

IN THE MATTER of a Civil Appeal

BETWEEN “B”

Appellant

AND “M”

Respondent

Hearing 12 October 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel: C R Carruthers QC for Appellant
W M Wilson QC for Intervenor
M T Scholtens QC Amicus Curiae

CIVIL APPEAL

10.08am

Carruthers May it please Your Honours, I appear for the appellant.

Elias CJ Yes thank you Mr Carruthers.

Wilson May it please Your Honours, I appear for the Intervenor.

Elias CJ Yes, thank you Mr Wilson.

Scholtens May it please Your Honours, I appear as Amicus.

Elias CJ Thank you Miss Scholtens. Right, well Mr Carruthers you're to lead off and we've been told you have an application to make.

- Carruthers Yes I do, I have a preliminary application under the Property Relationships Act, s.35. The appellant desires that the hearing be in public, be in private I beg your pardon, and in terms of the section that seems to be a matter that follows as of course.
- Elias CJ If we're hearing an application or appeal under the Property Relationships Act of course we are hearing the leave application that has been set down for hearing at the same time, but we would like to hear you on the leave applications Mr Carruthers and I'm not sure that it follows at all that that is an application, well it certainly is not an application under the Property Relationships Act, it's an application under the Supreme Court Act.
- Carruthers Although Your Honour it must be an appeal in terms of s.35 or at least within the concept of appeal because it is a preliminary step to appeal from the Court of Appeal.
- Elias CJ There's no appeal Mr Carruthers until we grant leave.
- Carruthers Well as Your Honour pleases I took from the direction that had been given that the application for leave and the appeal would be heard at the same time and certainly the way I had structured my argument I have formulated the issue or the matter for appeal and I was going to move directly from there to deal with the substantive appeal on the basis that the justification for the matter that I formulated would become clear from the material submit on the substantive appeal.
- Elias CJ I understand that be we would be assisted if you would address the issue of whether leave should be granted because although you have engaged on the substance of the appeal in the submissions, which of course we've read so we understand that background, there are discrete issues as to whether it is appropriate for the Court to entertain an appeal from the exercise of a power which is ancillary, not a statutory power under the Statute being engaged and also we had some concern as to whether an appeal would be reached in the particular case.
- Carruthers Well dealing with the first of the issues that Your Honour has raised, the jurisdiction that has been exercised both in the High Court and by implication in the Court of Appeal is the inherent jurisdiction of the Court. That is a matter really of assessment and balancing competing considerations where this Court is in precisely the same position as indeed both Courts below. It's not a matter of an exercise of discretion and I understand Your Honour probably carefully didn't use that expression so my submission in that respect is that there is plainly a proper appellant jurisdiction on that point.
- Elias CJ If we're satisfied that the Court exercising the inherent power has exercised it on a wrong principle, something of that sort, or has failed to take into account relevant considerations, but your submissions are all directed at the weight given to considerations which are identified

and considered and my concern is that these ancillary powers which the Courts have to do justice in the individual case are not generally the subject of appellant review for very good reason unless there is an error of that sort, one of principle or, because the guidance that a Court like this can give is so limited because the power necessary has to be exercised in a particular factual situation.

Carruthers Well I'm certainly content to argue the case on the basis that the Court of Appeal has applied a wrong principle and I am content that the way Your Honours formulated for me is really conventionally the way in which one would necessarily have to attack an exercise of discretion. This in my submission is in a different category where it is a balancing exercise, so it is in the category of assessment rather than exercise of discretion, but

Elias CJ But how the balancing fact is identified. They're not a matter of statutory interpretation here and I don't understand you to be saying that there were any factors which the Court of Appeal didn't take into account that you would say are relevant.

Carruthers What I would submit is that the fact is that the Court of Appeal did take into account were not relevant in the sense that they were not properly reasoned and analysed and that the Judge in the Court below properly recognised the relevant factors and gave them proper weight and assessed them properly and I think that the way in which I have challenged the Court of Appeal's decision in my submissions reflects that approach.

Elias CJ Well I think you'll have to enlarge upon that argument for the purposes of leave but the second matter I raised was the one of mootness.

Carruthers Yes. Well my submission is that it is not moot because if leave is refused and the appeal does not proceed the very issue of protection of the confidential information is lost, both in relation to the appellant and in relation to the firm so there is still a very discrete live issue as to protection of acknowledged confidential information and in that respect the matter cannot be moot. In the appeal against the number 2 judgment of the Court of Appeal there is no argument that affects the substantive judgment of the Court of Appeal on the division of the relationship property, that has been resolved, so in my submission it can't be said that the issue about which the appellant complains is moot.

Elias CJ The sole issue is the confidentiality of the husband's income.

Carruthers Yes that's right, or my learned friend Mr Wilson will undoubtedly put it, the wider issue of the interest of the partnership in disclosure of partnership income.

- Tipping J Is it really the fact that everything confidential monetarily is rendered unintelligible or was intended to be rendered unintelligible by the use of the “x” formula?
- Carruthers No, the key to my argument is that the formula that’s adopted is a practical working formula that actually does give the judgment life for other practitioners and for commentators, and let me deal with that point straight away
- Tipping J Could I just ask for a little bit of clarification Mr Carruthers? If we’re reading the published version of this judgment, the redacted version, the version that’s contained for example in the Family Reports of New Zealand, one can work out what “x” represents in dollar terms without difficulty, what would you say as to the remaining force of the confidentiality point?
- Carruthers Well the first point is we’re not dealing with that judgment, although that is one of the judgments, we’re dealing with the substantive Court of Appeal judgment and my
- Blanchard J Do you mean that the report in the Family Law Reports is not of the approved redacted version?
- Carruthers If Your Honour’s referring to the one that is in the case on appeal
- Blanchard J No, well I don’t know whether it is or not but there is a published version of this
- Tipping J It’s reported at 2006, 25 Family Reports of New Zealand at page 171.
- Carruthers Alright. Your Honour what I’ve included in the case on appeal was the version of the Court of Appeal judgment that was issued
- Tipping J I’m not in any way querying that
- Carruthers No, no no
- Tipping J But what I’m saying to you Mr Carruthers is that it seems to me that you could work out without difficulty what “x” is in dollar terms. I won’t mention the figure for obvious reasons at the moment but it is a matter of simple arithmetic from passages in this judgment that you could work out what “x” is. Now if that is so what possible reason is there to suppress if you like in further publications the dollar value?
- Carruthers Well Your Honour the answer to that is that there would be none but I join issue with you as to whether you can actually work that figure out because the whole purpose of this exercise was to have the value “x” and this is why I submit that it’s a practical workable judgment and if I can just develop that point for a moment so that I can indicate the basis on which I argue the application for leave and the appeal.

Blanchard J But it might be better if you let Justice Tipping explain the point he's making with reference to the particular passage.

Carruthers As Your Honour pleases.

Tipping J Well I was just looking Mr Carruthers at para.114 of the judgment of Justice Robertson, the third paragraph under the heading Mirror Trusts and it's on page 17 of the Family Reports of New Zealand and it starts "in the light of the conclusion I have reached". Are you at that paragraph?

Carruthers Yes I am.

Tipping J And I'm not going to mention out loud the figures at the moment. "As to the proper value of the interest in the firm the pool of relationship property has been increased by the sum of that figure of which the wife is entitled to half. The wife's half entitlement is rendered in the judgment as point 9 of "x". So "x" becomes a figure which you can immediately, unless there's some horrible flaw in my approach. I was going through the judgment with a view to seeing where there were dollar figures mentioned as opposed to fractions of "x" and I have to say that this dollar figure leapt off the page at me.

Carruthers Well I can understand why and I can equally say that that is so plainly an error which counsel has made in arguing the matter in relation to the redaction of the Court of Appeal version because Your Honour will appreciate that everywhere else in the judgment "x" has been used.

Tipping J Well you can actually work it out with a calculator and a bit of arithmetical knowledge almost exactly from para.62, where dollar figures also appear in the discounting exercise of Messrs Hagen and Frankham. I did it in my head before I got to para.114 and coincidentally I got to a figure almost exactly what is the product of 114, sorry, yes 114. I can't claim to have got it bang on but I got it very close, just in my head. The problem is that it hasn't been sufficiently redacted and this is now out in the public arena and I can imagine that people will know for a dead cert what "x" is. I mean I'm not a great mathematician and my brother Blanchard has invited me to say something about his involvement in the exercise but I won't at the moment, but

Blanchard J Well it wasn't a kindly remark.

Carruthers Well I suspect Your Honours often warn me of that.

Tipping J You see that's why I wonder where exactly, I mean it's unfortunate but the simply fact is that anyone reading this, and I imagine those for whom you're anxious about confidentiality have a modicum of arithmetical skill

- Carruthers Well Your Honour I know how this situation will have arisen. It has arisen entirely from the pressure under which this came about. The Court of Appeal judgment came out, steps were taken immediately, we had a half hour telephone conference to deal with the issue and Your Honour I can say that the whole intention of the redaction was to ensure that the dollar value in "x" could not be discerned.
- Blanchard J Well there's no doubt about that Mr Carruthers
- Tipping J I'm not prescribing blame or anything, I'm just simply saying why are we here?
- Blanchard J The problem is the cat's out of the bag. Anyone studying this will know what "x" is and it's been published.
- Carruthers Well I suppose the only way I can take the argument forward is to say that unfortunate as the state of affairs is there is a lesser chance of everybody identifying what the figure is than if the figures were published in full, that's probably as far as I can take in and I can see immediately the practical difficulties I face in pursuing that argument.
- Tipping J I think what's happened, and it's very understandable, is that because the heading is Mirror Trusts, one has assumed, this is leaving aside para.62 which is much more sophisticated, one has just assumed that the interest in the firm was over and that the text didn't engage on that but unhappily the Judge chose to recapitulate.
- Carruthers Yes and I can say it simply wasn't noticed in the exercise that was undertaken in the application to the Court of Appeal and perhaps more compellingly it hasn't been picked up
- Tipping J It's a very very unfortunate situation but I don't think we could legitimately say to another proper series of law reports you've got to publish it in a more covert way.
- Carruthers Yes.
- Tipping J Because that wouldn't seem at all sensible or right.
- Blanchard J But beyond that it's pointless suppressing the figure throughout the rest of the judgment when anyone can work it out and the legal profession being what they are, the secrecy of course is just attracting attention.
- Tipping J I think I know frankly Mr Carruthers that people have worked it out. I'm not saying I have learnt that someone has worked it out, but that didn't influence me in the slightest, that's subsequently.
- Elias CJ Do you want to consider this point, because if you are to proceed I do want you to enlarge upon the reasons why we should entertain an

appeal from what was really an application for recall and amendment of a judgment and I would want you to enlarge on the summary you've given us about balancing considerations and so on and how they are properly to be entertained by us, exercising the function that we have.

- Tipping J And we haven't heard from Mr Wilson either.
- Elias CJ Yes and it may be that Mr Wilson wants to address us as well but since this point the reason I asked if you'd like us to stand down for a few minutes is that it appears to me that this point has been put to you while you're on your feet and that both you and Mr Wilson might like a few minutes to consider it.
- Carruthers Yes I would like to do that and I do have representatives of the firm in Court so I would like time just to consider that thank you.
- Elias CJ Yes, well shall we take an adjournment for half an hour? Would that be sensible?
- Carruthers Yes that would be very sensible. Thank you Your Honour.
- Elias CJ Thank you.
- 10.30am Court adjourned
11.00am Court resumed
- Carruthers Your Honours I've discussed the position with my learned friend Mr Wilson and the representatives of the firm. For my part I hold to the argument that the intention of the redaction was that "x" was to be kept confidential. I must accept the point made by His Honour Justice Tipping but the judgment in its part redacted form still affords a protection of the acknowledged confidentiality to some extent that the appellant enjoyed. The argument at this point probably effects the firm more than the appellant personally and if Your Honours were prepared to hear Mr Wilson on that, I know that he wants to be heard on this issue of the effect of the judgment before we get to the second issue that Your Honour the Chief Justice raised with me.
- Elias CJ So you don't want to say any more on that point of mootness?
- Carruthers Not on that particular issue.
- Elias CJ No, thank you.
- Carruthers Thank you.
- Elias CJ Yes, thank you Mr Wilson. Excuse me, just a moment. Thank you Mr Wilson.

Wilson

Yes Your Honours, addressing only the issue of mootness as I apprehend as my task at present, may I first in this connection say a little about the hearing which took place in the Court of Appeal on the issues of confidentiality consequential upon the delivery of the substantive judgment in the appeal. I emphasise that I myself was not involved at that time. Mr Stevens QC as he then was, was acting for the firm at that time and my instructions, and I have discussed this point with Mr Stevens is that the issue of confidentiality aspects of the substantive judgment was dealt with in a telephone conference, as I think Mr Carruthers has already advised this Court, which talked no more than half an hour. At the time Mr Stevens was involved in a trial in Rotorua which obviously inhibited his ability to focus on this particular matter, and Your Honours why I say this is that it may well in my submission provide an explanation for why the redacting exercise was not carried out as comprehensively as it's now apparent should have been the position. Because in my submission what is clear is that the intention of the redacting was to prevent the identification of the figure represented by the letter "x". That was the as I said the purpose of the exercise. My instructions from the firm are that it was very concerned about this whole question of the disclosure of confidential firm information and therefore instructed senior counsel to act on its behalf. But the position that the firm took was to seek to facilitate a compromise between the protection of the firm's confidential information and the utility of the judgment as a precedent, seeking to balance those considerations and believing that those objectives could best be reconciled by the use of the formula "x" in the judgment, and as I said it does seem to be clear that the intention of redacting was to avoid disclosure of the dollar sum represented by "x". While I appreciate of course that when this Court looked at the matter at the stage of interim orders it wasn't examining the judgments closely. As I read the interim orders of this Court the position was to protect the position pending any substantive appeal here and as part of that protection to avoid disclosure of the figure represented by "x". Now Your Honours the firm accepts of course that, if I can put it colloquially, the cat can't be put back in the box in terms of the redacted judgment to the extent that has been distributed and more particularly the recent reporting of the judgment as Your Honour Justice Tipping noted this morning, clearly that has happened. But notwithstanding that it is the position of the firm that the issues sought to be raised on this appeal are not moot and I make that submission for the following reasons. First Your Honours I invite you to draw an analogy between the question of the name of the firm and the financial information represented by "x", and as the firm's acknowledged in the material that's before this Court, on reading the judgments any informed reader, particularly a reader from within the legal profession could make an educated guess as to the identity of the firm that's accepted and that's a consequence that couldn't be avoided of the matters which particularly the Court of Appeal had to refer to in its judgment. But Your Honours it's my submission that it doesn't follow

from that that the name of the firm should be published and there is a distinction in my submission between a situation where a reader of the judgment may be able to work out with a high degree of confidence the identity of the firm as opposed to having the firm actually named in a judgment and it is for that reason that whatever the outcome of the matters before the Court today I do ask this Court to continue what the Court of Appeal and direct that the name of the firm not be published. Moving from that to the question of “x”. Why I submit there is an analogy between this issue and that of the name of the firm is that likewise in the case of “x” having regard to the matters that Your Honours Justice Tipping and Justice Blanchard raised this morning, I accept that it is possible on looking at the judgment to work out what “x” is but that is in my submission a materially different situation, and again if I can put it colloquially, putting the figure represented by “x” up in lights by repeatedly publishing that figure as part of the judgment and it does in my submission make a difference in practical terms if I may say so with respect as numerate and analytical as Your Honours were able to work the figure out.

- Elias CJ Some of our Honours.
- Wilson I was about to say for myself.
- Blanchard J I’m definitely not, and it was easy to work it out.
- Tipping J Once it had been pointed out.
- Wilson Well I’m bound to say that once it was pointed out I could work it out and I would like to think I wouldn’t be completely alone in that respect.
- Anderson J The formulaic method adopted invites curiosity and lawyers are notoriously curious.
- Blanchard J And we can hardly suppress “x” by any more direct way. People are free to write law review articles in which they tell everyone what “x” is and it gets into the press because it’s an example of secrecy in the Courts and the whole situation will be exacerbated. Something that is of temporary interest will become a much more permanent interest.
- Wilson Your Honour that is not the assessment of the firm. Can I make two points in that respect? Firstly
- Elias CJ Sorry, are these responses to Justice Blanchard or are you continuing your points?
- Wilson Both, both, because I was about to make those
- Tipping J You saw him coming Mr Wilson?

- Wilson I'm going to watch out for him. Both connections first and subject to the jurisdictional points that Your Honour The Chief Justice raised this morning, if this is an appeal under the Property Relationships Act, the restrictions in reporting in s.35(a) obviously apply to limit any reporting and whatever the prurient interest there may be among some members of the legal profession individually one would hope that publications of the type which are able to publish under subsection 4 of s.35(a) would focus on the legal issues rather than the more prurient
- Blanchard J But there's somebody present in Court who can give you a much more accurate view on that.
- Elias CJ Sorry this point is that because the Property Relationships Act is engaged there is a legislative policy in limiting publication.
- Blanchard J But you couldn't prevent someone from referring to the figure in para.114 and then referring to all the calculations. Even if they didn't actually give the final figure, it would become a game.
- Wilson But I would have thought with respect Sir that any publication that were to engage upon such an exercise would be risking the loss of protection intended by subsection 4.
- Blanchard J I doubt it, I doubt it.
- Wilson I'd certainly be prepared to run that argument, but the other point I make is that on my instructions from the firm and whatever Your Honour Justice Tipping may have heard from some quarters, the question of the figure represented by "x" has not been raised with the firm or any partner so far as is known so it certainly up to now
- Elias CJ Probably politeness.
- Anderson J Or lack of interest. Who cares what the figure was three years ago.
- Wilson Well obviously from Your Honour's point time has some significance but the
- Blanchard J I mean the incomes of quite a few of the major firms are pretty well-known.
- Wilson Yes but the point that [-] the Chairman of the partners of the firm made in an affidavit filed in the Court of Appeal to which if the matter proceeds to a substantive hearing I would be referring the Court was that this firm unlike most of the larger or medium size firm does as a matter of policy not take part in inter-firm comparisons and has a very strong firm culture of keeping partnership financial information confidential within the partnership. But I do make this submission and I adhere to it notwithstanding with respect Justice Anderson's observation that it is well known the legal profession is interested in

such matters but no one has raised the matter with the firm by way of any attempted calculation up to the present. So Your Honours for those reasons it is my submission on behalf of the firm that the issues sought to be raised on appeal are not moot, notwithstanding the possibility of working out what exists.

Elias CJ Mr Wilson as I understand it your three arguments are analogy, statutory policy under s.35(a) and an assertion that this matter is not out in the wider arena. On that analogy point I just really wonder how potent it is because redaction or anonymity in the names of cases is so ubiquitous and intrudes so little on the purposes of publication of the reasons for decision that it's not an exact analogy at all and indeed of course under some Statutes it's automatic anonymity. Under this it isn't so that's why you say that there's an analogy, the Court decided to, but it's an almost invariable practice of the Courts isn't it? In fact there may even be some sort of practice note or, I'm just trying to think whether you ever see these days the names of the parties disclosed in these cases?

Wilson Well certainly from my much more limited knowledge of the area one doesn't see them but could I respond more generally to Your Honour's question by observation to me by saying that with respect and to avoid obviously trespassing into the substantive arguments here as far as possible but my argument would be on behalf of the firm if we reached the stage that there are here considerations of both privacy and confidentiality, and on the confidentiality leg of that argument in my submission it's very common practice, just about standard practice for commercially sensitive information not to be published in judgments in commercial cases and one recent example of that which is referred to in the written submissions is the *Millbrook and Bomac* case and I think Your Honour Justice Tipping, and even Justice McGrath, may have been involved in that matter in the Court of Appeal in the *Veterinary Products* case where in the following application, following the judgment of the Court of Appeal there was redacting by substituting a letter for the percentage involved on

Elias CJ That was a formula wasn't it?

Wilson On a formula. Not so much a formula, it was the percentage of one product, it was applied

Elias CJ No no, I mean it was a formula, I mean it's a mile away from this sort of math, no?

Wilson No, with respect it's not Your Honour, it's a confidential information case with confidential information provided by one of the parties to the litigation to the other and the question as to whether or not there had been wrongful use of the confidential information.

Elias CJ But it was clearly commercially sensitive in that case

- Wilson Well exactly and my submission is that from the firm's point of view what we're concerned with here, and in particular the figure represented by "x" is commercially sensitive information and again I'd be developing that argument if I have the opportunity
- Blanchard J But surely anybody who's wanting access to that information for business purposes has now got it.
- Wilson Anyone who
- Blanchard J All your suggestion of not, well I think you're making the suggestion that we should simply stick with the version as now redacted, but the commercial sensitivity argument really has gone. If this was a competitor situation where a competitor was interested, they would long since have worked it out. So really what you're trying to stop is members of the legal profession and others who are interested in law reports from finding out the figure simply by reading it without actually settling down and doing some calculations.
- Wilson Yes, yes, including potential competitors and
- Blanchard J But if potential competitors will be able to work this out.
- Wilson If they set out to they can, but I'm saying
- Blanchard J Well what if they're not setting out to do it they're obviously not greatly interested.
- Wilson No, with respect Sir that doesn't follow. They may on the one hand if they set out to do it obviously I accept that's a different category but if they happen to be reading the judgment for reasons of property relationship law and happen to set upon the figure that may well create their interest in the matter when it otherwise wouldn't
- McGrath J It really I suppose goes Mr Wilson to the question of whether the information still retains the quality of confidence
- Wilson Yes
- McGrath J And obviously this case has taken a different course this morning but I can't think of any case where the way to obtain the information is so open, so accessible, in which it's been held the quality of confidence still exists in the information
- Wilson Well it's always a matter of degree and if hypothetically the objective of protecting the figure represented by "x" had been lost, because in half a dozen places in the judgment it was overlooked and the figure was stated directly; I accept that would be a loss of the confidential character but I still maintain the submission and three it comes back to

the point I've endeavoured to address already as a matter of degree there is still a degree of confidentiality there but obviously it's not as complete as it was, so again for those reasons

Tipping J Could I ask for some help on a slightly different issue Mr Wilson? It's subject to the submissions that may or may not be required from the Amicus. Is it the fact that this appeal has to be allowed from what the Court of Appeal decided in order to set in place the redaction if you like at least so far as the parties agreement is concerned?

Wilson Yes indeed, yes indeed.

Tipping J But once we've got to the point if we do whereby the 'cat's out of the bag' point that must surely influence to what extent, if at all, the appeal should be allowed?

Wilson Yes, yes.

Tipping J Yes. I'm just trying to think through whether to accommodate what's, what would be the position if the Court of Appeal's order were to be left completely untouched, in other words if leave to appeal was declined the Court of Appeal, just help me out, my recollection is not absolutely secure. The Court of Appeal said what 'absolutely no redaction'?

Wilson That's my understanding Sir. No redaction, no protection at all. Well perhaps subject to the name of the firm point.

Tipping J Yes.

Blanchard J But is the name of the firm in the original version?

Wilson No it's not, it's not.

Blanchard J So we're not concerned with that?

Elias CJ No.

Wilson No, I'm just anxious that

McGrath J But you've asked us to maintain the same approach as the Court of Appeal in relation to this

Wilson In this Court, but in terms of the Court of Appeal judgment, no reference to the name of the firm

Blanchard J The only reduction relates to "x".

Wilson Yes.

Tipping J So refusing leave to appeal would mean that anybody within the ambit of that section, not anybody but anyone in the privileged category of law reporting and so on could publish all the figures raw?

Wilson Yes.

Tipping J And the sole issue then is whether or not there's a sufficient interest, the cat being 9/10ths out of the bag, or whatever proportion out of the bag you would wish to put it, but you say it's not so wholly out of the bag?

Wilson I'd say only the head's out of the bag.

Blanchard J It's certainly not Schroedinger's this cat.

Tipping J But really it comes down to that doesn't Mr Wilson? If the cat is effectively out of the bag there's little point. If however

Wilson It's Justice McGrath's point. In confidentiality terms, it's not confidential if it's completely out of the bag.

Tipping J Yes, well thank you. Yes I just wanted to make sure we didn't overlook some point that at least the parties concurrent should be respected but that doesn't actually arise does it? No.

Elias CJ Thank you Mr Wilson. Miss Scholtens do you want to be heard on this point of mootness?

Scholtens Thank you Your Honour, may it please the Court. I think there is a lot of force in the point that the information can't be seen as private any more and that it has lost its quality of confidence, so that there really is no justification for taking this very serious step of redaction.

Elias CJ Just thinking of some of your submissions, is there an issue also if confidence has been lost in the version published of equity as between publishers? You developed a submission based on freedom of expression but does that enter into this?

Scholtens I would have thought that the body that has published the report it would be simply free to publish another version of it without any redactions

Tipping J Well it should be free to do so?

Scholtens Yes.

Tipping J Yes, now the cat's out of the bag.

Scholtens Yes, yes and that there would be no unfairness with other publishers at all. They got there first and published the redacted version.

Elias CJ I was really rather raising the question of if the redaction is to be maintained it would have to be enhanced for other publishers. Whether there is an issue of equity is between publications.

Scholtens I think if we were talking about further redactions. For example the figure that we were looking at at para.114, that figure is an incredibly important figure to the understanding of what follows.

Tipping J Well it's become such.

Scholtens Of what follows in the judgment in terms of how the Court apply s.15, spousal maintenance.

Tipping J But what if they'd done what they should have done and made that figure 1.8 "x".

Scholtens Well, then I'd revert back to the submissions that I've made in writing about how difficult it is to understand the Court's reasoning if you do not know the value of "x".

Tipping J Well that's coming into the sort of more substantive merits isn't it, but it would seem to me Miss Scholtens if I may take up the Chief Justice's point, take it a step further, if one publisher has been allowed to publish the figure it would be quite odd if another publisher published something with that figure in it. No one could rationally suggest that it should be further adapted so as to prevent another publisher from

Scholtens No, and I don't think that

Tipping J And they're not arguing that.

Scholtens No.

Tipping J So

Scholtens What I understand

Elias CJ So we are being asked to allow an appeal to impose a redaction which is not effective?

Scholtens Yes Ma'am.

Elias CJ We'll retire for a few minutes thank you.

11.29 am Court adjourned
11.36 am Court resumed

Elias CJ Yes for the reasons that we will give in a short written judgment to follow we are satisfied that no sufficient grounds have been made out under s.13 in the circumstances of the case to entertain the appeal that leave will be dismissed.

Carruthers Your Honours please, Your Honours I wonder if I could ask the circumstances in which this issue arose might be recorded in that judgment in the sense that if the intention plainly was that “x” should appear throughout the judgment and if that had been appreciated, I mean this is the responsibility of counsel of course, but if that had been appreciated and been known before today’s hearing it would have cast the whole issue in a different light and you will understand from the way in which the case has been prepared and argued that it simply wasn’t appreciated, that the formula had been missed in relation to that paragraph.

Elias CJ Yes that’s undoubtedly true and it’s quite clear that “x” wasn’t to be redacted throughout.

Carruthers Yes, as Your Honour pleases.

Elias CJ Alright thank you counsel for your assistance.

11.38am Court adjourned