



Judgment Summary
Supreme Court
New South Wales
Court of Appeal

Liu v The Age Company Ltd [2016] NSWCA 115

Beazley P, McColl JA, Ward JA

Today the Court of Appeal upheld in part an appeal brought by Ms Helen Liu against a decision of McCallum J granting a stay of a preliminary discovery order that had required The Age Company Pty Ltd and three of its journalists (“Fairfax”) to give discovery of documents relating to the identity of sources referred to in articles Fairfax published concerning Ms Liu. The Court of Appeal set aside the stay.

The proceedings arose out of the following facts. On 3 February 2010, Fairfax published a number of articles which Ms Liu alleged were defamatory of her in substance because they imputed that she had engaged in corrupt conduct, including corrupt dealings with a Federal politician. The articles were substantially based on information Fairfax said it had received from unnamed sources. Ms Liu wished to commence proceedings both against Fairfax and its sources in respect of the defamatory imputations she contended the articles conveyed about her. She sought to identify the sources by an application for preliminary discovery against Fairfax. That application was upheld by the primary judge after a 10 day hearing (“first hearing”). Fairfax’s appeal from the primary judge’s decision was dismissed by the Court of Appeal. The High Court refused Fairfax’s special leave application.

Ms Liu then had the matter relisted before the primary judge to secure Fairfax’s compliance with the preliminary discovery order. At that stage, Fairfax sought a stay of the preliminary discovery order on the basis that it undertook not to rely on any defence of qualified privilege in respect of Ms Liu’s defamation claim against it (“Fairfax undertaking”). The primary judge considered that the Fairfax undertaking meant Ms Liu had a remedy in defamation against Fairfax which was “no less effective” than an action against the sources. Accordingly, her Honour granted the stay. She also ordered Fairfax to pay Ms Liu’s costs of the preliminary discovery hearing on the ordinary basis.

Ms Liu appealed, challenging the grant of the stay, the finding that by reason of the Fairfax undertaking she had an effective remedy and the basis on which she had been awarded costs of the first hearing. Fairfax cross-appealed, contending it ought not to have been ordered to pay any costs of the first hearing.

The Court of Appeal held that Ms Liu did not have an effective remedy as proof of a claim she intended to advance in her defamation proceedings for aggravated damages based on her knowledge of the falsity of the imputations would be impaired if she was unable to confront her accusers, the sources, and have the best opportunity to demonstrate the documents they provided were forgeries.

The majority of the Court of Appeal also held that it was not in the interests of justice for the primary judge to entertain Fairfax's stay application and permit the relitigation of the preliminary discovery application, albeit with the goal posts moved to suit Fairfax. It rejected that part of Ms Liu's appeal which complained about the basis upon which she was awarded costs of the first hearing.

The Court of Appeal dismissed Fairfax's cross-appeal, holding that there is no special costs rule for media defendants in relation to preliminary discovery applications.