



[2015] JMSC Civil 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 00789 OF 2012

| | | |
|----------------|------------------------------------|--------------------------------|
| BETWEEN | ADAM STEWART | 1ST CLAIMANT |
| AND | ANDREW DESNOES | 2ND CLAIMANT |
| AND | FREDERICK MOE | 3RD CLAIMANT |
| AND | JAIME STEWART McCONNELL | 4TH CLAIMANT |
| AND | MARK McCONNELL | 5TH CLAIMANT |
| AND | THE GLEANER COMPANY LIMITED | DEFENDANT |

Mr. Jerome Spencer & Mr. Hadrian Christie, instructed by Patterson, Mair, Hamilton for the claimants/applicants.

Lord Gifford, Q.C & Mrs. Emily Shields, instructed by Gifford, Thompson & Bright for the defendant/respondent.

IN CHAMBERS

Heard: January 7 and February 20, 2015.

“Independent” Claim for Disclosure – Connected Defamation Action – Application for Disclosure of Name of Alleged Joint Tort-feasor – Defence in Connected Claim of Qualified Privilege and Fair Comment on a Matter of Public Interest – The “Newspaper Rule”- Whether Applicable – Rule 69.7 of the Civil Procedure Rules (CPR) - The Defamation Act, 2013 – Whether Retrospective.

Coram: F. Williams, J.

The Newspaper Rule

[1] The Newspaper Rule is a rule that originated in and was developed through the common-law over many years and was subsequently, it might be said, incorporated, in one of its aspects, in our own Civil Procedure Rules (CPR) in Rule 69.7.

[2] Its substance was discussed and outlined as long ago as 1897 by Lord Esher in the case of **Hope v Brash** [1897] 2 Q.B. 188 where he said:

“It appears to me that in the case of *Hennessey v Wright* 24 QBD 445 the very same question in substance as that in the present case came before the Court of Appeal, namely, whether the defendant in an action for a libel published in a newspaper ought to be forced to disclose who it was that supplied him with the materials for the libel which had been published. To the judgment in that case I was a party; and Lindley L.J., after being informed that the general practice of the judges of the Common Law Courts had been for a long series of years not to order inspection in such a case, or to force the defendant to disclose who gave the information on which the libel was published, accepted that practice as binding upon him, and did not dissent from the view taken by myself and Lopes L.J. Therefore in that case the Court of Appeal recognized the existence of a general rule that inspection of such a document as this should not be given to the plaintiff in an action for libel. It is not necessary to say that the Court will never under any circumstances allow such inspection, but, in the exercise of its discretion, it will not, as a general rule, in the absence of any special reason to the contrary, allow it.” (page 191).

In the same case A.L. Smith L.J. said:

“It has been the ordinary rule of practice, as laid down by Lindley L.J. in *Hennessey v Wright* 24 QBD 445 that in a case such as this an order will not be made by which the plaintiff may obtain discovery

of the name of the person who originally wrote the libel published in a newspaper. I do not say that the rule so laid down is one which can never be departed from, but there must be something exceptional to take a case out of it.” (page 193).

[3] These sentences might be regarded as setting out the general principle at common law.

CPR – Rule 69.7

[4] So far as concerns the CPR, the relevant rule is Rule 69.7 which is set out hereunder:

“Requests for Information

69.7 In a defamation claim where the defendant states that the words or matters complained of –

- (a) are fair comment on a matter of public interest; or
- (b) were published on a privileged occasion,

the claimant may not make a request for information under Part 34 as to the defendant’s sources of information or grounds of belief.”

[5] This being a claim for disclosure in relation to a connected libel suit, the defendant, as might be expected, is relying on the newspaper rule.

[6] On the other hand, pitted against the defendant and its use of the newspaper rule, are the claimants and their reliance, *inter alia*, on the case of **Norwich Pharmacal Co v Commissioners of Customs and Excise** [1973] 2 All ER 943. The exact nature of their reliance on this case as well as a brief discussion of the facts will be dealt with a little later in this judgment.

[7] The claimants are also relying heavily on the case of **British Steel Corporation v Granada Television Limited** [1981] 1 All E R 251. In briefest summary, that case held that there are instances in which the court might order disclosure of the identity of a journalist's informant. That case arose from a broadcast concerning a strike by the claimant's employees nationally. Prior to the strike, the defendant received from an unofficial source, secret and confidential documents showing possible mismanagement within the claimant company. Some of the documents were used without the source being disclosed, based on a promise by the defendant to the source not to disclose his identity. The claimant sued the defendant and was successful in having the court order that the defendant disclose the identity of the source. That order was upheld by the Court of Appeal. On the defendant's appeal to the House of Lords, it was argued, *inter alia*, that an order for disclosure should not be made as it would be in breach of the newspaper rule. It was held, *inter alia*, that the conditions for the grant of the remedy sought existed and so the order for disclosure should be granted, considering that the claimant was not seeking discovery merely for gratification of curiosity; but had suffered a wrong for which it had a real and unsatisfied claim against the informant and could not bring any proceedings against him until the defendant revealed his identity.

Background

[8] It is important to be aware of the full background to this matter, as, even though it appears to stand alone, it in fact arises from and is connected with another suit – that is, claim number HCV 05740 of 2008. That claim is a libel action involving the same parties – both as claimants and defendants – as this case. That claim also arises from the publication of an allegedly-defamatory article in the defendant's publication – the Daily Gleaner – on July 19, 2008. The pseudonym used by the author of the allegedly-defamatory article (actually a letter) was "Long Bench"; and the letter was entitled "Sand in Our Faces".

[9] A defence has been put forward along the lines of privilege and fair comment on a matter of public interest.

[10] In that claim the claimants were able to secure an *ex parte* order on December 8, 2008 that the defendant disclose the identity and address of the writer of the article about which they have complained. That order was later set aside – that is, on January 29, 2009, after an *inter partes* hearing. The claimants thereafter applied to the court for an order to compel the defendant to disclose the writer’s identity and address. This application was filed on May 21, 2009; but it was adjourned by this court in that claim on September 29, 2009. Since that time no further action has been taken in that claim. The claimants’ next step was the filing of this action, in effect seeking the same relief that was refused in the other action.

[11] For completeness, these were the terms of the main order that was sought *ex parte* by the claimants:

“1. An Order that the Defendant its Directors, officers, servants and/or agents immediately disclose to this honourable court and give specific disclosure to the Claimants of the name and address of the writer of the letter of demand the subject of this suit using the pseudonym “Long Bench”.

[12] And these are the terms of the main order that is being sought by way of the claimants’ Amended Fixed-date Claim Form in the instant claim:

“1. An Order that the Defendant immediately disclose the true name and address of the writer of the letter “Sand in our Faces” which was published by the Defendant on July 19, 2008”.

The Parties’ Respective Positions

The Claimants’ Contention

[13] On behalf of the claimants, it was submitted that the newspaper rule, properly understood, means that :

“...a newspaper cannot be compelled to disclose the source of its information at the disclosure and inspection stage of a trial, primarily because the source of the information is irrelevant in proceeding against the newspaper company.”

[14] It was further submitted by Mr. Spencer that the rule is not a rule of evidence (citing the case of **Gaddafi v Telegraph Group Ltd.** [1998] EWCA Civ 1626). It rests not on privilege but on the limitations of discovery. The principle applies only in defamation cases. (The **Gaddafi** case was also cited by the defendant).

[15] Great emphasis was placed by Mr. Spencer for the claimants on the case of **Norwich Pharmacal Co v Commissioners of Customs and Excise** [1973] 2 All ER 943 (the **Norwich Pharmacal** case). He relied on this case as a basis for submitting that: (i) the newspaper rule is inapplicable to the instant claim and the **Norwich Pharmacal** principle is applicable to this case as (a) it is not a defamation claim, but a claim for disclosure; and (b) further, the order for disclosure is not being sought at the interlocutory stages but at the trial of this claim. (ii) The effect of the **Norwich Pharmacal** decision is that, unless some consideration of public policy prevents it, an individual who assists (even innocently) in the commission of a tort against another, must disclose the identity of the tortfeasor. The only defence to this claim, therefore, is public policy.

[16] He further submitted that, since the limitations of disclosure are no longer relevant factors in this claim, the defendant cannot credibly rely on the newspaper rule here. In support of this, he cited the case of **British Steel**. Submitted for the court's consideration as other examples of the inapplicability of the newspaper rule were: (i) **X Ltd. v Morgan Grampain (Publishers) Ltd.** [1991] 1 AC 1; and (ii) **Camelot Group plc v Centaur Communications Limited** [1998] 1 All ER 251.

[17] In relation to the last action taken by the claimants in the first suit, Mr. Spencer submitted that : “...the hearing to the latter application is still pending”. (see paragraph 2 of the claimants’ skeleton arguments).

The Defendant’s Contention

[18] Lord Gifford Q.C submitted in the main that this claim is really a device that the claimants are attempting to use in order to try to obtain an order which it is impossible for them to get in the first claim by reason of the existence of the newspaper rule.

[19] He further recounted the history and development of the newspaper rule, beginning with the case of **Plymouth Mutual Co-operative v Traders Publishing Association** [1906] 1 KB 403; and reviewing **Hope v Brash**, in both of which cases requests for disclosure were refused. He also cited the case of **White & Co v Credit Reform Association** [1905] 1 KB 653, in which the court had made an order for an interrogatory, but made it clear that it would not have done so, had the request been for an “illegitimate motive”: such as a motive to sue the informant.

[20] Cited as well by Lord Gifford was the case of **Adam v Fisher** (1914) 30 TLR 288, in which the rationale for the existence of the newspaper rule was discussed and recognized to be linked to the fact that a newspaper stood in such a position that on public-interest grounds, the name of its informant should not be disclosed and to do otherwise would be “plainly improper”.

[21] A number of other cases were cited by Lord Gifford, such as **Lyle-Samuels v Odhams** [1918-1919] All ER 342 and **Broadcasting Corporation of New Zealand v Alex Harvey Industries** [1980] 1 NZLR 163; and ending with the case of **Gaddafi v Telegraph Group Ltd** [1998] EWCA Civ 1626. The **Gaddafi** case, (as utilized by Lord Gifford), briefly, dealt with a consideration by that court (and quoting dicta of Lord Hirst), that the newspaper rule has developed as a practice by way of a long line of cases. Lord Hirst also had regard to what he considered to be the foundation of the rule as

having to do with the special position of those publishing and conducting newspapers and the desirability of protecting contributors from the risk of disclosing their identity.

[22] We may now proceed to analyze the issues and different contentions in the instant case.

The Issues

[23] The issue in this claim as stated in the Amended Fixed-date Claim Form is posed by the claimants in the following terms:

“...whether there are legally justifiable circumstances whereby a joint tortfeasor can refrain from disclosing the identity of another joint tortfeasor and thus frustrate attempts for full legal vindication by an aggrieved party against all the liable tortfeasors.”

[24] For the defendant, Lord Gifford, submitted (in summary) the following: (a) that there are three issues for the court’s determination in this claim: namely: (i) “whether there is a well-established rule of the common law which prevents disclosure by a newspaper of its sources, if the purpose of the request for disclosure is to sue the source”; (ii) “whether the reliefs sought by the claimants would, if they sought it in the defamation action, would (sic) be barred by the provisions of CPR Rule 69.7”; (iii) “whether it is permissible for a claimant who is not permitted to request information about the defendant’s sources in a claim for defamation, to request it for the purpose of a defamation suit by means of a parallel claim”.

Analysis and Discussion

[25] I find it convenient to use the issues as stated by counsel for the defendant in approaching the analysis of this matter, the first of these (and to a certain extent, the least controversial), relating to the existence of the newspaper rule.

First Issue: Whether there is a Well-established Rule of the Common Law which Prevents Disclosure by a Newspaper of its Sources, if the Purpose of the Request for Disclosure is to Sue the Source.

[26] Where this issue is concerned, it may be regarded as accepted by the claimants that such a rule exists. It will be recalled that they state their understanding of the rule to be this:

“...a newspaper cannot be compelled to disclose the source of its information at the disclosure and inspection stage of a trial, primarily because the source of the information is irrelevant to the trial (or, corrected to read: in proceeding) against the newspaper company.”

[27] So, the newspaper rule (as stated by the claimants), prohibits disclosure only at the disclosure and inspection stage of a matter. However, even so, (that is, stated with this limitation); this is, nonetheless, an acceptance of the existence of the rule.

[28] The claimants have stated the rule in this way as a springboard for their submission and general approach to the arguing of this claim – which is that, (a) this being not a libel claim; but a claim for disclosure; and (b) this being an application for the first hearing of this Amended Fixed-date Claim Form to be dealt with as the trial of the matter, the newspaper rule would, therefore, be inapplicable.

[29] However, the existence of the rule, in whatever form, having been accepted by the claimants, the limits of its use is a matter which we will examine in due course in the analysis of the other issues involved in this case.

Second Issue : Whether the Relief Sought by the Claimants would, if They Sought it in the Defamation Action, be Barred by the Provisions of CPR 69.7

[30] It is to be remembered that in the connected defamation claim, the defendant has advanced a defence based on qualified privilege and fair comment on a matter of public interest. (see, for example paragraphs 6 and 12 of the defence).

[31] A perusal (or even a cursory glance) of rule 69.7 shows that, where these defences are being advanced, the clear intendment or meaning of the rule is that:

“...the claimant may not make a request for information under Part 34 as to the defendant’s sources of information or grounds of belief.”

[32] To my mind, therefore, it must be regarded as settled and impatient of debate that, were this application to have been advanced in the defamation suit, in the light of rule 69.7, it would have been doomed to failure. In fact, according to what I would consider to be the clear wording of the rule, a claimant may not make such an application at all.

[33] This issue must, therefore, be resolved in favour of the defendant.

[34] This now takes us to the third and final (and most controversial) issue.

Third Issue: Whether it is Permissible for a Claimant, who is Not Permitted to Request Information about the Defendant’s Sources in a Claim for Defamation, to Request if for the Purpose of a Defamation Suit by Means of a Parallel Claim

[35] It appears to me that the best way of beginning the search for an answer to this question must be to try to ascertain the rationale for the existence and development of the newspaper rule. We may thereafter seek to relate the rationale to the facts and circumstances of this case and the parallel one.

The Rationale for the Newspaper Rule

[36] In this regard (that is, seeking to identify the rationale for the rule), we might derive assistance from three of the cases cited by the defendant. These are the **Adam v Fisher** case; the **BC of New Zealand** case; and the **Gaddafi** case.

[37] It will be recalled that in **Adam v Fisher**, it was stated that one reason for the existence of the rule related to the “special position” in which a newspaper stood along with public-policy considerations. As was stated by the court of appeal (at page 288) in that case:

“It seemed that two answers might be given. One was that it might be assumed that the object of getting the name of the informant of a newspaper was to sue the informant, which was plainly improper. The second answer was that a newspaper stood in such a position that it was not desirable on grounds of public interest that the name of a newspaper’s informant should be disclosed”.

[38] In the **BC of New Zealand** case, the rationale was stated (at page 166 [20]) to be:

“As for its underlying purpose I think it must be accepted that it is a rule very much concerned with the public interest and benefit for society in having discussion and evaluation of affairs that is informed. For example, potential sources of information that might usefully be aired in public should not be discouraged by the distracting thought that their identity could quickly be disclosed in proceedings taken against a newspaper which might then never have to face trial itself.”

[39] And this was what was said about the rationale for the newspaper rule in the **Gaddafi** case:

“The foundation of the rule is the special position of those publishing and conducting newspapers, who accept responsibility for and are liable in respect of the matters contained in their journals, and the desirability of protecting those who contribute to their columns from the consequences of unnecessary

disclosure of their identity.” (page 19 of the judgment).

[40] Similarly, in the case of **Hodder v New Queensland Newspapers Property Ltd.** [1983] QCA 043, Davies J.A and Byrne J , at page 1 of their joint judgment, discussed the rationale in the following terms:

“There is a public interest in the free flow of information on matters of general concern. An apprehension that exposing confidential sources prejudices that interest by diminishing the media’s capacity to report crimes, official misconduct or other public dangers and abuses largely accounts for the “newspaper rule” of practice.”

Discussion

[41] So we are able to discern from these dicta that there is a public-interest element that informed the development of the rule, tied in with a consideration of the special position of newspapers and their role in promoting discussion and the dissemination of information.

[42] Those considerations being among the reasons for the existence of the rule, it is extremely difficult (if at all possible), to see how the rule could be circumvented by the filing of a parallel claim (along with an application), that is connected with an action in which the parties are the same and the substance of the application the same as that made in the first action and refused.

[43] It also seems to me (with respect), that the claimant’s statement of what it considers to be the issue in this case is, in all the circumstances of this case, somewhat deficient. This, it will be remembered, is how it was stated in the Amended Fixed-date Claim Form filed November 6, 2012:

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“...whether there are legally justifiable circumstances whereby a joint tortfeasor can refrain from disclosing the identity of another joint tortfeasor and thus frustrate

attempts for full legal vindication by an aggrieved party against all the liable tortfeasors”.

[44] It was against the background of the issue being stated thus, in this very general way, dealing with all tortfeasors across the wide spectrum of all torts, that the claimants’ counsel sought to convince the court of the relevance of the cases on which the claimants relied. It is useful at this point to take a look at at least two of the main cases on which the claimants’ counsel relied.

[45] In the **Norwich Pharmacal** case, a case decided by the House of Lords, owners of a patent for a chemical compound had suffered a tortious infringement of their patent by the unlicensed importation of their patented product by others who were not legally permitted to do so. The respondents, when the importation that was complained of was being done, had obtained the names and other information of the importers. The owners of the patent (Norwich) needed this information in order to sue those who had infringed their patent. The denial of their request for this information from the respondents led to the filing of an action by Norwich claiming, *inter alia*, an order for discovery of the names of the importers. The order was granted at first instance, but reversed on appeal.

[46] On further appeal to the House of Lords, it was (as indicated in the headnote), held, *inter alia*, that:

“(i) Although as a general rule no independent action for discovery would lie against a person against whom no reasonable cause of action could be alleged, or who was in the position of a mere witness in the strict sense, the rule did not apply where (a) without discovery of the information in the possession of the person against whom discovery was sought no action could be begun against the wrongdoer, and (b) the person against whom discovery was sought had himself, albeit through no fault of his own, been involved in the wrongful acts of another so as to facilitate the wrongdoing...

(ii)...there was no statutory provision which prohibited the court from ordering discovery for the purpose of legal proceedings if the public interest in the proper administration of justice required it...”

[47] It is these principles taken from this case on which the claimants seek to rely.

[48] However, it will be observed that there are a number of differences in the factual circumstances between the instant case and the **Norwich Pharmacal** case. For one (and most importantly), that case did not involve a newspaper or journalism of any sort; and, more specifically, it did not involve a discussion or consideration of the newspaper rule. The focus of the discussion seemed largely to have been on what is known as the ‘mere witness’ rule and discovery generally. However, the newspaper rule, (it bears repeating), has as its foundation or its rationale, public-interest considerations and the special position that newspapers occupy in our world today. Another observation that might be made (especially in relation to what was held in that case at item (ii) above), is that there is in fact a provision – that is, rule 69.7 of the CPR – that prohibits the court from ordering discovery against a defendant in a defamation action where the defence of privilege or fair comment on a matter of public interest is being advanced. Although this is not a defamation action (but one closely connected with and arising directly from one), should the position be any different from that stated in the law – that is, rule 69.7? It is my view that it should not.

[49] Further, as Lord Gifford submitted, there are dicta of Lord Reid at page 91(a-b) of the judgment which indicate that: “Neither authority, principle nor public policy would justify...” the ordering of disclosure by someone in possession of a defamatory letter, of the name of the author of that letter. Similarly, unlike in the **Norwich Pharmacal** case, in which the appellant/claimant had no other legal recourse if discovery had not been ordered, in the instant claim there is a clear legal recourse lying in the first suit that was filed.

[50] I agree with Lord Gifford that the **Norwich Pharmacal** case can and should be distinguished on these bases.

[51] In relation to the **British Steel** case, I also find that although that case discusses the newspaper rule, its difference from this case lies in the fact that it was not a libel or defamation case; but, rather, a case concerning breach of confidence, so that the newspaper rule would not have applied with its full force and rigour. In fact it was specifically stated in the headnote that:

“The ‘newspaper rule’ was confined to libel actions and did not extend to actions based on breach of confidence...” (see page 418 (b) of the judgment).

[52] Also, the courts there found that disclosure was necessary in the public interest given the facts of that case. In my view, (having read the affidavit evidence and considered all the submissions in this case), the basis for making such a finding does not exist here.

[53] In relation to the other cases cited on behalf of the claimants, I am of the opinion that they might all be distinguished on the basis that their factual circumstances are different from those of the instant case – this, in spite of the valiant efforts of Mr. Christie for the claimants to convince the court otherwise.

[54] It is my view that nothing has been advanced by the claimants to make me consider it just or in the best interests of the administration of justice or in the public interest to order the disclosure requested by the claimants. I am not at all convinced that there should be in this case a departure from the newspaper rule. There exist in this claim no special reasons or exceptional circumstances warranting such a departure. I agree with the submissions of Lord Gifford that this application (along with the claim itself), is simply a device being used to attempt to obtain an order that plainly and clearly cannot be obtained in the first claim, as the rules simply do not allow it.

[55] I believe that these considerations should suffice for the disposal of the application. However, as the defendant has put forward another argument based on the provisions of the Defamation Act, 2013, I will give that argument some brief consideration.

Submissions on The Defamation Act

For the Defendant

[56] It was contended on behalf of the defendant that any claim against Long Bench would now be statute-barred by virtue of the provisions of the Defamation Act, 2013 (the Act).

[57] Reliance was placed on section 33 of the Act, which provides for a limitation period of two years in respect of defamatory matter published on the Internet – the two years running either from the date on which the statement is first published on the Internet; or the date on which it is first capable of being viewed or listened to on the Internet, whichever is later. In respect of other defamatory matter, the limitation period is two years from first publication.

[58] Based on this provision, it was submitted, the claim against Long Bench would be statute-barred because (i) the publication in the Gleaner was more than six (6) years ago – that is, on July 19, 2008; and (ii) the publication on the internet is dated July 18, 2008 – also more than six years.

For the Claimants

[59] On behalf of the claimants it was submitted that for that argument to succeed, retrospective effect would have to be given to the statute and that should not be done unless it is clearly the intention of Parliament that an Act should have such effect.

Discussion

[60] In **Re Athlumney** [1898] 2 QB 547 at 551, R. S. Wright J stated the principle relating to legislation with retrospective effect thus:

“Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only”.

[61] The relevant section of the Act is not dealing only with matters of procedure; but matters that affect vested rights – that is, the rights of persons to bring claims in respect of defamatory matter published in the media and also on the Internet. The view that I take is that this Act (Act 31 of 2013) having come into effect on November 29, 2013, its provisions take effect from that date. Causes of action already begun would not be affected. Interestingly, however, is the absence from the present legislation of what the Defamation Act of 1963 contained in relation to this type of concern. Section 15 (1) of that Act made it unnecessary to consider any such matter in relation to that Act; as it stated:

“15.-(1) This Act applies for the purpose of any proceedings begun after the 30th April, 1963, whenever the cause of action arose, but does not affect any proceedings begun before that date.”

[62] The retention of this or a similar provision might have rendered the present discussion unnecessary. However, on the basis of the dicta in **Re Athlumney**, it is my view that the Act would not have retrospective effect.

[63] That is the answer to the submissions on the Defamation Act.

Conclusion and Disposition

[64] There is no or no sufficient reason to displace the application of the newspaper rule in this case. Its displacement is not required by any consideration of the public interest. The claimants, if they are able at trial to surmount the defences that have been

advanced and succeed in their action, can look to the defendant to recover whatever damages they seek.

[65] There are no special or exceptional circumstances, (which the cases show would be necessary to be established), for the rule to be displaced. The disclosure that is being sought is not necessary in the interests of justice.

[66] Additionally, it is my finding that this application and, indeed, the claim itself, are together really a device, ruse or stratagem designed and intended to attempt to obtain in a separate suit an order that the claimants have realized they are unable to obtain in the first claim, in which they might very well be convinced (from the long delay in proceeding therein) that they have reached a dead end. It appears to me that what the claimants have done in this claim is to have changed the form of their application made in the first claim (and which was refused), but with its substance, however, remaining the same.

[67] At the end of the day, therefore, the application must be refused, and the defendant must have the costs of the application.

[68] These orders are therefore made:

1. Application refused.
2. Costs of the application to the defendant to be agreed or taxed.