
Church of Scientology of California v Department of Health and Social Security and others.

[From All England Law Reports (1979), vol. 3]

COURT OF APPEAL
STEPHENSON, BRANDON AND TEMPLEMAN LJJ

15th, 16th, 17th, 18th, 19th, 22nd JANUARY 1979

Discovery - Production of documents - Confidence - Undertaking not to make improper use of disclosed documents - Court's discretion to restrict production unless undertaking given - Court ordering that discovery of medical records be refused unless to a medical practitioner - Court further ordering that discovery of other documents be refused unless party's solicitor gave undertaking that documents would not be used for collateral or ulterior purpose - Whether court has inherent jurisdiction to restrict production subject to conditions - RSC Ord 24, r 9.

By three actions which were consolidated the plaintiffs, a religious sect, sued the Department of Health and Social Security and two of its senior officials for libel in respect of information released to the press by the Minister of Health and letters written by the officials to health authorities in Sweden and Canada which suggested that the plaintiffs were dangerous charlatans who gave inexperienced medical treatment to mentally ill people which made their condition worse rather than better. The defendants filed defences alleging justification and fair comment. In the course of mutual discovery in the action the defendants served on the plaintiffs a list of documents in which they objected, on the ground of confidentiality, to unrestricted production of medical records and certain letters from people (including potential witnesses for the defence) who had written to the department complaining about the plaintiffs and their methods. The master made an order in the terms requested by the defendants, excusing them from giving inspection of (i) the medical records except to a medical practitioner nominated by the plaintiffs on his giving an undertaking not to disclose the contents and (ii) the other documents in question unless the plaintiffs' solicitor gave an undertaking that the documents would not be shown nor their contents revealed to anyone other than counsel for the plaintiffs and that the plaintiffs would not use the documents for any purpose collateral or ulterior to the conduct of the action. On appeal by the plaintiffs, the judge affirmed the order. The plaintiffs appealed to the Court of Appeal, contending (i) that the court had no jurisdiction under a general discretion to make the order, or if there was such a discretion there were no grounds for exercising it. There was evidence and material before the court that the plaintiffs had in the past had a policy of harassing critics in order to discourage them from continuing with their criticisms.

Held - (i) Although under RSC Ord 24, r 9^a a party to litigation normally had the right of unrestricted inspection of those documents disclosed by the other party on discovery and for which privilege was not claimed, the court had, as part of its inherent jurisdiction to ensure that the ambit of discovery was not wider than necessary to dispose fairly of the action or to prevent conduct which might amount to an abuse of the process of the court or a contempt, a general power to impose restrictions on inspection, if for example there was a real risk of the right of inspection being used for a collateral purpose. Such a restriction could be imposed either by refusing an order except on an undertaking being given or by granting an order conditional on an undertaking being given (see p103 c to p104 e, p105 e to g, p106 c to p107 a, p112 d e, p113 h j, p114 a d e and p116 d to h, post); *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354, *Alterskye v Scott*

a. Rule 9, so far as material, is set out at p 102 g. post

[1948] 1 All ER 469 and *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677 applied; *McIvor v Southern Health and Social Services Board* [1978] 2 All ER 625 distinguished.

(ii) Because there was a real risk that an unnecessarily wide circulation of information obtained by the plaintiffs on discovery might lead to harassment of persons who had written to the department by over-zealous supporters of the plaintiffs either in England or abroad, some restriction on inspection of the defendants' documents by the plaintiffs was required. However, the restrictions imposed by the master were too restrictive and the counsel would substitute an order in terms agreed by the

parties. To that extent the appeal would be allowed (see p109 *f g*, p110 *e*, p112 *e f*, p113 *f to h*, p114 *e f*, p115 *g to f* and p116 *a, post*).

Notes

For objections to production of documents on discovery, see 13 Halsbury's Laws (4th Edn), paras 67-95, and for cases on the subject, see 18 Digest 177-122, 902-942.

Cases referred to in judgments

Alterskye v Scott [1948] 1 All ER 469, 18 Digest (Reissue) 62, 426.

Bustros v White (1876) 1 QBD 423, 45 LJQB 642, 34 LT 835, 3 Char Pr Cas 229, CA, 18 Digest (Reissue) 71, 499.

Coles and Ravenshear, Re [1907] 1 KB1, 76 LKJB 27,95 LT 750, CA, 51 Digest (Repl) 806, 3626.

Crompton (Alfred) Amusement Machines Ltd v Customs and Excise Comrs (No 2) [1973] 2 All ER 1199, [1974] AC 405, [1973] 3 WLR 268, HL, 18 Digest (Reissue) 102, 756.

D v National Society for the Prevention of Cruelty to Children [1977] 1 All ER 589, [1978] AC 171, [1977] 2 WLR 201,76 LGR 5, ILL.

Foot v Associated Newspapers Group Ltd (19th January 1977) unreported.

Hope v Brash [1897] 2 QB 188, [1895] All ER Rep 343, 66 LJQB 653, 76 LT 823, CA, 18 Digest (Reissue) 71, 500.

[*Hubbard v Vosper*](#) [1972] 1 All ER 1023, [1972] 2 QB 84, [1972] 2 WLR 389, CA, 13 Digest (Reissue) 121, 1002.

McIvor v Southern Health and Social Services Board [1978] 2 All ER 625, [1978] 1 WLR 757, HL.

Filler (Anton) K G v Manufacturing Processes Ltd [1976] 1 All ER 779, [1976] Ch 55, Li 976] 2WLR 162,[1976] RPC719, CA.

Printers and Finishers Ltd v Holloway [1961] RPC 77, CA.

Riddick v Thames Board Mills Ltd [1977] 3 All ER 677, [1977] QB 881, [1977] 3 WLR 63, CA.

Science Research Council v Nasse [1978] 3 All ER 1196, [1979] QB 144, [1978] 3 WLR 754 [1978] ICR 1124, CA.

Warner-Lambert Co v Glaxo Laboratories Ltd [1975] RPC 354, CA, 36 (2) Digest (Reissue) 1272,3621.

Woodworth v Conroy, Conroy v Woodworth [1976] 1 All ER 107, [1976] QB 884, [1976] 2 WLR 338, CA.

Interlocutory appeal

By writs dated 23rd July, 6th August and 10th September 1974 the plaintiffs, the Church of Scientology of California, sued the defendants, the Department of Health and Social Security, George Godber and John Cashman, for damages for libel. By order dated 9th June 1975 the actions were consolidated. By notice dated 2nd May 1977 the defendants applied for an order that they be excused from giving inspection of certain documents unless the plaintiffs, by their solicitor, gave an undertaking within 14 days not to reveal the contents of the documents to anyone other than the plaintiffs' counsel and not to use them for any purpose ulterior to the conduct of the action, and that the defendants be excused from giving inspection of other documents comprising medical records and hospital notes other than to a registered medical practitioner appointed by the plaintiffs. On 11th May 1977 Master Lubbock made the order in the terms asked for.

The plaintiffs appealed but on 22nd February 1978 Melford Stevenson J dismissed their appeal. The facts are set out in the judgments of Stephenson LJ and Templeman LJ.

Benet Hytner QC and *John Hamilton* for the plaintiffs. *Peter Bowsher QC* for the defendants.

STEPHENSON LJ. This appeal concerns discovery in three consolidated actions for libel brought by the Church of

STEPHENSON LJ. This appeal concerns discovery in three consolidated actions for libel brought by the Church of Scientology of California, the first action against the Department of Health and Social Security alone, the second against that department and its principal medical officer, Sir George Godber, and the third against the department and an under-secretary in it, Mr John Cashman.

On 11th May 1977 Master Lubbock made an extraordinary order. Paragraph 3, subparas (3) and (4) of that order are as follows:

'(3). The defendants be excused from giving inspection of the documents numbered 7, 30, 150, 166, 171, 205, 305, 306, 314, 315 and 323 in Part I of Schedule I of their List of Documents served on the 26th February 1977, unless within 14 days the Plaintiffs by their solicitor, Stephen M. Bird, expressly undertake that the said documents will not be shown nor their contents revealed to anyone other than Counsel for the Plaintiffs and that the Plaintiffs will not use the said documents for any purpose collateral to or ulterior to the conduct of this action;

(4). The Defendants be excused from producing for inspection the documents numbered 146, 152, 177, 178, 179, 202, 239, 240, 241, and 424 in Part I of Schedule I of their said List of Documents other than to a registered medical practitioner appointed by the Plaintiffs for the purpose of these consolidated actions and upon his expressly undertaking in writing that he will not disclose the contents thereof.'

On 22nd February 1978 Melford Stevenson J affirmed that order by dismissing the appeal from it.

The writs in these three actions were issued on 23rd July, 6th August and 10th September 1974. The allegations claimed to be defamatory are in effect that the plaintiffs are dangerous charlatans who give inexpert medical treatment to mentally sick persons and make them worse rather than better; and that they are an undesirable and evil body. Those allegations were made in background notes issued by the Minister of Health to the press in 1968, the subject of the first action, and in letters in the other two actions, one by Sir George Godber to a health authority in Sweden, and the other by Mr Cashman to another health authority in Ontario, Canada.

The defences in all three consolidated actions contain pleas of justification and fair comment in paras 5 and 6, and annexed to them are particulars referring to ten cases of mentally sick persons whom they allege to have been so treated, two of whom are now dead.

In in the course of the proceedings, and that course has not been swift or expeditious for various reasons, the defendants have made and served a list of documents. Paragraphs 2, 3 and 4 of that list are in these terms:

'2. The defendants object to produce the documents numbered 146, 152, 177, 178, 179, 202, 239, 240, 241 and 424 in Part I of the said Schedule 1 other than to the plaintiff's medical adviser on the ground that such documents contain extracts from patients' medical records or material based thereon and are thus confidential in nature and ought not otherwise to be disclosed.

3. The defendants object to produce document numbered 7 in Part 1 of the said Schedule 1 unless the plaintiff, by its proper officer, gives an undertaking not to use any of the material contained in the document otherwise than for purposes reasonably necessary for the conduct of the actions, and not for any collateral or ulterior purpose. The defendants further object to disclosing any part of the letters comprising the document which might reveal identifying details of the writer

thereof or the individuals referred to therein. These objections are made to preserve the necessary relationship of confidence between the Secretary of State for Social Services (formerly the Minister) and his Department and those who write to him regarding matters on which the Secretary of State ought to be informed.

4. The defendants object to produce the documents numbered 30, 150, 166, 171, 205, 305, 306, 314, 315 and 323 in Part 1 of the said Schedule 1 unless the plaintiff gives an undertaking in respect thereof in similar fashion to that mentioned in the preceding paragraph. The defendants further object to disclosing any part of the said document which might reveal identifying details of those who corresponded with the person named in Part 1 of the Schedule in respect of such documents.

Now the documents referred to in para 2, the first of those three paragraphs, are hospital notes and medical reports on the ten patients to whom I have referred, and in that list it is asked that the contents of those documents should only be disclosed to

the plaintiffs' medical adviser and nobody else, and that is the order that has been made by ~ the master and affirmed by the judge in respect of those documents.

The second head of documents to which objection to production is made is no 7 referred to in para 3, and that contains 250 letters from some 30 or 40 persons (we are told) who have given information to the defendants adverse to the plaintiffs. The documents referred to in the last paragraph are letters passing between a Mr Maurice Johnson and some six other 'renegades', persons (we are told) who have been scientologists, and allegations in the pleadings show that Mr Johnson is also a person who has been treated by the plaintiffs.

The objection taken in the last two paragraphs of the list of documents which I have read is to producing those letters, the Maurice Johnson letters or the other informants' letters, to the plaintiffs unless the plaintiffs, by their proper officer, give the undertaking which I have read.

It will be noticed that the order under appeal goes further than that objection because it forbids production to any proper officer, or an undertaking by any proper officer, other than Stephen Bird, the plaintiffs' solicitor. The undertaking which he is required to give on the order, and which the proper officer was requested to give in this list, is an undertaking which the law implies, as is shown by the case of *Alterskye v Scott*¹. The way in which these objections are taken in this list is the same as that in which it was taken in that case, and in *Foot v Associated Newspapers Group Ltd*², in which the following order was made on 19th January 1977 by Ackner J, in these terms:

'... there be inspection of documents within 7 days of the service of the defendants' list. That the plaintiff be excused from giving inspection of the documents at Item 5 of Schedule 1, Part 1 of the plaintiff's list of documents served on 30th March 1976, unless within 14 days the defendants by their solicitors expressly undertake that the said documents will not be shown to anyone other than the second defendant, and the legal advisers to the defendants [The Associated Newspapers Group Ltd and the second defendant] including [and there are named two persons] and expert medical advisers and that the defendants will not use the documents for any purpose collateral to or ulterior to the conduct of this action.'

No claim is made in this list of documents for privilege. Confidentiality, as is recognised and was declared by the House of Lords in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)*³, is not a ground of privilege although it may be relevant to the question of privilege. Counsel appearing for all the defendants has affirmed and reaffirmed in this court that he is making and can make no claim to privilege for any of the documents which are the subject of the order under appeal on the

-
1. [1948] 1 All FR 469
 2. (19th January 1977) unreported
 3. [1973] 2 All ER 1199, [1974] AC 405

grounds of public interest. The only privilege claimed is claimed for certain documents in part 2 of the first schedule and those documents are not those with which we are concerned.

The judge decided to dismiss the appeal and affirm the master's order, after some argument, on a balance of conflicting interests: the balance of conflicting interests stated by Lord Denning MR in *Riddick v Thames Board Mills Ltd*¹. Lord Denning MR referred to the public interest in discovering truth so that justice may be done between the parties, and how that had to be put into the scales against the public interest in preserving privacy and protecting confidential information. It was in balancing those two public interests that the judge came to his conclusion that the master's order should stand.

The judge had before him certain evidence, to which I shall be referring. The master had no evidence, but he had full particulars setting out copious extracts from documents attributed to the plaintiffs and their founder, Mr Ron Hubbard; and I shall have to refer later to the points that were taken before him and the points taken before the judge. At the moment all I would say is this, that the judge must, by implication (although we are not told that he did so expressly), have rejected a submission that there was no jurisdiction in the court to make an order depriving a party of the right to inspect documents which were not protected by any privilege claimed.

Two questions are raised by the notice of appeal which is put on three grounds:

(i) That save in certain established instances e.g. under the Administration of Justice Act 1970 sections 31 or 32 or where trade secrets are involved, there is no general discretion in the Court, where a party is not claiming that documents are privileged from production, to limit the right of the other party to inspect the documents disclosed by the first party; (ii) That if there is such a general discretion the principal consideration which should govern the exercise thereof is that a litigant should be able to inspect the document disclosed by his opponent in order to prepare his case; (iii) That there were in any event in the instant case no or no sufficient grounds advanced or established which could or did derogate from the generality of the proposition in (ii) above and that there were no grounds to support the manner in which the learned Judge exercised the general discretionary power (if it exists) to limit inspection.'

So the first question this court has to consider is: has the court jurisdiction to restrict the discovery (production, that is, for inspection) of documents in the way in which it has been restricted or in some such way, as I have said, the judge must by implication have held that we have? Clearly if there is no such jurisdiction, the judge went wrong in law and this court could and should reverse him.

If, however, the answer to the first question is, Yes, and there is such jurisdiction, there then arises, subject to a further question of the form of restriction about which I shall have to say something later, the second question: was there material on which the court could restrict production and inspection in the way it has been restricted? There, as has been pointed out by counsel for the defendants, this court, before it can reverse the judge must, of course, be satisfied that he was plainly wrong in the exercise of his discretion, and it has to be shown that in balancing the various factors and conflicting public interests he did leave out something or put into the scales something which it was wrong for him in the one case to leave out and in the other to put in; or that from the order which he did make this court can conclude that he must have given the wrong weight to some very important factor, a much more difficult operation for an appellant to carry.

Counsel for the plaintiffs, who has said everything that could be said in support of this appeal, has conveniently submitted to the court five typed propositions, but I am not going to read those because to do so I think would be unnecessary and lengthen a judgment which I am conscious may well be too long without them. But the appeal does

1. [1977] 3 All ER 677 at 687, [1977] QB 881 at 895-896

raise important matters so I shall make no further apology for going into them at no little length.

Nor am I going to read every rule of RSC Ord 24, the order comprising the Rules of the Supreme Court which now cover discovery and inspection of documents, although there is also a provision of RSC Ord 77 which must be read, as one of the parties to these appeals is a government department and these proceedings are therefore civil proceedings against the Crown, but these rules, except rr 1 and 2, are applied to them by RSC Ord 77, rr 1 and 12.

The parties to an action are required by RSC Ord 24 to make mutual discovery, first of all by disclosing what documents are or have been in their possession, custody or power relating to the matters in question in the action (r i(ii)) and secondly to produce those documents for inspection. They first of all make that discovery, either with or without an order under rr 2 and 3, by exchanging a list of documents set out in two schedules. As is well known, the first schedule contains the documents which are in their possession, custody or power, and the second schedule those documents which are no longer in their possession, custody or power. But the form given in Appendix A no 26 makes it plain that the first schedule is divided into two parts: those documents, in the first part, which the party making discovery does not object to produce for inspection, and those documents, in the second part, which he does object to produce for inspection. If the party objects to produce documents for inspection he has to state the grounds. If the documents have left his possession, custody or power, he has to state when, and what has become of them, and in whose possession they now are. That is provided for by RSC Ord 24, r 5(1) and (2). If his objection to production is by a claim of privilege from production, that claim must be made in the list with a sufficient statement of the grounds of privilege (r 5(2)). But it is clear from r 13(2) that objection may be made on another ground than privilege, and that is the position here. Objection has been made in this list of documents on another ground than privilege.

If a party does not make or serve such a list on the other party, the court may make orders of different kinds ordering him to do so (that is r 3) but it will only order him to do so if of opinion that discovery is necessary, or necessary at the stage when applied for, either for disposing fairly of the cause or matter or for saving costs (that is rr 8 and 13(1): compare r 2(5), where 'the action' takes the place of 'the cause or matter'). After discovery of documents by disclosing what documents are or have been in the parties' possession, custody or power, they must then produce those documents for inspection, and a party

been in the parties' possession, custody or power, there comes discovery by producing documents for inspection, and a party who has served this list, by r 9, a rule of importance in this case which I therefore quote -

'... must allow the other party to inspect the documents referred to in the list (other than any which he objects to produce) and to take copies thereof and, accordingly, he must when he serves the list on the other party also serve on him a notice stating a time within 7 days after the service thereof at which the said documents may be inspected at a place specified in the notice.'

Those words 'must allow the other party to inspect the documents referred to in the list' are strongly relied on by counsel for the plaintiffs in this case.

If a party objects to produce any document for inspection the court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner as it thinks fit, but only again if of the opinion that the order is necessary fairly for disposing of the cause or matter or for saving costs: that is r 1 1(1) which is expressly made subject to r 1 3(1). There is provision in the rules for the parties agreeing to dispense with or limit discovery of documents by disclosure, or the court may by order limit discovery to specified documents or matters or dispense with it if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, either for disposing fairly of the cause or matter or for saving costs, and that is rr 1(2), 2(5) and 3(3). There is also provision for the court ordering further discovery under r 7, but none of those rules has

102

any application, as I read them, to production of documents for inspection; they relate only to disclosure of their existence, not of their contents.

Finally, all those are to be 'without prejudice to any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest': that is r 15 (compare RSC Ord 77, r 12(2)), and r 17 empowers the court to revoke or vary any existing order made under any of these rules on sufficient cause being shown.

These rules then require one party to produce to the other for inspection and copying all the first party's documents relating to matters in question in the action, subject to two restrictions. The first restriction is that the production of documents is required only if and in so far as they are necessary for disposing fairly of the cause or matter or for saving costs: see rr 11 and 1 3(1) to which I have referred. Secondly, production is not required of those documents to which valid objection has been taken by a claim of privilege, or on any other ground upheld by the court or perhaps taken by the court as by a rule of law to be withheld in the public interest: see rr 11, 13 and 15 to which I have referred. There is nothing that I can find in the rules which expresses or implies a power in the court to deny production or inspection to the other party, or to order production to a third person not authorised by the other party to act as his agent to inspect them or copy them, or to order production to a third person, whether authorised by the other party or not, with a condition that he should not show them to his principal, the other party, or give him a copy. Nor is there anything in the rules to indicate what other grounds than claim of privilege may support an objection to production, or whether those grounds go beyond objections to production as unnecessary for disposing fairly of the cause or matter or for saving costs, or perhaps as injurious to public interest.

Counsel for the defendants contends that there is jurisdiction, first under RSC Ord 24 itself and secondly under the court's inherent jurisdiction, to make such orders as have been made in this case. On the first question whether there is any power in the court, either under RSC Ord 24 or under its inherent jurisdiction, to prevent a party at any stage from himself inspecting a document not protected by privilege, or receiving a copy of it, if he wants to, there seems to be no express authority, or, rather, the point never appears to have been taken and decided, at least since 1876. The judgment of Lawton LJ, in *Woodworth v Conroy*¹ seems equivocal, favouring no discretion in one passage² and the existence of discretion in another³. Against any such discretion would appear to be the language of RSC Ord 24, r 9 and the decision of this court (eight judges strong) in *Bustros v White*⁴ that the predecessor of RSC Ord 24, r 9, though couched in very permissive terms, perpetuated the old equity practice under the Chancery Procedure Act 1852, which gave a party inspection as of right and which was by the Supreme Court of Judicature Act 1873 to prevail over the common law practice of treating inspection as a matter of discretion: see *Bray on Discovery*⁵. In favour of such discretion would appear to be the language of RSC Ord 24, rr II and 13, and the established practice (i) approved by this court in *Hope v Brash*⁶ in actions for libel, of refusing to a plaintiff suing a newspaper, inspection of a document supplied to the newspaper containing the libel published in the newspaper but adding nothing to the publication except the name of author, and (ii) in actions for infringement of patents or otherwise concerned with secrets, of restricting inspection of documents containing trade secrets to persons other than the party concerned, whether an individual or a limited company: see *Warner-Lambert Co v Glaxo Laboratories Ltd*⁷ and cases there cited.

-
1. [1976] 1 All ER 107, [1976] QB 884
 2. [1976] All ER 107 at iii, [1976] QB 884 at 890
 3. [1976] All ER 107 at 112, [1976] QB 884 at 891
 4. [1876] QBD 423
 5. *The Principles and Practice of Discovery* (1885), p 152
 6. [1897] 2 QB 188, [1895-9] All ER Rep 343
 7. [1975] RPC 354

In none of those cases does the point of jurisdiction appear to have been taken, but the basis of those practices appears to be necessity in the interest of justice. It may have been merely no necessity or no necessity at that stage for fairly disposing of the action, which may or may not be the same thing as necessity in the interests of justice; but though Buckley J in *Warner-Lambert Co v Glaxo Laboratories Ltd*¹ talks of unrestricted inspection serving no useful purpose and the judgment of Rigby J in *Hope v Brash*² struggles to derive the restriction on disclosing documents supplied to a newspaper from similar words to those of RSC Ord 24, r 1 3(1) in the old rules, I find it difficult to be certain that the restriction is based on that principle or its expression in the language of any such provision in the rules. In the newspaper libel cases the restriction seems to rest on public interest in preserving the anonymity of informants.

I am, however, far from being persuaded by counsel for the plaintiffs that the restrictive practice of discovery where trade secrets are concerned is derived from special statutes or rules or from anything but the necessity to protect one trader from the abuse by another trader of the powerful weapon furnished by discovery where the weapon is particularly liable to such abuse: see Terrell on the Law of Patents³.

The terms of RSC Ord 103, r 26, on which counsel for the plaintiffs relied, seem to be against him on this point rather than for him; for the exclusion of RSC Ord 24, rr 1 and 2 from applying to proceedings within RSC Ord 103 by r 26(3) in my opinion supports the applicability of the rest of RSC Ord 24 to such cases, as does the judgment of Lord Evershed MR in *Printers and Finishers Ltd v Holloway*⁴. Indeed, I find that the leading judgment of Buckley J in the *Warner-Lambert* case¹, which was cited to this court in the most recent case on discovery of *Science Research Council v Nasse*⁵, throws much light on our problems and assists us to make the right order in this case.

Counsel for the defendants, on the other hand, has not persuaded me that any of the rules of RSC Ord 24 or any other order entitles the court to deny to a litigating party inspection of an unprivileged document of which inspection by somebody is necessary for fairly disposing of an action. The words of RSC Ord 24, r 9 are mandatory, as I have already stressed. The Rules of the Supreme Court may be the hand-maiden, not the mistress, of the court (see *Re Coles v Ravenshear*⁶) but they are made by the Rules Committee under s 99 of the Supreme Court of Judicature Act 1925 to be obeyed by the parties and enforced by the courts and the courts cannot disobey their own mandatory instructions by re-writing the rules as they may think they should have been written, any more than they can re-write a statute: see *McIvor v Southern Health and Social Services Board*⁷. There the House of Lords held, overruling decisions of this court, that s 32(1) of the Administration of Justice Act 1970 which gave the court power on the application of a party to certain proceedings, to order production to the applicant, did not give the court power to order production to medical advisers nominated by the parties. Nor does the practice approved by this court in *Anton Piller KG v Manufacturing Processes Ltd*⁸ suggest any power in the rules to bend the rules. On the contrary it indicates⁹ the power in the court to order or permit conduct related to discovery which is not covered by any of the rules, though it may help counsel for the defendants towards establishing the inherent jurisdiction of the court to restrict discovery in an appropriate case.

The object of mutual discovery is to give each party before trial all documentary

-
1. [1975] RPC 354
 2. [1897] 2 QB 188, [1895] All ER Rep 343
 3. 12th Edn (1971), p 350, para 900
 4. [1961] RPC 77 at 78
 5. [1978] 3 All ER 1196, [1979] QB 144
 6. [1907] 1 KB 1 at 4
 7. [1978] 2 All ER 625, [1978] 1 WLR 757

8. [1976] 1 All ER 779, [1976] Ch 55
9. [1976] 1 All ER 779 at 783, [1976] Ch 55 at 61

material of the other party so that he can consider its effect on his own case and his opponent's case, and decide how to carry on his proceedings or whether to carry them on at all. The sight of one document may lead a plaintiff to abandon his action or a defendant to throw up his defence, or it may lead a party's legal advisers to advise one of those courses but may not deter the client from pursuing his action or his defence against their advice.

Another object is to enable each party to put before the court all relevant documentary evidence, and it may be oral evidence indicated by documents, so that justice can be done. This object is achieved by each party inspecting all documents disclosed if it wants to. Unless a party is in person, production would ordinarily be by a solicitor to a solicitor. Solicitors are a convenient receptacle or screen, if I may say so without disrespect, for the other side's documents. Some documents' effect on litigation is better judged by legal advisers than by the parties themselves or their agents. Some documents are better valued or appreciated by experts, eg an accountant or an architect or a doctor. Some documents are better not seen by an individual plaintiff or a defendant, for example in infant cases. In some cases (like this) the party is a body corporate and inspection must be by the eyes of servants or agents.

Can then an individual litigant insist that he or she sees what his or her legal advisers see? Can a litigating company insist on some servant or agent seeing what its legal advisers see? The answer, I think, must normally be, Yes. If a party objects to the other party inspecting except by an agent can the other party insist on personal inspection, if the party is an individual, or inspection by any particular officer or officers, or servant or agent, if the party is a corporation? Or has the court power under the rules, or outside them by inherent jurisdiction, to deny inspection to a party and restrict it to an appropriate servant or agent approved by the court, or by the other side, or by both, for instance to its solicitors and to them only, or to its medical advisers and to them only, where (as here) the party is a body corporate?

The authorities seem to me to show that one party can object to a particular agent appointed by the other party to inspect, and the court will uphold the objection and restrict inspection to an agent considered suitable, appropriate or approved. They also show that one party can object to the other party, whether an individual or a corporation, inspecting, and the court will uphold such objection and control disclosure in the interests of justice and fairness to both parties, and will restrict inspection to an approved agent on his undertaking not to disclose the inspected document or its contents to others, including his own principal, the party concerned himself or itself. This is established in the case of trade secrets and in the case of press informants on the authorities which I have already cited.

Counsel for the plaintiffs submits that RSC Ord 24, r 9 does not permit the court to deny a party the right to inspect himself or the right to inspect by some agent of his choice, and that applies to a corporation, which has a right to select its own officers or agents for the purpose of inspecting documents produced by the other side for inspection. He submits that the words of RSC Ord 24, r 9 are as clear as the words of ss 31 and 32 of the Administration of Justice Act 1970. Now the only point of jurisdiction taken in *McIvor v Southern Health and Social Services Board*¹ was as to the court's jurisdiction under that Act; but there are two illuminating passages in the judgment of Sir Robert Lowry LCJ which were approved by different members of their Lordships' House in that case. Lord Scarman agreed with Sir Robert Lowry LCJ when he said²:

'If Parliament had wished to enact provisions for discovery, limited in the ordinary case to medical advisers, it could have done so, instead of using language importing conventional discovery. It could still enact such provisions but not I hope, before very careful deliberation.'

-
1. [1982] 2 All ER 625, [1978] 1 WLR 757
 2. [1978] 2 All ER 625 at 629, [1978] 1 WLR 757 at 763

Lord Russell of Killowen approved this statement by Sir Robert Lowry LCJ¹:

'The High Court has an inherent jurisdiction to attach conditions to most orders in the interests of justice, but I do not think it has any jurisdiction to order disclosure to the applicant on condition that disclosure is not made to the applicant (or to his legal advisers).'

It is I think implicit in those speeches and those quotations that conventional discovery is regarded as ordering production for inspection by a party or his legal advisers, but the question never arose in that case whether there could be production for inspection by the legal adviser but not by the party himself. The only issue was between an order for production for inspection by the party or his legal adviser on the one side and an inspection by a medical adviser on the other side. So I get no help from that case in deciding this point, although it does, I think, emphasise what is perhaps obvious that in the ordinary course inspection must be inspection by the party himself, herself or itself.

What the court is being asked to do, counsel for the plaintiffs submits, is contrary to r 9 as no privilege is claimed. I am of opinion that, as no privilege is claimed, the court can only act contrary to the rule if compliance with the rule is unnecessary for fairly disposing of the action or if the court has inherent jurisdiction to act contrary to the rule.

Counsel for the defendants has not submitted that compliance is not necessary for the purpose of disposing fairly of the action or of saving costs, and I doubt if such a submission could be made with success. I am of opinion that counsel for the defendants is, however, right in submitting that the court has inherent jurisdiction to prevent the abuse of its own process, or, as it is sometimes termed, 'process of law', and that that jurisdiction gives it the power which was taken by the master and by the judge in this case.

The court has always, in my judgment, inherent jurisdiction to prevent abuse of that process, and indeed must take steps to prevent it of its own motion, as where illegality is brought to its attention. Discovery, including production of documents for inspection, is part of its process to enable an action to be carried to a just conclusion. As Lord Denning MR said in *Riddick's case*²: 'A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. To use a document produced for inspection for a collateral or ulterior purpose is a misuse against which the court will proceed for contempt or by injunction: see *Alterskye v Scott*³. But that proceeding may be after the abuse has taken place. The court has power to prevent or reduce the chance of such an abuse taking place by an undertaking. As it seems to me, it can do it in two ways; it can do it either by refusing an order except on an undertaking or it can do it by giving an order conditional on an undertaking being given. Which way it does it does not seem to me to matter, and seems to me a question of form rather than substance, with all respect to counsel for the plaintiffs' argument.

Furthermore I do not think it matters in most cases whether the object of preventing an abuse of process is achieved or attempted to be achieved by restricting inspection to a person other than the party or only by refusing to order any inspection unless the party undertakes not to misuse the material. In most cases, an undertaking is unnecessary because it is implied, as was pointed out in *Alterskye v Scott*³ where an undertaking was refused. In the remainder, an undertaking by the party himself or by his counsel or solicitor may be enough; but it seems to me that there is a very small hard core of cases where the undertaking is not enough and where the court may come to the conclusion that the party cannot be trusted not to misuse the information and so abuse the process

-
1. [1978] 2 All ER 625 at 629, [1978] 1 WLR 757 at 762
 2. [1977] 3 All ER 677 at 688, [1977] QB 881 at 896
 3. [1948] 1 All ER 469

of discovery. That is really what counsel for the defendants is maintaining in this case in support of the order under appeal; and in the form in which it is made, particularly that which relates to the hospital notes and medical reports, it seems to me that the order must be justified on that basis, or it must be revoked or modified.

If this is a case of threatened abuse of process, it seems to me unnecessary to decide how far the broad statement of principle laid down by Lord Denning MR in *D v National Society for the Prevention of Cruelty to Children*¹ for balancing one public interest against another, has survived the pruning it received at the hands of the House of Lords in reversing the decision of this court. It seems to me only necessary to remember that that statement was made and modified in a case where it is clear from more than one of the judgments in both courts that privilege from production was claimed under RSC Ord 24, r 5(2).

Treating this case as a case of threatened or likely or foreseeable abuse of process, I proceed to consider whether the order made can be justified on that ground, or whether some other order ought to be made of a restrictive character, or whether counsel for the plaintiffs is right in saying that even if this court has jurisdiction, on the material which it has it should none the less make an unrestricted order.

On this second question, argument, or at any rate emphasis, has changed, as so often in this court, from the form or forms which it took in the courts below, largely I think in response to indications from the court itself, but partly as a result of the decision in Riddick's case ² and, on the other side, the decision in McIvor's case ³ which had not been reported at the time when the master and judge reached their decisions. Riddick's case ² had been reported and was indeed referred to by the judge, but it to some extent renders nugatory one of the grounds relied on in argument and in the affidavit by which the defendants supported the master's order.

If one looks at the affidavit of Mr Beaven, a senior legal assistant in the office of the minister of the defendant department, sworn in the consolidated actions, one sees that the grounds by which he seeks to support the order made by the master are limited. First of all, in para 3 of his affidavit he deposes that:

'The documents referred to in paragraph 2 of the said List comprise extracts from Hospital Case Notes and confidential medical reports furnished by Hospitals. Such documents are essentially confidential in nature as they contain, as well as the case history and diagnosis, personal details of the individuals concerned and the treatment they received. The items in question were furnished to the Defendant Department as the responsible Authority in matters concerning health, and it would be contrary to the interests of the individuals concerned to afford unlimited disclosure in respect thereof. For these reasons it is considered that the documents should not be disclosed other than to the Plaintiff's Medical Adviser, and upon his expressly undertaking in writing that he will not disclose the contents thereof.'

In other words, it is the interests of the individuals who are the subject of the hospital notes and confidential medical reports on which the objection is based.

The next paragraph of his affidavit deals with the 250 items which are contained in document no 7, and that is this bundle of 250 letters:

'Some letters were received direct from members of the public, others were received by Members of Parliament from their constituents and subsequently transmitted to or copies thereof furnished to the Defendant Department and a few came into the possession of the Defendant Department from other sources. Many

-
1. [1977] 1 All ER 589, [1978] AC 171
 2. [1977] 3 All ER 677, [1977] QB 881
 3. [1978] 2 All ER 625, [1978] 1 WLR 757

of the letters were expressed to be confidential and the conditions specified in the said paragraph 3 were imposed to preserve the necessary relationship of confidence between the Secretary of State for Social Services (formerly the Minister of Health) and his Department and those who write to him regarding matters on which the Secretary of State ought to be informed. To this end it is considered that every precaution should be taken to ensure that individuals who wrote letters should not be approached by or on behalf of the Plaintiffs, either personally or by correspondence, and that confidential letters should not be made the subject of public discussion unnecessarily.'

So the claim in respect of the letters from these 30 or 40 informants to protect them from being approached by or on behalf of the plaintiffs and to preserve the necessary relationship of confidence between such persons and the Secretary of State for Social Services, the claim getting near to a claim for Crown privilege and covering, I would have thought not merely, as counsel for the plaintiffs submits, an approach to persons who might be potential witnesses and therefore likely to be diverted or perverted from assisting in doing justice in the action between the parties, but covering also an approach which might endanger them. There is an allegation in the next paragraph that the plaintiffs

'...have commenced numerous legal proceedings for the purpose of intimidating their critics and silencing criticism but have brought very few of such actions to trial, [and the deponent then goes on to refer to various documents and to a list of 43 libel suits referred to in The Toronto Sun and goes on to say:] I verily believe that the Plaintiffs have a propensity to harass individuals with libel actions and at the hearing of the Summons for Directions herein on 11th May 1977 I understood learned counsel for the Plaintiffs to claim the right to sue the authors of defamatory statements if libellous material emerged on discovery in these proceedings.'

The last paragraph, para 6 of the affidavit, deals specifically with the Maurice Johnson letters and it is those letters which it is said are -

'written to and by a witness for the Defendants [that is Mr Maurice Johnson] to correspondents, whose identities are not disclosed in the Defendants' List of Documents but are potential witnesses for the Defendants and who, I would respectfully submit, ought to be protected at this stage in view of the matters referred to in the preceding paragraph of this my Affidavit.'

Now it was decided by this court in *Riddick's* case ¹ that it is an improper or collateral or ulterior use or misuse of a document disclosed in one action to make it the basis of another action for libel and that is the reason for which every member of this court agreed that Mr Riddick's action should be dismissed. So it is said by counsel for the plaintiffs that these individuals writing 250 letters, and Mr Johnson's correspondents, will not be harassed by libel actions because the court will protect them from such harassment, or it may be that bearing in mind the decision in *Riddick's* case ¹, writs will never be issued based on any document which discloses their names and what they have said against the plaintiffs. It is also said that such actions would be statute-barred.

The position, in my judgment, is not quite as simple as that, first because it will still be open to the plaintiffs to threaten such individuals with libel actions and require them to go to legal advisers to tell them what the law is and that they have nothing to fear and that they can apply to have those actions stayed, and secondly, as has been pointed out by

1. 1 [1977] 3 All ER 677, [1977] QB 881

108

counsel for the defendants, there is always the possibility of re-publication of a libel and that might extend the period of limitation so as to remove the protection of these individuals from such libel actions. Still the force of that ground of potential harassment is undoubtedly weakened by the considerations which have been put before us by counsel for the plaintiff.

Counsel for the defendants in this court, has transferred the weight of his argument principally, if not entirely, to harassment - I think of all the persons concerned, whether as writers of letters to the defendant department or their MP's, or as the subject of medical reports, or as possible witnesses, or as corresponding with Mr Maurice Johnson to harassment in the sense not of harassment by libel actions, but harassment by accusations, by threats of blackmail or even by assault, which may prevent them from giving evidence for the defence, or injure them or upset them whether they are witnesses or not. Probably not, I think, on the evidence, harassment by anybody in England; harassment perhaps here but more probably abroad if such potential victims are to be found abroad, where the strong arm of Mr Ron Hubbard may be suspected as likely to pursue against what are termed 'suppressives' the policy of 'fair game', some of the provisions of which have already been referred to in this court: see the judgment of Megaw LJ in [Hubbard v Vosper](#) ¹.

I bear in mind the fact that this is a different allegation from what we are told was made before the judge. It seems to have figured, to some extent at any rate, before the master but not before the judge. It would be wrong in my judgment for this court to be prevented by that circumstance from considering the weight of the evidence, or simply because it is not stressed or may not even be mentioned in the affidavits to which documents have been exhibited. Pleadings of course are not evidence, nor is hearsay even in an affidavit; but the documents set out in the pleadings and the documents exhibited to the affidavit are, as it seems to me, evidence and material which the court is bound to take into account in considering whether the right orders have been made in this case, whether they can be justified or whether the plaintiffs are entitled to the unrestricted inspection for which counsel for the plaintiffs asks.

I have carefully considered the documents to which we have been referred and some to which we have not. I am satisfied by my consideration of the documents that there is a real risk that all three categories of documents may be misused, ie not for legitimate purposes of the action but for harassment of individual patients, informants and renegades named in them, not only by proceedings for defamation against them but by threats and blackmail, and that they may be distributed to those in other parts of this worldwide organisation who may misuse them in the same way.

I am thinking chiefly of the 'fair game law' against suppressive persons expounded in the HCO policy letter of 1st March 1965 and referred to in the particulars, and the policy letter of 1st October 1968 cancelling publication of the policy in the interests of public relations. but not the policy itself.

I am also impressed by the 'dead file' system set out in the particulars. The history of Maurice Johnson is not evidence, but it is

material which we are entitled to take into account as likely to be the subject of evidence. I also take into account what is written about 'noisy investigations' in HCO executive letter of 15th September 1966 and the extract in Sir John Foster's report from the HCO policy letter of 15th February 1976, which is exhibited to the affidavit of Mr Beaven.

Again, I am impressed by Mr Hubbard's statement published in the article in the Toronto Sun, exhibited to the same affidavit, a document which sets out the purpose of bringing actions in Mr Hubbard's view, which I will not quote.

Again, I have considered the affidavit of Mr Bird, the plaintiffs' solicitor, sworn in another action, which is exhibited to the affidavit of Mr Grant, a solicitor in the office of the Treasury Solicitor, in which Mr Bird deposes that the writ in the action was issued on

1. [1972] All ER 1023 at 1031-1032, [1972] 2 QB 84 at 99

109

25th July 1974, and would not have been issued if the government had acted on Sir John Foster's report and removed the ban excluding alien scientologists, including Mr Hubbard, from entering this country. I appreciate what has been sworn about that article and the manner in which English actions are conducted by Mr Parselle, the barrister, who claims in his affidavit to have had charge of the legal department of the plaintiffs in these actions since 1968, but who we are now told is in charge of the worldwide legal department also situated at Saint Hill Manor at Fast Grinstead, but is subject to Mr Tampion who is head of the legal department of the plaintiffs. In addition to the 43 actions brought by the Church of Scientology of California in Toronto, referred to in the article, there are 29 actions brought by the plaintiffs in this country and Mr Grant has sworn that none of them has been settled on terms really favourable to the plaintiffs and only one has been fought, and that has been lost by the plaintiffs.

We have to weigh the claims of Mr Parselle and Mr Bird that the plaintiffs here do not bring proceedings for Mr Hubbard's declared purposes, or conduct them except in accordance with the procedure and directions of the court, against the evidence that the founder is the de facto controller of all the organisations of this church, including the plaintiffs, whatever separation of legal entities there may be.

I am not myself impressed by the defendants' contention that the object of bringing these actions is to remove the ban on Mr Hubbard and other alien scientologists and not, therefore, to clear their name. It seems to me the two purposes very naturally and understandably run together and there is nothing improper in the plaintiffs wishing to clear their name in order to enable them to carry on their work with the assistance of those who are not natives of this country, including their founder. But reading paras 8 to ii in the particulars of the defence and the further and better particulars given under sub-para 8(a) served on 31st October 1975 and also Mr Hubbard's 1966 note to all staff on corporate status, I would need evidence, which I do not find here, that Mr Hubbard has changed his position since 1966 (or about that time) and that it is now no longer the policy of this church's founder to act and to require subordinates to act and members of his church to act as those documents indicate.

I must not, however, lose sight of the important fact that there is no evidence that the plaintiffs have ever broken the law of this country or disobeyed an order of the courts of this country. Why should the defendants tear, says counsel for the plaintiffs, that the plaintiffs should break the law that a document disclosed in an action cannot be used for any purpose external to the action either by a solicitor of the Supreme Court, who though an 'in-house' solicitor and a scientologist is also an officer of the court and also subject to the discipline of the Law Society? Or by a barrister who is also a scientologist and an 'in-house' lawyer but who though no longer in practice is also subject to the discipline of the judges and the Senate and Bar Council? Or, if a copy of the document is in fact in their hands, by the plaintiffs themselves?

But who are the plaintiffs? A company, like the plaintiffs, must act and inspect through agents and I can see nothing outrageous in requiring some limitation on the dissemination of confidential information to a company. Why should confidential information be disseminated and not restricted to as few persons as possible and as necessary for justice and a fair disposal of the action?

It was with that in mind that the court asked for particulars of the plaintiffs' organisation, and of course we bore in mind RSC Ord 5, r 6(2) (to which Brandon LJ drew attention in the course of the argument) that a body corporate may not begin or carry on proceedings in the High Court otherwise than by a solicitor.

Counsel for the plaintiffs was good enough to give us those particulars; he told us that this Church of Scientology of California is a trustee corporation without shares or share capital incorporated under the non-profit corporation law of the state

of California. It has three trustees, Americans, who do not include Mr Hubbard, and those trustees are empowered to elect directors both in the United States of America and here and to remove the directors whom they elect here. Subject to that, the church here, the plaintiffs, is an autonomous body.

Counsel gave us the names of three British nationals who are the three directors of the church here at present, and of the registered agent, a British lady appointed by the United Kingdom directors. The organisational head of the plaintiffs in England is Mrs Tampion. There are two legal departments, one of the church in England (the plaintiffs) and one worldwide, and both these legal departments are stationed at Saint Hill Manor, East Grinstead, and the worldwide legal department supervises litigation throughout the world. The head of the English legal department is Mr Tampion, who is not a lawyer; the head of the worldwide legal department is Mr Parselle, whose affidavit is before us and who, as I have already said, is a non practising barrister. Mr Bird, the plaintiffs' solicitor, who has sworn an affidavit, is employed by the worldwide legal department but he also acts for the English legal department. In practice, the conduct of the plaintiffs' action is in the hands of Mr Tampion and he would act in settling the action or making any major decisions with regard to it in conjunction with Mrs Tampion and Mr Parselle and Mr Bird. That information is something which I think we should bear in mind, with all the other circumstances, when we consider what the right order to make in this case is.

However, I find it unnecessary, in view of the order which I propose we should make in this case (if my brethren agree), to take the invidious course of deciding, on I think inadequate material (put bluntly), who among those whose names have been given to us by counsel for the plaintiffs is to be trusted with confidential information. I am glad not to be bound to decide that question. It would be quite wrong however to suppose that I am taking an adverse view of any of those persons whose names have been given to us or whose names I have mentioned.

At a late stage in the argument counsel for the defendants submitted that in any event whatever order we make on this appeal, it would be desirable that it should be conditional on further discovery being made by the plaintiffs. He pointed out that as long ago as 2nd May 1977 the defendants had requested further discovery which had been said to be awaiting counsel's advice as long ago as 1st December 1977, but the request had not yet been complied with. That is a matter which counsel for the plaintiffs said we should certainly not consider in relation to the substance of the order which we make on this appeal, but could take into account in considering whether to make the order subject to that further condition.

There is one more matter:

'To complicate matters further [and here I am quoting from the words of the document itself (counsel for the plaintiffs, for the assistance again of the court and of counsel for the defendants, put in what he called a 'memorandum' of the plaintiffs' documents). That memorandum says:] The plaintiffs may have had in their possession, custody or power documents relating to (a) the medical cases [and then he sets out the ten names of patients to whom I have referred and against which names he has said:] The whereabouts of these persons, and documents which may relate to them are not known at this time. [Then it goes on:] (b) and other scientologists or ex-scientologists named in the defendants pleadings [and a long list of persons is then set out, some with 'USA' against their names and in relation to all these names he says:] The whereabouts of these persons and documents that may relate to them is not known with certainty at this time. [Then at the bottom of the document, one sees:] Any documents pertaining to persons in the United States of America would be outside the possession, custody or power of the plaintiff, being in the possession, custody or power of a separate legal entity. [Then:] To complicate matters further [and here are the words which I have quoted] the relevant functions of the plaintiff are now being performed by the Church of Scientology Religious Education College Inc. The last named Corporation would now have any documents which may have been held by the plaintiffs. As such, these documents would be outside the plaintiffs' possession, custody or power.'

In elaboration of this counsel for the plaintiffs frankly informed us that this education

college took over the functions (or some of them) and the documents (that does not mean all the plaintiffs' documents but any of the documents which are referred to in this list) at the end of 1976 or the beginning of 1977 and that this is an education college which has been incorporated in Australia. That information in effect is consistent with what is sworn by Mr Grant in his affidavit, and gives the date of the incorporation of that company, and of its taking over some of the functions of the plaintiffs, as March 1977.

Counsel for the plaintiffs has further told us that the reason why this rough draft further list of documents, which is what it really is, is so vague and says neither that the plaintiffs have in their possession, custody or power or have had in their possession, custody or power, but that they may have had in their possession, custody or power certain documents, is twofold. First of all before this action started there was a bonfire of documents of which some or all of these documents may or may not have been included, and secondly there have been what he called 'periodic clearouts' of documents which may or may not have included some or all of these documents. I confess that I am troubled by this memorandum, and what counsel for the plaintiffs says about it, in the light of such documentary material as we have; for instance, Mr Hubbard's boasts about case histories, which are contained in the particulars given under para 16 of the defence, and the document which I have referred to about the 'dead file' system.

I hope I have now covered, at too great a length, all the matters which, for my part, I think have to be considered in arriving at the right order to make in this case. (1) I am satisfied that the court has inherent jurisdiction to do what it can to restrain a threatened or likely or foreseeable abuse of the process of the court by misusing the documents which are the subject of the order under appeal for a purpose other than the purposes of this action, and to do that by controlling or restricting production for inspection of documents for which privilege has not been claimed. (2) I am satisfied that on the material which we have in this case some sort of restriction ought to be imposed in the exercise of that jurisdiction. (3) I am of opinion that the restrictions which were imposed, particularly the restriction to a medical officer of the hospital notes and the medical reports, were wrong.

Faced with the possibility of the court taking that view, counsel for the plaintiffs is prepared to submit to an order setting out certain restrictions with which counsel for the defendants is satisfied. That absolved the court, as I see it, from upholding the master's order or from devising an order of its own if, as I think right, it can and should make an order restricting discovery in some way.

The order which I propose we should make is this: that the appeal should be allowed and for the order made by the master and affirmed by the judge, should be substituted this order:

'Upon the plaintiffs by their counsel expressly undertaking that on inspection Mr Bird, their solicitor only will attend and take one copy of each of the documents referred to in this order (hereinafter called the restricted documents) and that Mr Bird shall keep the same confidential to himself and leading and junior counsel save insofar as he be advised in writing to the contrary by counsel. And upon the plaintiffs by their counsel undertaking that Mr Bird will show a copy of this order to every person who is to be supplied with a copy of a restricted document or supplied with information therefrom before the supply of such copy or information with a warning that the document or information is not to be used for any purpose other than a purpose connected with this action. And upon the plaintiffs by their counsel expressly waiving legal or professional privilege in respect of any such written advice relevant to any issue that may be before the court in this consolidated action (whether raised in committal or sequestration proceedings or otherwise) as to whether they have acted wholly or partly in accordance with or contrary to such advice and undertaking to instruct any counsel who may be instructed to give such advice to keep a copy thereof and to be at liberty, in the event of any such issue arising and his being called upon by the court so to do, to lodge such copy with the

112

court, and further to instruct him to be at liberty, should he entertain any reasonable apprehension that the plaintiffs are acting or may act otherwise than in accordance with any such advice, and should he see fit to inform counsel for the defendants of such apprehension and/or to furnish counsel for the defendants with a copy of the advice on which such apprehension arises.

'Order, that the defendants do allow Mr Bird, the plaintiffs' solicitor personally to inspect the documents referred to in sub-paras (3) and (4) of para 3 of the master's order of 11th May 1977.

'Order, that the plaintiffs do make and serve a further and better list of documents verified by affidavit of the plaintiffs by their proper officer within 21 days.

'Order, that the defendants be not bound to give inspection of the restricted documents except on mutual discovery of documents generally after the service of the said further and better list of documents and the final determination of any application arising therefrom.'

To that I would add, after discussion with counsel:

'Order, that the defendants do make and serve a further and better list of documents verified by affidavit of the defendants by the defendant Cashman within three months.

'Order, that all future interlocutory applications be made to a judge who shall so far as practicable retain such matters to himself.'

That, subject to the agreement of Brandon and Templeman LJ and the comments of counsel, is the order which I would make.

BRANDON LJ. Four questions appear to me to arise on this appeal. First, is it shown that, if the plaintiffs are given an unrestricted right of inspection of the defendants' documents, there is a real risk that they would use such right for a collateral and harmful purpose? Second, if so, does the court have power to impose restrictions on the plaintiffs' right of inspection in order to prevent or discourage such use? If the court has such power, third, what kind of restrictions can be imposed? Fourth, what method should the court use to impose them?

With regard to the first question, there is material to which Stephenson LJ has referred in detail in his judgment, which shows that it has been the policy of the plaintiffs, in the past at any rate, to treat their critics as enemies and to use various techniques of harassment in order to discourage them from pursuing their criticisms. In these circumstances I consider that, if the plaintiffs are given an unrestricted right of inspection of such of the defendants' documents as would reveal the identities of persons who have criticised them, and the nature and extent of their criticisms, there is a real risk (I do not put it any higher) that the plaintiffs will use such right for a collateral and harmful purpose in harassing those persons.

With regard to the second question, the principles applicable are, in my view, as follows. 1. A party to litigation has a prima facie right of unrestricted inspection of the documents of which discovery has been made by the other party so far as may be necessary to dispose fairly of the case or for saving costs. 2. A party is not entitled to use his right of inspection for any collateral purpose. 3. If it is shown that there is a real risk of a party using his right for a collateral purpose, the court has power to impose restrictions on such right in order to prevent or discourage him from doing so. I think that this power is derived from the inherent jurisdiction of the court to prevent abuse of its process rather than from anything in RSC Ord 24 itself.

But it seems to me that the use of the word 'may' rather than 'shall' in RSC Ord 24, r II (1) and (2) has the effect of preserving the power, or else that the power survives despite the absence of any express words in RSC Ord 24 designed to preserve it. The power in question appears to have been exercised only, or almost only, in cases involving secret

trade processes or analogous matters: see *Warner-Lambert Co v Glaxo Laboratories Ltd*¹ and the authorities there cited.

In my view, however, the principle on which the power has been exercised in such cases is of general application and applies in particular to a case like the present one where the collateral purpose potentially involved is the harassment of third parties.

With regard to the third question, the authorities on cases involving secret trade processes show that the restrictions which may be imposed include restrictions relating to (a) the person or persons who may inspect and take copies of the documents on behalf of the party concerned; (b) the distribution of copies of documents when taken; and (c) the dissemination of the contents of such documents and copies.

There was argument before us whether the court had power to impose such restrictions on inspection as would prevent a personal litigant from inspecting or taking copies of documents on his own behalf. Since the plaintiffs in the present case are a corporation, which can only inspect and take copies of documents through an agent acting on their behalf, it is not necessary to decide this question on this occasion. My provisional opinion however, based on the cases concerning secret trade processes, is that the court would have power in a proper case to do just that.

With regard to the fourth question, two methods of imposing restrictions were discussed before us: first, by making an order allowing inspection only on terms expressed in such order; second, by making an order allowing inspection only subject to undertakings given by the party concerned.

It was contended for the plaintiffs that the court, assuming it had power to impose restrictions at all, could only proceed by the second method. I do not accept this contention. It appears to me to be inconsistent with authority in cases concerned with

secret trade processes. I should, however, be content, on the footing that the plaintiffs are willing to give such undertakings as the court thinks are needed, to use the second method in this case.

On the basis of my answers to the four questions discussed above, I agree that the appeal should be allowed on the ground that the restrictions imposed by the judge went too far. But I think it should only be allowed to the extent of substituting for the restrictions imposed by the judge the different restrictions proposed by Stephenson LJ, and adding the further provisions to the order which he has indicated.

TEMPLEMAN LJ. I agree. The defendants, the Department of Health and Social Security, seek to withhold from certain of the officers of the plaintiffs, the Church of Scientology of California, and from the members of the plaintiffs' church and from other persons, knowledge of the contents of certain documents which are admittedly relevant to this action and which have been disclosed in the department's lists of documents.

The plaintiffs sue for libel and seek to establish that they are a religious and charitable organisation promoting the beliefs of scientology. The department contend, inter alia, that scientology is a system of indoctrination aimed at attracting individuals particularly those who are insecure, disturbed or unhappy, and obtaining their total commitment so that large fees can be extracted from adherents, and that the plaintiffs resort to intimidation and undue influence to attain their ends. That is the department's case as pleaded.

Amongst the documents which appear in the department's list are three categories which the department are only willing to disclose on terms which secure a restricted circulation. The first category consists of medical reports. The second category consist of about 250 letters of complaint about the practice of scientology, some of which are expressed to be confidential. The third category consist of letters to and by a potential witness for the department, namely a Mr Maurice Johnson.

The department do not put forward a claim for privilege for any of these

1. [1975] RPC 354

documents. The affidavits filed by the department in support of their claim for restricted circulation do not in themselves prove any compelling reason for restriction. The exhibits to the affidavits, which include documents emanating from the plaintiffs, and the particulars of the defence, which include allegations of harassment of Mr Maurice Johnson, do however show cause for anxiety. Stephenson LJ has mentioned in particular the documents which give cause for concern. The flavour of those can be gained from an extract which was a communication from the Hubbard communication office address which is now the English address given by the plaintiffs on 5th September 1962, and which referred to an earlier letter which had given details how to go about dealing with attacks on scientology. It was addressed to scientologists, and the subject was:

How to do a noisy investigation. Further to HCO executive letter of 3 August 1966, Cathy Gogerly HCO Area Secretary, Adelaide Australia has given details of how to go about dealing with attackers of scientology... "Here's what you do. Soon as one of these threats starts you get a Scientologist or Scientologists to investigate noisily. You find out where he or she works or worked, doctor, dentist, friends, neighbours, anyone and phone 'em up and say, 'I am investigating Mr/Mrs... for criminal activities and he/she has been trying to prevent Man's freedom and is restricting my religious freedom and that of my friends and children, etc. . . .' You say now and then, 'I have already got some astounding facts' etc. etc. (*use a generality*) ... It doesn't matter if you don't get much info. just be noisy - its very off at first but makes fantastic sense and works.'

Counsel for the plaintiffs, submitted that the extracts which I have read and which Stephenson has referred to are from the plaintiffs' past and were culled from a period in the history of the plaintiffs during which the plaintiffs were fighting for survival and were using what counsel described as 'robust American methods of defence'. The plaintiffs' policy and tactics have, he said, since been modified. The plaintiffs are an autonomous body with a legal department whose members are well aware of the restrictions imposed in this country on the use of documents revealed on discovery. It is not in the interests of the plaintiffs to countenance any harassment or improper conduct. There is no recorded allegation that, in the course of much litigation in all parts of the world, there has been any harassment of witnesses or disobedience of an order of the court, apart from the instant allegation about Mr Johnson, and those allegations are disputed.

I acknowledge the force of these submissions and make no finding and reach no conclusion, tentative or otherwise, adverse to the plaintiffs. Nevertheless, the former policies and tactics of the plaintiffs, as revealed by the extracts which I have read and

by other documents, are disturbing. The plaintiffs are a foreign corporation; there is no evidence of their present doctrines, policies or tactics, and the information we have gleaned from counsel of its relations with other sister-organisations and about the persons who control the plaintiffs in theory and practice, are not altogether reassuring.

Moreover it is plain that the plaintiffs, in the course of their activities and as part of the work of scientology, must inevitably assist individuals who have personality problems and whose zeal might outrun their discretion. The possibility has been raised and persists that an unnecessarily wide circulation of information obtained on discovery might result in some harassment in England or abroad even if the plaintiffs themselves are not responsible and were themselves prejudiced by an excess of zeal on the part of some supporter.

In my judgment, the interests of the prudent administration of justice and the interests of the plaintiffs themselves require that reasonable precautions be taken to restrict the circulation of information without hampering or prejudicing the plaintiffs in their pursuit of the remedies they seek in this action.

Counsel for the plaintiffs submitted that the court had no jurisdiction to impose restrictions and that in any event no sufficient case was made out to justify any restrictions, or at any rate to justify the restrictions which were canvassed in argument. For the reasons I have already given, I am of the view that restrictions are desirable if they are lawful and I turn, therefore, to consider the objection of jurisdiction.

RSC Ord 24, r 9 requires the department to allow the plaintiffs to inspect the documents referred in the department's list of documents. This rule will be fully complied with if the plaintiffs' solicitor is allowed to inspect and take copies as the agent of the plaintiffs which, being a corporation, can only act through agents. RSC Ord 24, r i 3(1) provides that the court shall only make such order for discovery as is necessary for disposing fairly of the cause or matter.

If a litigant makes use of information obtained on discovery for improper purposes, that is to say otherwise than bona fide in the course of the action, he is guilty of contempt of court: see *Alterskye v Scott* ¹. If he begins an action based on such information his action is liable to be struck out as an abuse of the process of the court: see *Riddick v Thames Board Mills Ltd* ².

These sanctions are usually sufficient to procure that documents disclosed on discovery are only used for the purpose of the relevant action. But where, as in the present case, misuse whether by parties to the litigation or by other persons is apprehended, then it seems to me that there are three principles which enable the court to impose reasonable restrictions. The first principle is that the court shall not order discovery which is not necessary for the fair disposal of the action. It follows that the court has power to impose restrictions which ensure that the ambit of discovery is not wider than is necessary to dispose fairly of the action. The second principle is that the court may act to prevent any possibility of conduct which might constitute contempt of court. The third principle is that the court may act to prevent what may be an abuse of the process of the court. Of course a strong case must be made out for the court to impose restrictions, and the court will endeavour to ensure that the litigants are not prejudiced by the restrictions in the reasonable prosecution of their claim, but in the unusual circumstances of this case I am satisfied that the court ought to intervene and that there is jurisdiction for the court so to do.

True, a litigant is entitled to inspect documents disclosed on discovery and to take copies: see *McIvor v Southern Health and Social Security Board* ³. But if there is a danger that inspection and copying in the manner desired by the litigant may lead to misuse of information, the court in the exercise of its power to prevent a possible contempt of court or in the exercise of its power to prevent an abuse of process and in the exercise of its power to confine discovery to the ambit which alone is necessary for the disposal of the action may dictate the manner in which inspection is carried out, whether by an individual litigant or by a corporate litigant, and may regulate the taking and safeguarding of copies, and may impose limitations on the circulation of copies and information.

The powers of the court are explained in the considered judgment of Buckley LJ in *Warner-Lambert Co v Glaxo Laboratories Ltd* ⁴. The court imposed restrictions in that case to preserve the secrets of a business. It must be able to act similarly to protect the persons or property or even the peace of mind of individuals. I agree with the order which has been proposed.

Appeal allowed; order agreed between the parties substituted for order of the master. Leave to appeal to House of Lords refused.

1. [1975] 1 All ER 707
2. [1977] 3 All ER 677, [1977] QB 881
3. [1978] 2 All ER 625, [1978] 1 WLR 757
4. [1975] RPC 354

116

Solicitors: *Stephen M Bird*, East Grinstead (for the plaintiffs);
M W M Osmond, Department of Health and Social Security (for the defendants).

Elizabeth Hindmarsh Barrister.

117



Last updated 21 February 1997

Page maintained by **Martin Poulter** (plmlp@mail.bris.ac.uk)