2015] VSC 687 at [40].

Under Section 126K(3) of the *Evidence Act*, an order requiring disclosure may be made subject to such terms and conditions (if any) as the court thinks fit.

It is clear that the statutory privilege recognises the strong public interest behind the free flow of information in a democratic society which may outweigh other public interests which apply in relation to the production of documents for the purposes of litigation.[59]

10. Tony Madafferi

Tony Madafferi's case was one of the first to seriously contest the statutory privilege. Madafferi had commenced defamation proceedings against The Age and its journalists. The defendants did not plead truth, but pleaded qualified privilege defences to which the plaintiff sought further and better particulars of those defences including details of the sources. The defendants refused to supply those particulars relying on journalist privilege pursuant to section 126K of the *Evidence Act* 2008 (Vic) and the 'Newspaper Rule'.

The plaintiff challenged the claim for journalist privilege and also sought orders for preliminary discovery pursuant to Rule 32.03(2) of the UCPR (Vic) including that the defendants attend before the court for oral examination and an order that they make discovery of all documents relating to the description of the persons concerned. The plaintiff said that the purpose in seeking the identity of the sources was to join them as defendants to the proceedings alleging that they were publishers of the articles.

Justice John Dixon considered that statutory journalist privilege may, or may not, apply in the exercise of the court's discretion after undertaking the following analysis:

(1) Identify the issues in the proceeding that determine the context of the application;

(2) Identify the public interest in disclosure, in the context of those issues in (1) above, that is advanced by the plaintiff;

(3) Assess the degree of significance or weight to be attributed to that public interest;

(4) Identify the likely adverse effect of an order for disclosure on the informant and others;

(5) Identify the public interest in a free and informed press and in investigative journalism;

(6) Assess the degree of significance or weight to be attributed to that public interest;

(7) Weigh up the competing considerations according the significance or weight attributed to them to answer whether the public interest in disclosure outweighs the other interests.[60]

The defendant bears the onus in respect of Issues (4) and (5) while the plaintiff bears the onus in respect of Issue (2).

Justice John Dixon refused disclosure of identity of the sources. In undertaking the above analysis, he considered that there were genuine fears of very serious adverse consequences if the sources were named. Further, he accepted that the journalist had fears of adverse consequences for himself, his family and his professional career if the sources were named. Some of the Italian sources would, if identified, be genuinely fearful for their personal safety or alternatively, the journalist would be adversely affected by a genuine concern that some of the Italian sources might threaten his personal safety or that of his family if the sources were identified.

There were also statements attributable to criminal justice sources and it was accepted that if their identities were revealed, either potential witnesses would be discouraged from coming forward to provide information to the authorities or it would hinder or interfere with ongoing investigations and/or identify their informants which could discourage their co-operation or expose them to serious repercussions. Accordingly, the Judge was satisfied that this consideration was deserving of significant weight against requiring the defendants to disclose their sources.

The Judge was satisfied there was significant and substantial legitimate public interest in the communication of facts and opinions on these particular matters to the public.

In terms of the public interest in disclosure, the Judge did not accept that the confidential sources were the key to the defendants qualified privilege defence. The references in the articles to confidential sources were not prominent but were a '*thread in the fabric of the qualified privilege defence along with identified sources and proven facts, assertions of careful adherence to prudent journalist practice and the ethical code and the public interest.*'[61]

51 [2016] NSWCA 115 at [219].

52 *Liu v The Age Company Limited* [2016] NSWCA 115 at [219], [223].

53 Division 1A of Part 3.10 of the *Evidence Act* 1995 (Commonwealth); *Evidence Act* 2008 (Vic) sections 126A, 131A; *Evidence Act* 2011 (ACT) sections 126K, 131A and *Evidence Act* 1906 (WA) sections 20H-20M.

54 *Ashby v Commonwealth of Australia* [2012] FCA 766 at [17].

55 [2012] FCA 766 at [23]; *Madafferi v The Age* [2015] VSC 687 at [39].

56 *Ashby v Commonwealth of Australia* [2012] FCA 766 at [18].

57 *Jones v Dunkel* (1959) 101 CLR 298.

58 *Madafferi v The Age* [2015] VSC 687 at [40].

59 *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290 at 174.

60 *Madafferi v The Age* [2015] VSC 687 at [44].

61 [2015] VSC 687 at [133].

The Judge was further satisfied that the identity of the sources was not the critical matter as to whether publication was reasonable in the public interest under the qualified privilege defence. There were sufficient critical matters which appeared in objectively demonstrative facts and documents which would permit an evaluation of the reasonableness of the newspaper's conduct under the qualified privilege defence which meant that the plaintiff would not be significantly disadvantaged not knowing the identity of the confidential sources.

In the circumstances, the Judge held that the capacity for a fair trial on the issue of reasonableness under the qualified privilege defence was not compromised by not identifying the sources such that the plaintiff did not have an effective remedy. He was not persuaded that the public interest in the disclosure of the identity of the sources would be compromised by non-disclosure in a manner that outweighed the likely adverse effect of disclosure on the informant and on other persons and the public interest in the communication of facts and opinion to the public by the news media.[62]

11. Exceptional Cases

Journalist statutory privilege under the Evidence Act was not available to The Age in *Helen Liu's* case. The publication took place in 2010 and the application for preliminary discovery was made shortly thereafter. In New South Wales, Journalist Privilege did not become available until amendments to the Evidence Act took effect on 21 June 2011. While section 126L provided that Journalist Privilege would apply to information given before the commencement of that amendment, it did not apply to hearings which began before commencement. The hearing began in October 2010.

Journalist Privilege is a powerful shield protecting sources in those jurisdictions where it applies. However the privilege can be disregarded in exceptional cases where the public interest in the administration of justice requires it.

Helen Liu's case was exceptional. The exceptional nature of the case involved the documents disclosed by the sources which Ms Liu alleged were fraudulently altered. McCallum J concluded that the handwritten documents '*may well have been falsely attributed to the plaintiff*' and that in respect of the handwritten list which did not purport on its face to be Ms Liu's document '*could well have been falsely or wrongly attributed to the plaintiff*'.[63] In respect of the letters, which bore a signature attributed to the plaintiff, based upon Ms Liu's evidence, the appearance of the second letter and the absence of any original documents, McCallum J concluded that it may well be that someone deliberately appended her signature to a document that was not hers.[64]

In the context of these prima facie findings, it was evident that the journalists never met or spoke to the sources. They never saw the original documents. Scientific handwriting analysis could not be carried out on the electronic copies of documents emailed to the journalists. Although the journalists sought to verify the truth of the documents by arranging to meet with the sources, the sources refused to meet and demanded money before any such meeting, up until the time the documents were sent.

In the article, the journalists claimed that the story was a result of a 10 month investigation. In fact, the emails between the journalists and the sources established that they had been negotiating for 10 months over the price to be paid for the documents. The sources wanted initially $200,000 for the documents and through this lengthy process, The Age eventually offered to pay a '*$10,000 research fee*', but no payment was ultimately made. The documents themselves were only received by the journalists 13 days before publication of the articles.

The sources represented to the journalists that the documents were in Helen Liu's handwriting. Immediately prior to publication, however, the sources requested the journalists not to use '*Helen's handwritten*' in any publication, which the journalists understood to refer to Helen's 'handwriting'. In response, the journalists asserted that there was a '*paramount public interest*' in disclosing the dishonesty. Consequently, the sources expressed their anger at the content of the articles which referred to Helen Liu's handwriting and refused to communicate further with the journalists.

In all these circumstances, the one matter that stands out is the journalists' assertion that there was a paramount public interest in disclosing dishonesty or in other words, the public knowing the truth. Given the conduct of these sources, the public interest is not one sided, but involves knowing who these sources are and knowing the truth about them.

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62 [2015] VSC 687 at [161].
63 [2012] NSWSC 12 at [188].
64 [2012] NSWSC 12 at [189].