Date: 20000107
Docket: CA

157822

NOVA SCOTIA COURT OF APPEAL

[Cite as: Kent v. Kehoe 2000 NSCA 3]

Freeman, Bateman and Cromwell, JJ.A.

BETWEEN:

CARL KENT, HAROLD DUFFETT, and KENT & DUFFETT CHARTERED ACCOUNTANTS Appellants - and - DENNIS KEHOE Respondent	)	Douglas W. Lutz for the appellants David A. Miller, Q.C. Nancy Murray for the respondent Appeal Heard: November 25, 1999 Judgment Delivered: January 7, 2000

THE COURT: Appeal is allowed with costs to the appellant fixed at $2,000, inclusive of disbursements, the cross-appeal is dismissed, Order of the Chambers judge set aside and a substitute Order dismissing the application of the respondent for document discovery, as per reasons for judgment of Bateman, J.A., Cromwell, J.A., concurring; Freeman, J.A., dissenting.

Bateman, J.A.:

[1] This is an appeal from a Chambers decision of Justice Linda Lee Oland of the Supreme Court.

[2] The respondent, Dennis Kehoe, being the defendant in the Supreme Court action, was successful before her in his application for production of documents made pursuant to **Civil Procedure Rule 20**. Justice Oland (decision reported at [1999] N.S.J. No. 313) summarized the matter as follows:

> [1] In the fall of 1997, the defendant, an electrical engineer and former employee of the Kentville Electric Commission, wrote a letter to the Town of Kentville [dated September 2, 1997] concerning financial aspects of the sale of that Commission. Copies were published to members of Town Council and to the local media. The plaintiffs alleged that certain statements in the letter were defamatory of them. In the defense, the defendant pleaded justification and fair comment. He did not state in his pleadings the facts on which he relied to prove justification and fair comment.
>
> [2] The plaintiffs having refused to produce certain documents, the defendant has applied for an Order, pursuant to *Civil Procedure Rule 20*, for production of documents. I have been asked to determine whether, in this defamation proceeding, the scope of production is governed by the breadth of disclosure required by the *Civil Procedure Rules* or by the more narrow parameters set out in the body of law on defamation cases.

[3] The Chambers judge found that the Mr. Kehoe was not entitled to general document discovery pursuant to **Rule 20**, but could pursue limited disclosure.

[4] The appellants, Kent & Duffett Chartered Accountants, Carl Kent and Harold Duffett, say that the Chambers judge erred in ordering disclosure. The respondent, Dennis Kehoe, cross-appeals. While agreeing generally with the result, the respondent says that the judge erred in concluding that **Civil Procedure Rule 20** did not apply to

defamation proceedings so as to permit the usual broad rights of discovery.

[5] The Chambers judge correctly summarized the law in her decision:

> [3] If the claim by the plaintiffs was other than defamation, it is unlikely that an application would be brought on *Rule 20*. Our Court of Appeal is clear: a wide and liberal interpretation should be given to *Rule 20* on document production: *Nova Scotia Light and Power Co. Ltd.* (1974), 10 N.S.R. (2d) 679 (C.A.) at p. 691. In *Sydney Steel Co. v. Mannesmann Pipe and Steele Co.* (1885), 69 N.S.R. (2d) 389 (T.D.), Justice Hallett set out the guiding principle for disclosure of documents in paragraph 13 at p. 394:
>
> > In short, the principle that all relevant documentary evidence should be made available to the court (even though damaging to the party who possesses such a document) has ascended as the dominant principle, subject only to the restrictions that a relevant document need not be produced on the ground of legal privilege if the dominant purpose for which it is prepared was to submit it to a legal advisor for use and advice in litigation.
>
> [4] The defendant has submitted that the test for production of documents in a defamation case as well as in any other case is relevance, that the documents sought are relevant to the facts in issue as defined in the pleadings, and that they are necessary for a proper defense and ought to be produced.
>
> *Disclosure in Defamation Cases*
>
> [5] However, according to J. Porter and D. Potts, *Canadian Libel Practice*, at 386 on p. 105, in defamation cases, where the defendant pleads justification and/or fair comment, the particulars pleaded will limit the scope of discovery and the inspection of documents. This rule and its rationale were set out in *Care Canada v. Canadian Broadcasting Corp.*, [1998] O.J. No. 1532 (QL) (Master) at paragraph 3:
>
> > For well over a century, the scope of the examination in a libel action has been limited. Where the defendant pleads justification, it bears an onus to prove that the words are substantially true. Where the alleged libel is general in nature and no particulars are given, a defendant may not use the discovery to find a defense of which it was not aware at the time of pleading. The rationale for this rule was to prevent a person from defaming another and then obtain access to all his books to see whether what was said can be justified. Once a defendant has particularized the defense, it is limited at discovery and trial to the issues that have been defined by the particulars furnished.
>
> [6] While that quotation prohibits the use of discovery to find a new ground of defense, the rule also applies to prevent a defendant from using pre-trial disclosure to bolster a defense of justification which was not supported by particulars of facts, incidents or transactions. The Alberta Supreme Court in

> *Parkland Chapel Ltd. v. Edmonton Broadcasting Co. Limited et al* (1964), 45 D.L.R. (2d) 752 (Alta. S.C.) at 6-7 Quicklaw stated:
>
> > The defendants in the present case, in my opinion cannot embark on an effort to ferret out items of truth, something that will "justify" their statements but they, on the strength of their pleadings, must be held to have made statements based on certain information - best known to themselves - and must prove it by their own evidence and not from the plaintiff.
>
> [7] See also for example *Drake v. Overland*, [1980] 2 W.W.R. 193 (Alta. C.A.) and *Fletcher-Gordon v. Southam Inc.*, [1997] B.C.J. No. 107 (QL) (S.C.), aff'd. [1997], B.C.J. No. 369, (QL) (C.A.) which held at 2 of the QuickLaw text:
>
> > The plaintiffs are correct. The defendants are not entitled to proceed to discover documents so as to bolster a defense of justification unless particulars of facts, incidents or transactions have been given in support of such a plea.
>
> [8] The history of the rule and the many cases, English and Canadian, which have approved the rule, are set out in the Plaintiff's brief. The rationale for the rule is compelling.
>
> (Emphasis added)

[6] The Chambers judge, correctly in my view, rejected the respondent's argument that the old rules of pleading and discovery in defamation cases have been supplanted by the modern trend to wide discovery. She wrote:

> [9] The contest between broad rules of disclosure and this narrow rule in defamation cases has been heard before Courts in other jurisdictions. In *Fletcher-Gordon v. Southam Inc*., supra, the British Columbia Supreme Court stated that the rule of practice that a defendant can discover only as to specific facts alleged by him in justification was not overtaken by "the general rule of disclosure based on relevance." It was also argued unsuccessfully in *Parkland Chapel Ltd. v. Edmonton Broadcasting Co. Limited et al* (1964), 45 D.L.R. (2d) 752 (Alta. S.C.) that the general rules of disclosure prevail. See also *G. Cudmore, Choate on Discovery*, 2d. ed. at p.3-76.4 and *Canadian Libel Practice*, supra, at 386 on p. 105 which states:
>
> > Parties in libel actions are governed by the same procedural requirements about documentary disclosure as other actions.
>
> but continues:
>
> > When the defendant pleads justification, the particulars pleaded will

> limit the scope of the evidence at trial and the discovery and the inspection of documents.
>
> [10] I reject the defendant's arguments that in defamation proceedings generally, this rule is archaec [sic] and that *Civil Procedure Rule 20* prevails. I am of the view that the rule applies to prevent an abuse of the discovery process in defamation proceedings. For good policy reasons, pre-trial disclosure should not be available to gather facts to prove a plea of justification and fair comment.
>
> (Emphasis added)

[7] To appreciate the issue before the Chambers judge it is helpful to examine the pleadings in relevant part. In their statement of claim the appellants identified three allegedly defamatory statements from the respondent's letter to the Town of Kentville:

> 4. On or about September 2, 1997, the Defendant wrote a letter to the Town of Kentville and copies thereof were published to the members of the Town Council of the Town of Kentville, and the "local media."
>
> 5. By publication of the said letter the Defendant made statements defamatory of and concerning the Plaintiffs, and each of them in their professional capacity which were and are defamatory of the Plaintiffs, including the following:
>
> (a) "Council, and the Town's auditor, are trying to tell the citizens of Kentville that they can spend almost $300,000 on extraordinary items and it need not be disclosed in the financial statements."
>
> (b) "I also find it interesting that the auditor picked up approximately $28,000 in fees associated with the sale attempt in addition to the normal audit fees of approximately $5,000 and the solicitor picked up approximately $16,000. If similar amounts have been paid in the three fiscal years of this council, these two individuals have taken $150,000 from the Town for electric commission activity only. Obviously an incentive to play the game!! "
>
> (c) "DESPITE YOUR PUBLIC POSTURING AND YOUR 'COOKED' FINANCIAL STATEMENTS, . . ."
>
> 6. The said letter and in particular the statements set out in paragraph 5 above, are defamatory of the Plaintiffs, were made maliciously and without justification by the defendant and are calculated to bring the Plaintiffs into disrepute, public contempt and odium, thereby damaging the reputation of the Plaintiffs and each of them.
>
> (Emphasis added)

[8] In his defence the respondent admitted publication, denied the defamatory nature of the comments and pleaded, *inter alia*, fair comment and justification:

> 1. Defendant denies each and every allegation set out in the Statement of Claim.
>
> 2. The Defendant does not deny that the statements alleged to have been made by the Defendant were, in fact, made by the defendant and published by the Defendant in the manner set out in the statement of claim.
>
> 3. The Defendant denies that any of the statements made by the defendant defamed the Plaintiffs or any of them.
>
> 4. The Defendant says that the statements made by the Defendant were either true or constituted fair comment.
>
> 5. The Defendant denies that any of the statements made by the defendant were made maliciously or without justification.
>
> 6. The Defendant further denies that any of the statements made by the Defendant were calculated by the Defendant to bring the Plaintiffs or any of them into disrepute, public contempt or odium.
>
> 7. The Defendant further denies that any of the statements made by the Defendant damaged the reputation of the Plaintiffs or any of them and puts the Plaintiffs or any of them to strict proof thereof.
>
> . . .
>
> (Emphasis added)

[9] The Chambers judge correctly held that "the rule limiting discovery of the plaintiff to the particulars pleaded by the defendant applies, even if the plaintiff did not, as here, make a demand for particulars". (citing **Canadian Libel Practice**, **supra**, at 418 and 419 and **Drake v. Overland**, **infra**.)

[10] The respondent's specific demands for document production were set out in counsel's letter of April 28, 1999 to the appellants:

> . . . the Defendant requests production of all relevant documents, including but not limited to the following:
>
> 1. The Plaintiffs' financial statements for the years 1990 to date;
>
> 2. Copies of any interim financial statements for the period since the last

official statements were issued;

3. Files of the Plaintiffs relating to work performed by the Plaintiffs for the Kentville Electric Commission;

4. Files of the Plaintiffs relating to work performed by the Plaintiffs on behalf of the Town of Kentville in relation to the Kentville Electric Commission;

5. If not included in the foregoing requests, we request the following:

   (a) copies of the financial statements for the Town of Kentville for the years ending March 31, 1997, 1998 and 1999;

   (b) copies of the financial statements for the Kentville Electric Commission if not included in the above town financial statements;

   (c) detailed allocation of the $333,235.90 of expenses (outlined in Tab 54) by specific year incurred i.e. year ended March 31, 1996 or March 31, 1997;

   (d) additional information for similar expenditures in years prior to March - 1, 3 1996 and subsequent to year ended March 31, 1997 by specific year, description and account.

6. If not included in the foregoing requests, we request the following:

   (a) copies of the Request for Proposals regarding the sale of the Kentville Electric Commission, including amendments;

   (b) details of any unusual or non-operating transactions by the Kentville Electric Commission in each of the last ten years prior to March 31, 1998 and the years subsequent to March 31, 1997;

   (c) copy of T4 summary report for each and every year noted above;

   (d) copy of power purchase agreement(s) between KEC and Nova Scotia Power or any other source of power.

7. If the consent of the Kentville Electric Commission or of the Town of Kentville is necessary for the production of any documents, we have previously requested that the Plaintiff seek that permission;

> 8. If not included in the above requests, information pertaining to the Plaintiff including:
>
> (a) copies of financial statements for the ten years prior to March 31, 1997 and for all years subsequent to and including 1997;
>
> (b) list of new accounts and lost accounts in each of the years noted above;
>
> (c) copy of the Kent & Duffett Partnership Agreement.

[11] It is the appellants' submission that the Chambers judge fell into error when she accepted that, although the pleadings were inadequate to support the discovery sought, the "particulars and specifics" contained in the letter of September 2, 1997 provided a satisfactory basis for the respondent's broad request for document disclosure. In this regard she wrote:

> [16] The defendant is entitled to obtain discovery on the issues defined by the particulars furnished in his letter to the Town to prove justification or fair comment. He is not however, entitled to require general document production. He remains limited to documents relevant to those facts relied upon.
>
> (Emphasis added)

[12] The issue on this appeal is whether the Chambers judge erred in finding that the letter of September 2, 1997 provided sufficient particulars to entitle the respondent to discovery.

[13] The appellants have identified in the statement of claim, the precise parts of the letter which they claim are defamatory. The respondent, having pleaded fair comment and justification, is committing to prove as true, a set of facts which support the allegedly defamatory statements. As a matter of pleading, these facts are to be

particularized in the defence. In **Drake v. Overland**, [1980] 2 W.W.R. 193 (Alta. C.A.) Laycraft, J.A. said: "fairness as well as the fundamental principles of pleading require that the issues in dispute between the parties be defined with precision". He continued at p.199:

> This rule of practice was said by Stuart J. in *Reid v. Albertan Publishing Co.*, supra, to be applicable to examinations for discovery in Alberta. Quoting from *Odgers on Libel and Slander*, 5th ed., p. 190, he said [at pp. 920-21]:
>
> > A justification must be specially pleaded and with sufficient particularity to enable the plaintiff to know precisely what is the charge he will have to meet. Where the words complained of are precise and convey a specific charge in full detail it is sufficient to plead that they are true in substance and in fact and no particulars are necessary. But where a vague general charge is made, as for instance that the plaintiff is a swindler, it is not sufficient to plead that he is a swindler; the defendant must set forth the specific facts which he means to prove in order to show that the plaintiff is a swindler. Unless specific facts are alleged a plea that the statements made are true is, as Kay, L.J., said in *Zierenberg v. Labouchere* [supra], quoting J'*Anson v. Stuart* (1787), 1 Term Rep. 748, 99 E.R. 1357, simply respecting [sic - repeating] the libel.

[14] Indeed such a requirement comports with **Civil Procedure Rule 14** which provides in part:

> **14.04** Every pleading shall contain a statement in summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which the facts are to be proved, and the statement shall be as brief as the nature of the case admits.
>
> **14.06** Unless an opposing party has specifically denied it in his pleading, a party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party.

[15] Facts need not be specified in the defence where the defamatory statements themselves are so specific as to make clear the facts underlying the statement. As was stated in *Odgers*, above, and approved by Laycraft, J.A. in **Drake v. Overland**, **supra**:

> . . . Where the words complained of are precise and convey a specific charge in full detail it is sufficient to plead that they are true in substance and in fact and no particulars are necessary. . . .

[16] Where a defendant does not specify, in the pleading, the facts which support the defamatory statement, the plaintiff may request particulars. In **Wooten v. Sievier** [1911-13] All E.R. Rep. 1001 (C.A.) Kennedy L.J. wrote at p.1002:

> . . . The degree of fullness and precision which ought to be required in an action for libel from a defendant who has pleaded a justification and has been ordered to give particulars under that plea, is not infrequently a matter which admits of reasonable debate. Certain general propositions are not, I think, not open to controversy. In every case in which the defence raises an imputation of misconduct against him a plaintiff ought to be enabled to go to trial with knowledge not merely of the general case he has to meet but also of the acts which it is alleged he has committed and on which the defendant intends to rely as justifying the imputation.
> (Emphasis added)

[17] As was recognized by the Chambers judge, it is a well established rule of defamation practice that a defendant can only discover a plaintiff on facts pleaded in justification. (**Wismer v. Maclean-Hunter Publishing Co. Ltd. & Fraser (No. 1)**, [1954] 1 D.L.R. 481 (B.C.C.A.)) A plaintiff who does not demand particulars is not precluded from arguing that the defence filed is not sufficiently specific to entitle the defendant to discovery. (**Drake v. Overland**, **supra**; **Parkland Chapel Ltd. v. Edmonton Broadcasting Co. Limited et al** (1964), 45 D.L.R. (2d) 752 (Alta. S.C.))

[18] Here, the respondent has not pleaded the facts nor are the allegedly defamatory statements themselves sufficiently specific to enable the appellants to know the facts upon which the statements are based. I agree with the Chambers judge that

the pleadings do not provide any particulars of the basis for the alleged defamation.

[19] A defendant who pleads justification, is taken to be possessed of facts which support the truth of what was said (**Parkland Chapel Ltd. v. Edmonton Broadcasting Co. Limited et al**, **supra**). For that reason, the defendant is not permitted to go on a fishing expedition through the discovery process in hopes of finding information which will justify his defamatory comments. Lindley, L.J. wrote in **Yorkshire Provident Life Assurance Company v. Gilbert & Rivington**, [1895] 2 Q.B. 148 (C.A.) at 152:

> . . . I think it would be a very bad precedent to suggest that a person can simply by libelling another obtain access to all his books and see whether he can justify what he has said or not. . . .

[20] The strict requirements of pleading are related to the unique nature of defamation actions. The position of the parties differs from that in most other forms of litigation. The plaintiff need only establish that the allegedly defamatory statements were published. The material is then presumed to be false. Thereafter, the onus is not upon the plaintiff to prove that the statements are untrue, but upon the defendant who pleads justification to prove that they are true (**Littleton v. Hamilton**, (1974) 4 O.L.R. (2d) 283 (C.A.)).

[21] It is important to distinguish between the cases concerning a demand for particulars and those focusing upon a request for discovery. Where particulars are demanded by a plaintiff in a defamation case, the court looks at the defence and the statement of claim to determine whether the pleadings reveal sufficient information so

that the plaintiff knows the case that he must meet at trial. The court is not concerned on such an application with the discovery process.

[22] When, however, the issue before the court is the entitlement of the defendant to discovery, the court must consider the pleadings, not from the perspective of whether the plaintiff knows the case that must be met, but whether they are sufficiently specific to entitle the defendant to the discovery sought. As has already been said, the defendant is only entitled to discovery if he has set out what parts of the allegedly defamatory statements are facts, the truth of which is relied upon. (**Arnold & Butler v. Bottomley**, [1908] 2 K.B. 151 (C.A.)) This derives from the longstanding policy which discourages persons from making defamatory statements about others when not possessed of facts which would support such statements.

[23] It is my view that, in her inquiry, the Chambers judge erred in focusing only upon whether the appellants knew the case that they must meet, rather than considering whether the respondent had adequately identified the facts which he claimed to be true and the facts which he relied upon to establish their truth. She said:

> [14] In this case however, the failure of the defendant to specify facts in support of its defenses of justification and fair comment, and the fact that the plaintiffs chose not to make a demand for particulars, did not mean that the plaintiffs did not know the case they have to meet. There are considerable particulars and specifics in the letter written by the defendant to the Town of Kentville. The defendant particularized the facts on which he relied as justification that the plaintiffs may know precisely what charge he must meet. It is true that the duty imposed on the defendant was not discharged in the pleadings. The defendant has however particularized in the letter itself, the general allegations against the plaintiffs so as to enable them to know the charges which the defendant proposes to make against them, in the words of the Alberta Court of Appeal in *Drake v. Overland*, supra, which was referred to with approval by our court in *Rowe v. New Cap Inc.*, (1994), 134 N.S.R. (2d) 52; 383

> A.P.R. 52. Reference is also made to *Reid v. The Albertan Publishing Company, Limited* (1913), 10 D.L.R. 495 (Alta. S.C.)
> (Emphasis added)

[24] She should have considered not only whether the appellants knew the case that they had to meet, but also whether the appellants could discern from the pleadings or from the context of the defamatory statements, what were the statements of fact that the respondent claimed to be true.

[25] The adequacy of the pleadings and particulars must be decided in each individual case. Here, the defamatory statements are general. Indeed, it is unclear from the statements themselves what is comment and what is fact:

> (a) Council, and the Town's auditor, are trying to tell the citizens of Kentville that they can spend almost $300,000 on extraordinary items and it need not be disclosed in the financial statements.
>
> (b) I also find it interesting that the auditor picked up approximately $28,000 in fees associated with the sale attempt in addition to the normal audit fees of approximately $5,000 and the solicitor picked up approximately $16,000. If similar amounts have been paid in the three fiscal years of this council, these two individuals have taken $150,000 from the Town for electric commission activity only. Obviously an incentive to play the game!!
>
> (c) DESPITE YOUR PUBLIC POSTURING AND YOUR 'COOKED' FINANCIAL STATEMENTS, . . .

[26] The lengthy letter of September 2, 1997 contains a substantial amount of material, a mixture of commentary and statements of fact. It is impossible to identify from that letter what the respondent may assert at trial as facts supporting the defamatory statements. Indeed, in some instances it is difficult to distinguish what

statements are commentary and what are stated as fact. Accepting, without deciding that in this instance it was proper for the Chambers judge to look outside of the pleadings, I would find that the letter does not provide adequate particularization of the facts to entitle the respondent to discovery.

[27] The circumstances, here, may be likened to those in **Drake v. Overland**, **supra**. There, the defamation was said to arise in a newspaper article written by the defendant. The entire article was set forth in the statement of claim. The defence admitted publication but denied the defamatory nature of the comments and included, as here, a “rolled-up plea” of fair comment. The onus was thus on the defendant to prove the truth of the facts alleged to support the fair comment. Laycraft, J.A. wrote at p.199:

> . . . In an examination for discovery as well as in an interrogatory, the procedure should not permit questions not justified by the pleadings. The so-called rule of practice is nothing more than a specific example of the wider general rule that the basic function of pleadings is to delineate with precision the matters as to which parties to litigation differ and those as to which they agree so that the issues between them may be brought forward for settlement or judicial decision.
>
> The utility of such a rule of practice becomes evident on a review of these pleadings. The rolled-up plea here is based upon the "facts" stated in the article and upon some other facts "stated in the said newspaper or referred to explicitly or implicitly in the said article". It is left to the plaintiff to work out which statements are facts and which are opinions. In addition, after working his way through the very general allegations against him in the article, he has the task of determining what other things said in the newspaper at some other unstated time are implicitly referred to in the article. Any of these things the defendants say they are entitled to bring forth in the examinations for discovery and later at the trial of the action. I cannot believe our system of pleading permits the parties to proceed through the trial process on any such ill-defined issues.
>
> (Emphasis added)

[28] Having pleaded both fair comment and justification, it is incumbent upon the respondent to state with precision the facts which he will prove to be true either in justification or in support of the fairness of the comment. Not only has the respondent here failed to identify those facts, he has not distinguished between that which he will prove to be factual and that which he says is comment, albeit warranted by the proven facts.

[29] As to the cross-appeal, I have already indicated that I do not accept the respondent's submission that the Chambers judge erred in finding that **Civil Procedure Rule 20** mandates a broad right of discovery in defamation proceedings. The judge's power under the **Rule** is a discretionary one - "unless the court otherwise orders" a list of documents shall be filed (**Rule 20.01**); "the court may at any time" order a party to file a list of documents, make discovery limited to certain documents, dismiss an application requesting an order for discovery (**Rule 20.02**); "the court may order production" of any document relating to any matter in question in a proceeding (**Rule 20.06**). The Chambers judge recognized that, generally, a wide and liberal interpretation is given to **Rule 20**. The **Rule** must be applied, however, taking into account the special nature of a defamation action, in particular, the reverse onus and the sound principle underlying the longstanding rule limiting discovery. I would find that the Chambers judge did not err when she concluded that **Rule 20** did not, in these circumstances, entitle the respondents to document discovery. In my view, **Rule 20** is not inconsistent with the judge-made rule limiting discovery in defamation cases.

Absent specific pleading by the respondent, the information sought to be discovered is not “relevant” under the **Rule**.

[30] It bears noting that the parties agreed that the defence as drafted was sufficient to raise the defences of fair comment and justification. It is thus not necessary for us to consider the adequacy of the pleadings in that regard.

[31] I would grant leave, allow the appeal, dismiss the cross-appeal, set aside the Order of the Chambers judge and substitute an Order dismissing the application of the respondent for document discovery.

[32] The appellant shall have costs of the appeal which I would fix at $2,000 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Freeman, J.A.: (Dissenting)

[33] This is an appeal from the interlocutory judgment of a Chambers judge who exercised her discretion to permit discovery of certain documents after finding that more general discovery under **Civil Procedure Rule 20** was not available to a defendant in a defamation action whose pleadings did not particularize the case the plaintiff must meet. The respondent has cross-appealed, claiming that **Rule 20** should govern.

[34] Justice Bateman's judgment sets out the facts and the applicable law. I agree with her dismissal of the cross-appeal, but I would also dismiss the appeal. In my view, there was a proper factual foundation for the exercise of the discretion of the Chambers judge, Justice Oland, and her results should not be disturbed.

[35] The respondent is an electrical engineer formerly employed by the Town of Kentville Electric Commission. The appellant/plaintiffs are the Town's accountants who sued him in defamation in respect of a letter he wrote to the mayor, which was widely publicized locally. In it he took issue with figures included by the accountants in statements of the financial position of the electric utility. He asserted that the utility's finances were better than they had been depicted. The matter was of interest to the public in determining whether the utility was viable or should be sold to Nova Scotia Power Incorporated.

[36] The appellants pleaded that the letter made statements defamatory to them,

including three statements which were pleaded specifically:

> (a) Council, and the Town's auditor, are trying to tell the citizens of Kentville that they can spend almost $300,000 on extraordinary items and it need not be disclosed in the financial statements.
>
> (b) I also find it interesting that the auditor picked up approximately $28,000 in fees associated with the sale attempt in addition to the normal audit fees of approximately $5,000 and the solicitor picked up approximately $16,000. If similar amounts have been paid in the three fiscal years of this council, these two individuals have taken $150,000 from the Town for electric commission activity only. Obviously an incentive to play the game!!
>
> (c) DESPITE YOUR PUBLIC POSTURING AND YOUR 'COOKED' FINANCIAL STATEMENTS, ...

[37] The respondent's defence also refers to the letter, which he admits publishing, but denies the statements are defamatory. He pleads justification and fair comment, but does not particularize the facts on which his comments were based apart from the reference to the letter.

[38] In my view this is not a general defamation, as when one person calls another a "swindler" in which the defendant's pleadings must particularize the facts on which the statement was made, so the plaintiff, in the reverse onus situation, knows what case he must meet. The defendant's rights of discovery are limited to the facts he pleads.

[39] In the present circumstances, the statements are only meaningful, whether defamatory or not, in the specific context of the letter. The case the plaintiffs must meet is set out in the narrow context of the letter; there is no other context.

[40] Justice Oland reviewed the law applicable to discovery in defamation actions

and concluded as follows:

> I agree that the plaintiffs are not obliged to seek further particulars of relevant facts when the defence of justification and fair comment is bare bones. The rule limiting discovery of the plaintiff to the particulars pleaded by the defendant applies, even if the plaintiff did not, as here, make a demand for particulars. See **Canadian Libel Practice**, supra; **Drake v. Overland**, [1980] 2 W.W.R. 193 (Alta C.A.)
>
> In this case however, the failure of the defendant to specify facts in support of its defenses of justification and fair comment, and the fact that the plaintiff chose not to make a demand for particulars, did not mean that the plaintiffs did not know the case they have to meet. There are considerable particulars and specifics in the letter written by the defendant to the Town of Kentville. The defendant particularized the facts on which he relied as justification that the plaintiffs may know precisely what charge he must meet. It is true that the duty imposed on the defendant was not discharged in the pleadings. The defendant has however particularized in the letter itself, the general allegations against the plaintiffs so as to enable them to know the charges which the defendant proposes to make against them, in the words of the Alberta Court of Appeal in **Drake v. Overland**, supra, which was referred to with approval by our court in **Rowe v. New Cap Inc.** , (1994), 134 N.S.R. (2d) 52.

[41] In **Drake v. Overland** the allegedly defamatory document was a newspaper article. The rolled up plea of justification and fair comment was not limited to facts stated the article itself but to facts "referred to, explicitly or implicitly, in the said article." In discovery, the plaintiff refused to answer certain questions on the advice of counsel because the defendant had not particularized its case. Laycraft, J.A. (as he then was), granted leave to the defendants to amend their pleadings or to supply particulars. He then sorted the questions into groups, requiring some to be answered and some not to be answered, as though particulars had been supplied.

[42] In the present case, Justice Oland also crafted a remedy appropriate to the more specific circumstances before her. The decisions of Chambers judges in the exercise of their discretion in interlocutory matters are entitled to considerable

deference. Justice Flinn set out the standard of review in **Ross v. Attorney General of Canada and the Town of Springhill**, C.A. 156447, Nov. 9, 1999, as follows:

> [15] While the proceeding before the Chambers judge was an interlocutory proceeding, involving a discretionary order, the Order of the Chambers judge disposed of the appellants proceeding against the respondent The Town of Springhill. In **Saulnier v. Dartmouth Fuels Ltd.** (1991), 106 N.S.R . (2d) 425 (N.S.C.A.), this Court allowed an appeal from an order dismissing an action for want of prosecution. Justice Chipman said the following concerning the standard of review by this Court of such an order at p. 427:
>
> > The principles which govern us on an appeal from a discretionary order are well- settled. We will not interfere with such an order unless wrong principles of law have been applied or a patent injustice would result. The burden of proof upon the appellant is heavy. **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P. R. 331, at 333, and **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54, at 57.
> >
> > On two occasions recently, this court has allowed appeals from discretionary orders: in **Canada (Attorney General) v. Foundation Company of Canada Ltd. et al.** (1990), 99 N.S.R. (2d) 327; 270 A.P.R. 327, from an order dismissing an action for want of prosecution and in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143, 275 A.P.R. 143, from an order dismissing an application to renew an originating notice. In both cases, the court attached considerable significance to the consequences of the discretionary orders which had the effect of finally disposing of each of the proceedings without adjudication on the merits. [emphasis added]
>
> [16] Similarly, and more recently, in **Hurley v. Co-operators General Ins. Co.** (1998), 169 N.S.R. (2d) 22 (N.S.C.A.) this Court stated at pp. 27-28:
>
> > The proceeding which is the subject of this appeal is an interlocutory proceeding involving a discretionary order. However, since the order of the trial judge is a final order, which dismisses the appellants action, the decision of the Chambers judge is not given the same deference usually afforded by this court when dealing with interlocutory matters involving the exercise of discretion.

[43] In my view, Justice Oland did not apply wrong principles of law nor create an injustice in exercising her discretion to order that certain documents, which the defendant had requested, be produced by the plaintiff. I would dismiss the appeal as

well as the cross-appeal.

Freeman, J.A.