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parties do bear their own respective costs"; and (2) that subject as aforesaid this appeal be dismissed without costs.

Decree varied as above mentioned. Subject to such variation appeal dismissed.

Solicitors for the appellants, *Sly & Russell.*

Solicitors for the respondent, *Ernest Cohen & Linton.*

B. L.

Appl *Southern Equities Corp v West Aust Government Holdings Ltd* (1993) 10 WAR 1

[HIGH COURT OF AUSTRALIA.]

SMITH'S WEEKLY PUBLISHING COMPANY LIMITED . . . . . DEFENDANT, } APPELLANT;

AND

THE SUNDAY TIMES NEWSPAPER COMPANY LIMITED . . . . . PLAINTIFF, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 27, 28; *April* 24.

Knox C.J., Isaacs and Rich JJ.

Practice—Discovery—Common law action—Inspection of document—Claim for privilege—Affidavit of discovery—Common Law Procedure Act 1899 (*N.S.W.*) (*No.* 21 *of* 1899), *secs.* 102, 103.*

In an action for libel brought in the Supreme Court of New South Wales the defendant obtained an order for discovery, and in the affidavit of discovery it was sworn on behalf of the plaintiff that a certain document in its possession

* Sec. 102 of the *Common Law Procedure Act* 1899 (N.S.W.) provides that "(1) Upon the application of either party to any action or other proceeding, upon an affidavit by such party or his attorney of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession or power of the opposite party, the Court or a Judge may order that (*a*) the party against whom such application is made; or (*b*) if such party is a body corporate, some officer to be named of such body corporate, shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody such documents or any of them are in, and whether he or they objects or object to the production

related solely to and supported the plaintiff's case and did not support the defendant's case or contain anything cutting down or impeaching the plaintiff's case. The Supreme Court having refused an application by the defendant for inspection of the document,

Held, by *Knox* C.J., *Isaacs* and *Rich* JJ., that on the evidence there was no substantial ground upon which to base a conclusion that the statement in the affidavit was made erroneously or under a misconception of the character of the document, and, therefore, that the application was properly refused.

Held, also, by *Isaacs* and *Rich* JJ., (1) that sec. 103 of the *Common Law Procedure Act* 1899 (N.S.W.) is merely an inspection provision giving a more summary method of getting at law the precise benefit of inspection which, after discovery in equity, could have been there obtained; (2) that secs. 102 and 103 of that Act should be read separately, neither attaching to procedure under sec. 102 the limited consequences of sec. 103 nor enlarging the limited consequences of sec. 103 by the larger consequences attached to procedure under sec. 102; and (3) that where after an order for discovery it has been sworn in an affidavit of discovery that a particular document relates solely to and supports, and contains nothing cutting down or impeaching, the case of the party on whose behalf the affidavit is sworn and does not support the case of the other party, the latter is entitled under sec. 102 to an order for inspection of the document if he establishes a reasonable probability that it contains something which may aid his case.

Decision of the Supreme Court of New South Wales affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by the Sunday Times Newspaper Co. Ltd. against Smith's Weekly Publishing Co. Ltd., claiming damages for libel. The plaintiff Company, which had a paid-up capital of £100,000 in 100,000 shares of £1 each, issued a prospectus offering to the public for subscription 100,000 cumulative preference shares of £1 each. Part of the prospectus consisted of a report of John Stewart & Co., public accountants, dated 27th May 1922. The defendant Company published in their newspaper an article criticizing that prospectus; and this article was alleged to

of such as are in his or their possession or power, and if so on what grounds. (2) Upon such affidavit being made the Court or Judge may make such further order thereon as shall be just." Sec. 103 provides that "Upon the application of either party to any action or other proceeding in any case in which, before the passing of the Act sixteenth Victoria number fourteen, a discovery might have been obtained by filing a bill, or by any other proceeding in a Court of equity at the instance of such party, the Court or a Judge may order the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or proceeding, and if necessary to take examined copies of the same or to procure the same to be duly stamped."

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be the libel complained of. An order for mutual affidavits of discovery having been made by the Court, the affidavit of discovery made on behalf of the plaintiff specified a number of documents as being privileged from discovery. One of these documents was described as a copy of a report by John Stewart & Co., public accountants, dated 12th May 1922, addressed to Messrs. J. C. Ward & Co., sharebrokers, Sydney; and the plaintiff Company refused to produce it on the ground, as stated in the affidavit, that it related solely to and supported the plaintiff's case and did not support the defendant's case and did not contain anything cutting down or impeaching the plaintiff's case.

The defendant then applied, on summons in Chambers, for an order that the defendant have inspection of the particular document, or, in the alternative, that the document be produced for the inspection of the Judge, on the ground (*inter alia*) that the plaintiff had erroneously represented or misconceived the nature of the document. This application was heard by *Ralston* A.-J., and the summons was dismissed; and that decision was affirmed on appeal by the Full Court.

From the decision of the Full Court the defendant now, by special leave, appealed to the High Court.

Weston (with him *Evatt*), for the appellant. The Court will give relief to an applicant for inspection if it is satisfied that the person who swore the affidavit of documents has erroneously claimed privilege for the particular document (*Attorney-General* v. *Emerson* (1)), and the test is whether the Court is satisfied that privilege has been claimed for a document which may, not must, assist the applicant's case or damage that of his opponent (*Compagnie Financière et Commerciale du Pacifique* v. *Peruvian Guano Co.* (2)). The facts of this case bring it within that principle. Sec. 103 of the *Common Law Procedure Act* 1899 (N.S.W.), in cases to which it applies (of which this case is one), gives a power to the Court to order inspection to be given to a party irrespective of the technical rules of discovery, and impliedly permits the Court itself to inspect the document to ascertain whether or not it should be produced for inspection. In

(1) (1882) 10 Q.B.D., 191. (2) (1882) 11 Q.B.D., 55.

applying that section, the Court can act upon a mere balance of testimony, and need not attach any special importance to the affidavit of discovery. Sec. 102 (2) of that Act also enables the Court to deal with the matter without regard to the rules which formerly prevailed or which now prevail in the equitable jurisdiction, and in the exercise of the unfettered discretion given by that section the Supreme Court should, in the present case, have made the order asked for, or, at any rate, should have inspected the document in question in order that it might have determined what order was just. [Counsel also referred to *Williams* v. *Quebrada Railway Co.* (1).]

[RICH J. referred to *Hunt* v. *Hewitt* (2).

[KNOX C.J. referred to *Pepper* v. *Chambers* (3); *Hill* v. *Philp* (4); *London Gas Light Co. v. Chelsea Vestry* (5).

[ISAACS J. referred to *Chartered Bank of India, Australia and China* v. *Rich* (6).]

Shand K.C. (with him *Curtis*), for the respondent. Inspection was properly refused in this case. In no reported case have the Courts in England, acting under the English *Common Law Procedure Act*, deviated from the practice of the Court of equity, namely, that if it is sworn that the document of which inspection is sought does not help the applicant's case or injure the case of the other party, the Court will not grant inspection unless satisfied that the affidavit is erroneous. [Counsel referred to *Roberts* v. *Oppenheim* (7).]

[ISAACS J. referred to *Anderson* v. *Bank of British Columbia* (8).

[KNOX C.J. referred to *Bustros* v. *White* (9); *Pye* v. *Butterfield* (10).]

Under sec. 102 (2) of the *Common Law Procedure Act* 1899 the Court would consider it to be just to act in accordance with the practice of a Court of equity. The onus is upon the appellant to show that he is entitled to discovery.

Weston, in reply.

(1) (1895) 2 Ch., 751, at p. 757.
(2) (1852) 7 Ex., 236, at p. 244.
(3) (1852) 7 Ex., 226.
(4) (1852) 7 Ex., 232.
(5) (1859) 6 C.B. (N.S.), 411.
(6) (1863) 4 B. & S., 73.
(7) (1884) 26 Ch. D., 724, at p. 734.
(8) (1876) 2 Ch. D., 644, at p. 654.
(9) (1876) 1 Q.B.D., 423.
(10) (1864) 5 B. & S., 829.

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PER CURIAM. The appeal will be dismissed. The reasons will be given later.

The following written judgments were subsequently delivered :—

KNOX C.J. The appellant, the defendant in the action, applied in the Supreme Court for an order allowing inspection of a document mentioned in the affidavit of discovery of respondent's secretary. The document was described in the affidavit as a copy of a report by John Stewart & Co., public accountants. The application was resisted on the ground that the document related solely to and supported the respondent's case and did not support the case of the appellant or contain anything cutting down or impeaching the respondent's case, the affidavit of discovery containing a statement to this effect. The application for production of this document was refused by *Ralston* A.-J. This decision was affirmed on appeal by the Full Court of the Supreme Court; and the appellant now, by special leave, appeals to this Court against the order of the Supreme Court. The argument before us extended to many topics on which I find it unnecessary to express an opinion. Much of the argument was addressed to the question whether a party applying under sec. 102 of the *Common Law Procedure Act*, for production of a document for which protection is claimed in the terms used in the affidavit in this case, is in a better position as to the degree of certainty to be attained in establishing that the statement in the affidavit is erroneous than a party making a similar application in the Court of equity.

I express no opinion on this question, being of opinion that even if the *Common Law Procedure Act* authorizes the Court to order production on proof less convincing than that required by the practice of the Court of equity, the appellant has in this case wholly failed to establish that, on the material before the Court, there is any substantial ground on which to base a conclusion that the statement in the affidavit above referred to was made erroneously or under a misconception of the character of the document. As I understood his argument, Mr. *Weston* admitted that the statement in the affidavit is to be treated as conclusive unless the Court is satisfied that it was so made. The exact degree of satisfaction to be required is irrelevant in a case such as the present, in which there are really no facts on which the Court could properly arrive at that conclusion.

For these reasons I am of opinion that the appeal should be dismissed.

ISAACS AND RICH JJ. We agree that this appeal should be dismissed. Whether the relevant law, as held by the Supreme Court, requires reasonable certainty that the party making the affidavit has misconceived or misapprehended the character of the document in question, or whether it is sufficient to establish reasonable probability that the document is such as the applicant has a right to see, we are clear that the facts as they appear in this appeal, fall short of the necessary standard. But we conceive, in view of the very full argument on the law, that it is most desirable, in the interests of the general administration of justice in the Supreme Court of New South Wales, that we should not leave *in dubio* the reasons which guide us to our opinion. Secs. 102 and 103 of the *Common Law Procedure Act* were intended to be and are extremely valuable and, as we regard them, powerful means given by the Legislature to the Court for the better and more speedy and certain attainment of justice. We therefore think it very important to state their effect as that appears by the light of a body of judicial opinion of unusual weight and authority, short of the supreme tribunal.

It will conduce to a better appreciation of the matter if we begin with the section later in order—sec. 103. In reality it is the earlier in point of history. It was enacted in substance by the Act 16 Vict. No. 14, sec. 6, an Act to amend the law of evidence. In its consolidated form in the Act of 1899, there is no substantial alteration. But its operative effect must, of course, be determined by its interpretation as it stands in the Act of 1899. Its meaning, we think, is plain on its own language. But we are relieved from placing our own independent interpretation on the section by reason of the fact that the view we would personally take of its language, if it were *res integra*, is the settled construction of the corresponding English enactment from which it was adopted, namely, the Act 14 & 15 Vict. c. 99, sec. 6, known as *Lord Brougham's Act*. At that time the power of a Court of law to allow discovery was very limited (see *Blogg* v. *Kent* (1)), except where the Court of Exchequer in the

(1) (1830) 6 Bing., 614.

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exercise of its equitable jurisdiction went further (see per *Pollock* C.B. in *Hunt* v. *Hewitt* (1)). Shortly after the Imperial Act was passed, the case of *R.* v. *Ambergate &c. Railway Co.* (2) came before the Court of Queen's Bench. Lord *Campbell* C.J. said (3): "The order is made under stat. 14 & 15 Vict. c. 99, sec. 6, which gives what I trust will prove a very beneficial provision for compelling the inspection of documents in civil actions, the only means for obtaining which, before that Act, was the filing a bill of discovery in equity." The words of the learned Lord Chief Justice were, as reported, not quite as wide as the statute, because the section contained words "by filing a bill or by any other proceeding in a Court of equity." But substantially he was right, because it referred the operation of the statute to the equity standard. That case, however, did not construe the enactment. A definite and finally accepted construction was put upon it in 1852. First, it was held in 1851, within three months of its passing, in *Galsworthy* v. *Norman* (4), that the section did not enable a party to obtain *discovery*, but merely to obtain *inspection* of documents of which he could allege affirmatively the necessary relevance. In *Pepper* v. *Chambers* (5), in January 1852, it was held that an affidavit by a party that he was "advised" as to the necessity of documents, without even stating *belief*, was insufficient. In June of that year *Hunt* v. *Hewitt* was decided. This, like *Galsworthy's Case*, held that not *discovery* but *inspection* was the purpose of the enactment. It was also held, and this is the important point now, that the case must be one in which a discovery could be obtained in a Court of equity. The procedure necessary is detailed at p. 243 of the report, and the rules of equity as to the right of inspection were decided to govern the matter (6). On p. 245 the words "if no answer is given to them by affidavit" are extremely important in applying the section. *Hunt* v. *Hewitt*, which followed the Court of Common Pleas, was in 1863 approved by the Court of Queen's Bench in *Chartered Bank of India, Australia and China* v. *Rich* (7); and so

(1) (1852) 7 Ex., at p. 243.
(2) (1852) 17 Q.B., 957.
(3) (1852) 17 Q.B., at p. 966.
(4) (1851) 21 L.J. Q.B., 70.
(5) (1852) 7 Ex., 226.
(6) (1852) 7 Ex., at pp. 243-244.
(7) (1863) 4 B. & S., 73.

in that year every one of the Courts of common law held a clear and definite view that sec. 6 of the Act 14 & 15 Vict. c. 99 (the present sec. 103 of the *Common Law Procedure Act* 1899) was merely an "inspection" provision—a more summary method of getting at law the precise benefit of "inspection" which *after discovery* in equity could have been there obtained. This was later confirmed in the latest case on the subject prior to the *Judicature Act* 1875, namely, *Hill* v. *Campbell* (1). That view was upheld by the majority of the Court, though *Brett* J. thought that the power of the Court as to discovery had been enlarged by later legislation, and that such larger power could be applied in administering sec. 6 of 14 & 15 Vict. c. 99. The majority, however, held that the original limitation applied; and that is important here. We apply that decision with the others in this way: we follow the rule in *Hunt* v. *Hewitt* (2) as to the original scope and effect of sec. 103, and we follow the decision in *Hill* v. *Campbell*, that sec. 102 and sec. 103 are to be read separately and, adopting the words of Lord *Coleridge* C.J. (3), neither attaching to the later procedure the limited consequences of the earlier statute nor enlarging the limited consequences of the earlier statute by the larger ones attached to a later procedure.

It was, of course, early apparent that the beneficial effects of the Act of 1851 were not as great as they were expected to be. It was well known, not only that the strict rule of equity as to discovery and inspection sometimes produced gross injustice (as, for instance, in the glaring case of *Clapham* v. *White* (4)), and often hampered the Chancellor in doing what he would have wished to do (as in *Sheffield Canal Co.* v. *Sheffield and Rotheram Railway Co.* (5)), but "discovery" as such was wholly unprovided for.

In 1854, by secs. 50 and 51 of the *Common Law Procedure Act*, a great advance was made. Sec. 50 corresponds to sec. 102 in the New South Wales Act, and the decisions under that first-named section govern the construction of the latter. The earliest form of the local enactment was in 1857 by 20 Vict. No. 31, sec. 23, adopted from the English Act.

(1) (1875) L.R. 10 C.P., 222.
(2) (1852) 7 Ex., 236.
(3) (1875) L.R. 10 C.P., at p. 246.
(4) (1802) 8 Ves. Jun., 35.
(5) (1844) 1 Ph., 484.

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The new English provisions first came under judicial consideration in *Martin* v. *Hemming*, where *Pollock* C.B. said (1): "It is a very important statute, holding out the prospect of a very considerable change in the practice of the Courts, and it is an enactment likely to *advance* the efficiency of their proceedings." He, however, did not pronounce on the effect of it as that was not, as he said, "fully and fairly before us." In *Hill* v. *Campbell* (2) some of the decisions are traced. We shall refer only to some important ones. In 1857, in *Thompson* v. *Robson* (3), it was recognized in the argument of counsel that the new statutory provision by allowing "discovery" supplied the defect of the earlier enactment. The Court held, in effect, that the foundational affidavit of the applicant must show sufficient to satisfy the Court that inspection of at least one identifiable document is proper in the interests of justice. (See also per *Byles* J. in *Woolley* v. *Pole* (4) and per *Willes* J. in the same case (5).) In 1861, in *Daniel* v. *Bond* (6), *Erle* C.J. said of this section: "The statute has given to the Courts extremely wide powers for directing documents to be produced, *limited only by what they shall think just.*" He adds: "*I am well aware of the indefinite nature of that limitation, and of the danger of too great laxity in the exercise of this power.*" *Williams* J. and *Keating* J. concurred, the former in a supplemental observation expressly stating his assent to the construction placed by *Erle* C.J. on the statute. In 1863, in *Woolley* v. *Pole*, the Court agreed with *Thompson* v. *Robson*. In the same year the Court of Queen's Bench, in *Chartered Bank of India, Australia and China* v. *Rich* (7), had to consider not so much the scope of the section from the point of view with which we are now concerned as the application of it to the class of documents before the Court, namely, confidential communications. The Court held against inspection, and on this point one portion of *Hunt* v. *Hewitt* (8) was relevant. But in the judgment of *Blackburn* J. are some observations directly relevant to the present inquiry. The learned Judge says (9):—"Under the *Common Law Procedure*

(1) (1854) 10 Ex., 478, at pp. 486-487.
(2) (1875) L.R. 10 C.P., 222.
(3) (1857) 2 H. & N., 412.
(4) (1863) 14 C.B. (N.S.), 538, at p. 542.
(5) (1863) 14 C.B. (N.S.), at p. 546.
(6) (1861) 9 C.B. (N.S.), 716, at p. 723.
(7) (1863) 4 B. & S., 73.
(8) (1852) 7 Ex., 236.
(9) (1863) 4 B. & S., at p. 82.

Act 1854, 17 & 18 Vict. c. 125, sec. 50, the Court or Judge having before them the answer of the party as to the documents in his possession or power relating to the matters in dispute, and his objection to the production of them, 'may make such further order thereon as shall be just.' I think the Legislature did not mean that we should be bound by the same rules by which a Judge of a Court of equity is bound; but *that we should be regulated by what is just as between the parties.*" This entirely accords with the judgment of *Erle* C.J. and *Williams* J. in *Daniel* v. *Bond* (1). And, in addition to the great authority of the opinion of *Blackburn* J. himself, it will be observed that he testifies to the general practice of the Court and the Judges in Chambers in reference to the matter. In the next year, 1864, in *Houghton* v. *London and County Assurance Co.* (2), the coping-stone, so to speak, is placed on the structure. It was held by the whole Court that the limits on the section were that the party applying must show that the documents of which he is asking inspection (1) do really exist and (2) are relevant *to his case*—that is, they must be relevant, not merely to *the* case, but to *his* case. The practice of the Court, as *Williams* J. observed *in arguendo*, had narrowed the decision in *Thompson* v. *Robson* (3): "It is not necessary," said the learned Judge (4), "to show that the document would be evidence: it is enough if it may fairly be serviceable to the applicant's case." The whole tenor of the judgment of the Lord Chief Justice is that the applicant is not bound by the strict equity practice as to the evidence upon which the Court will act. The Court, according to that judgment, ascertains the facts as in any other case, subject only to the express conditions of the statute. They held, in the absence of an affidavit in denial, that ordinary business presumptions were sufficient and should be acted upon. *Williams* J. thought (5) that in the circumstances there was "such an air of probability," which was "not explained away by counter-affidavits," as to support the order for inspection. One has only to contrast this case with the case of *Clapham* v. *White* (6) to see how far the legislation had travelled beyond the equity

(1) (1861) 9 C.B. (N.S.), 716.
(2) (1864) 17 C.B. (N.S.), 80.
(3) (1857) 2 H. & N., 412.
(4) (1864) 17 C.B. (N.S.), at p. 82.
(5) (1864) 17 C.B. (N.S.), at p. 83.
(6) (1802) 8 Ves. Jun., 35.

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practice. Finally, in 1875, just before the *Judicature Act*, came *Hill* v. *Campbell* (1), where Lord *Coleridge* C.J. and *Brett* J. certainly were of opinion (*Grove* J. expressing no opinion as to this) that sec. 50 of the English Act, that is, sec. 102 of the local Act, was not in any way limited by the practice or procedure of the Courts of equity. But, if not limited by any such practice or procedure and if empowered to "make such order as shall be just," it is plain to us that there can be no such restriction as that imposed by the old chancery practice, which is the admitted foundation of *Attorney-General* v. *Emerson* (2), and which required in the first place "reasonable certainty," by which was meant "*that amount of certainty* that a reasonable man would act on *as a certainty*"; and which required, in the second place, that that reasonable certainty should be arrived at from a very limited sphere of material. The old chancery practice, as pointed out by *Jessel* M.R. in *Anderson* v. *Bank of British Columbia* (3) and *Bustros* v. *White* (4)—that is, the chancery practice settled in 1852 and copied into the Judicature Rules—was by specific provision of Act of Parliament declared to prevail against any contrary practice in Courts of law. That accounts for the decisions in England following in such matters the equity practice. But in New South Wales that position does not exist. The statutory provisions remain in full force and effect, and have not been superseded. Their effect is, in our opinion, that which has been declared by the cases we have quoted.

In making such order as is "just," it is hardly necessary to say the tribunal is not left at large. The discretion is judicial, and not arbitrary. "Just" means, in such a case, "just according to law" (see *Brown* v. *Dean* (5)). While the tribunal is emancipated from the procedural and evidential fetters that had grown up historically in equity practice, it is still bound to observe the substantial rules of justice established in such cases as between litigants. Such, for instance, are the protection of legal professional confidence, of admissions tending to criminate or penalize, questions of public policy and so on. Those and kindred questions are matters which

(1) (1875) L.R. 10 C.P., 222.
(2) (1882) 10 Q.B.D., 191.
(3) (1876) 2 Ch. D., at p. 654.
(4) (1876) 1 Q.B.D., at pp. 425-426.
(5) (1910) A.C., 373.

affect the justice of any order sought, and are as potent under sec. 102 as under sec. 103. None of those circumstances are suggested in the present case, but reference to them is made in order to prevent misapprehension.

Applying the law so ascertained to the facts before us, we cannot find any evidence of probability, and therefore there is nothing whatever to satisfy us that the report of which the appellant seeks inspection contains anything which could aid his case. There is the distinct oath of the plaintiff to the contrary. Treating that oath as evidence only, and open to contrary evidence, we find nothing to countervail it. True, there is the suggestion of learned counsel that if it had been favourable to the plaintiff it would have been attached to the prospectus; but that is mere suggestion. It may or may not turn out that the document in question does bear out that suggestion. But our duty is to act on the evidentiary material now before us; and, so acting, we think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Heydon & Heydon.*

Solicitors for the respondent, *Houston & Co.*

B. L.