IN THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. 9 OF 1988

On appeal from the High Court of Fiji
Consolidated Civil Actions No. 599
of 1987 and No. 604 of 1987.

Between:

NEWSPAPERS OF FIJI LIMITED	Appellant (Original First Defendant)
- and -	
JAMES AH KOY	Respondent (Original Plaintiff in Civil Action No. 599 of 1987)
- and -	
MRS. LAVINIA AH KOY	Respondent (Original Plaintiff in Civil Action No. 604 of 1987)

Mr. P. Knight for the Appellant
Mr. P.C. Heerey, Q.C. with Mr. G.P. Lala for the Respondents

Date of Hearing: 8th March, 1989
Date of Judgment: 19th May, 1989

JUDGMENT OF THE COURT

This is an appeal from an interlocutory Order made in the High Court by Fatiaki J. on 23rd June, 1988 whereby he ordered that out of the proceeds of sale of the appellant's assets paid into the trust account of Messrs Cromptons, solicitors for the appellant, a sum of $100,000 be "retained by the said solicitors and placed in an interest bearing account with a registered bank in Fiji, such account not to be drawn upon without a prior written order of the Court".

Appellant has appealed against this order upon the following two grounds:

1. That the learned judge erred in law and in fact in ordering that it was necessary, as a security for any judgment that the respondent may obtain in the action for any sum to be retained out of the proceeds of sale of the assets of the appellant.

2. That the learned judge erred in law and in fact in ordering that the sum of $100,000 was to be retained out of the proceeds of sale of the assets of the appellant as security for any judgment that the respondent may obtain in the action, such sum being excessive.

The two grounds of appeal can conveniently be summarised thus:

(a) that the order in question should not have been made at all as it was unnecessary,

(b) that in any event the amount ordered to be retained is excessive.

The brief background to the making of the order in question and also to this appeal is as follows:

The appellant company was at all material times carrying on the business of printing "The Fiji Sun" a daily newspaper. Although duly incorporated in Fiji at least 80% of the company's shares are held by non-Fiji residents.

On the 8th of July 1987 the 1st named respondent James Ah Koy issued a writ (No.599 of 1987) against the appellant company and 2 others for defamation allegedly contained in an article headed "Bank questions $200,000 transfer" published in its paper "The Fiji Sun" of the same date. Later Mrs. Ah Koy also issued a similar writ

(No.604 of 1987) in respect of the same article and another which appeared in "The Fiji Sun" of 9th July 1987 on the same subject.

The respondents claim that the articles seriously libelled them inter alia by the innuendo that they acted improperly and corruptly in transferring the money to New Zealand. The appellant admits the publication of the articles but it is defending the actions on several grounds.

On 19th May, 1988 Fatiaki J. granted a 'Mareva' injunction until further order, against the appellant on the ex-parte application of the first named respondent. The interim injunction effectively restrained the appellant from disposing of its assets by sale, transfer or by removing them from the court's jurisdiction. The application was made primarily on the basis that the appellant had ceased operating in Fiji and that it had been endeavouring to sell its Fiji assets and there was a risk that it may remove such assets from the court's jurisdiction or otherwise dispose of such assets.

On 2nd June the appellant was permitted to enter into a sale and purchase agreement but pending further order of the court the proceeds were to be retained in the trust account of Messrs Cromptons, solicitors for the appellant. The matter was adjourned to 9.6.88 and the appellant was required to file a further affidavit disclosing its total unpaid creditors "with a view to assisting the court in arriving at a more specific amount to be retained out of the proceeds of the sale pending final disposal of the both actions".

The solicitor for the appellant deposed that the negotiated price of the appellant's assets was $820,000 and the total owed to the creditors was $361,425 thus leaving a balance of $458,575.

On 8th June, 1988 the two actions against the appellant were consolidated for the purpose of the injunction application.

On 23rd June, 1988 Fatiaki J. in a written and considered ruling made the Order against which this appeal has been lodged.

Before making the Order Fatiaki J. made the following observations in his Ruling:

> "I have carefully considered the submissions of learned counsel for the plaintiffs on this matter and have found of particular assistance the section on the general principles governing an award of damages for defamation including inter alia:
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> (a) vindication and consolation;
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> (b) the conduct of the defendants;
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> (c) the respective standing of the plaintiffs and the defendants;
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> (d) the article complained of; and
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> (e) comparable verdicts.
>
> Under this latter head the plaintiffs' counsel has cited numerous English and Australian authorities which I have found of little assistance in an assessment of the quantum of damages that the courts in this country have awarded in past defamation actions.
>
> Needless to say, and counsel for the plaintiff does not seriously doubt its correctness, previous awards of damages for defamation in this country have rarely reached five figures and almost never, even in the most serious accident compensation claims reached six figures.
>
> This is not to say that a six figure award of damages will not be made in appropriate cases.
>
> Therefore and without in any way being seen to prejudge the outcome of the case or the amount of damages which this court will or might award in the event the plaintiffs are successful in their claims I order ....."

However it should be noted that on 9th September, 1988 the appellant obtained by consent from Jesuratnam J. the court's approval to sell its assets for not less than $700,000 cash.

The annexure of the supporting affidavit filed on behalf of the appellant showed a comprehensive list of creditors totalling $406,533.

Appellant's assets have since been sold and the sum of $100,000 has in fact been deposited in an interest bearing account with a registered commercial bank in Suva. The appellant company went into voluntary liquidation on 9th October, 1988 and Mr. D. Henderson and Mr. Hemraj, both of Price Waterhouse Registered Accountants, were appointed liquidators.

Mr. Peter Knight, learned counsel for the appellant has contended that until such time as all creditors have been paid or otherwise adequately compensated, it will not be possible for the appellant company to be dissolved and for the liquidators to transfer any excess assets to shareholders. He therefore submits that the respondents are adequately protected without a special fund being set aside to meet a possible judgment in their favour. He further submits that the liquidators are persons of reputable professional background and their integrity can be relied on.

He did not question the learned judge's jurisdiction to make a 'Mareva' type of injunction order but submits that it was not necessary in the circumstances of this case. With regard to the first ground of appeal he frankly stated that he was not pursuing it with any vigour and indeed went as far as to concede that the real bone of contention was the quantum ordered to be retained.

As there is no dispute about jurisdiction and as we ourselves are satisfied that the circumstances in this case were such that the learned judge was amply justified in granting an injunction we do not find it necessary to discuss the principles on which a 'Mareva' injunction should be made except to say that the jurisdiction of a superior court of record in common law system to grant a 'Mareva' injunction is now well established. (See Jackson v. Sterling Industries) (1987) 162 CLR 612 and Riley McKay Ptd. Ltd. (1982) 1 NSW LR 264.)

Insofar as the making of the order itself is concerned as distinct from the quantum to be retained, we accept the submissions of Mr. Heerey Q.C. learned counsel for the respondents that the order was a discretionary one and that it was made on the correct principle namely to restrain the appellant company from disposing of its assets in a manner that might frustrate a possible judgment by transferring its assets or their proceeds overseas.

We also agree that there was no reason in law or in fact why the order in question should not have been made bearing in mind that the appellant company is in liquidation and that at least 80% of the shares are owned by non-Fiji residents. Consequently we have no hesitation in dismissing the first ground of appeal.

We now turn to the second ground of appeal which contends that the sum of $100,000 ordered to be retained is excessive.

Mr. Knight has argued that the sum ordered to be set aside is not only excessive but grossly so. He bases his arguments on previous awards made by the Fiji Courts in defamation cases. The damages the courts awarded in the cases he cited ranged from $1,500 to $5,000. In fact it is common ground that there is no instance in Fiji of an award exceeding $5,000.00. Two of these cases had reached the Fiji Court of Appeal namely Pacific Daily (Fiji) Limited v. Usher (1971) 17 FLR 122 and Armugam Pandaram & Others v. Pandit Roop Narayan Sharma (1972) 18 FLR 83. In the first case an award of $3,000.00 for libel contained in 6 articles was not disturbed. The second case arose out of the burning of an effigy and a display of defamatory placards the incident being subsequently published in a weekly newspaper with the defendant's permission. Loss of income attributed to the libel was also established by the plaintiff. Although one of the appeal judges considered the libel to be "deliberate and vicious", the Court did not consider $3,000 damages to be inappropriate.

Mr. Knight also referred this Court to the case of Mohammed Hassan v. Fiji Times and Herald Limited S.C.A. 304 of 1983 in which the plaintiff, a Senior Prison Officer, was libelled by the

'Fiji Times' for beating up a prisoner and attempting to bribe 2 persons to keep the incident quiet. Mr. Knight contended that the case was rightly considered to be a very serious instance of defamation and yet $5,000.00 was considered adequate recompense for the plaintiff. Mr. Knight does not argue that the cases cited by him should be looked upon as precedent because each case depends on its own facts as to whether it is serious or not. He however urges us to treat them as providing some guidelines for purposes of consistency. He argues that if there is no modicum of consistency then newspapers will be in the dark as to their financial liability and legal practitioners will find it difficult to advise their clients. He suggested that a provision of $10,000 will be more than adequate.

Mr. Heerey on the other hand has urged us to bear in mind that the order was an interlocutory one and the primary judge had a discretion. In these circumstances an appellate court should only intervene "for grave and powerful reasons" where a clear case has been made out that a primary judge has acted on some wrong principle or made an order which works a substantial injustice to one of the parties.

He also pointed out that the cases cited were decided several years ago and that the provision of $100,000 was in respect of 2 plaintiffs - one a well-known businessman and the other occupying the high post of Cabinet Secretary. He submitted that the alleged libel was a serious one and that there is no reason why a six-figure award cannot be made.

In deciding on the figure of $100,000 the primary judge was not deciding on what the respondents should recover but rather what they might recover, Mr. Heerey contended. Furthermore the question of costs will also have to be kept in mind. If it turns out that there has been over-provision the shareholders of the appellant company will be compensated by interest. An under-provision could mean the respondents "missing out". He submitted that the provision of $100,000 does not occasion any injustice to the appellant company as ample surplus funds were available to comply with the Court order.

Our attention has been drawn to some recent overseas decisions awarding substantial damages against newspaper companies for defamation. However for obvious reasons we are of the view that generally speaking overseas precedents are neither useful nor appropriate. For instance England has a population of about 60 million people for the vast majority of whom English is the mother tongue. Income level of an average individual in England is considerably higher than that of Fiji. Fiji is a small country with a small population of about 750,000 for the vast majority of whom either Fijian or Hindustani is the mother tongue. "The Fiji Sun" being an English language paper therefore necessarily had a limited circulation, notwithstanding the fact that a lot of people in Fiji do speak and read English.

The fact that the sum deposited in the Bank is earning interest does to some extent mitigate any hardship that the Order might have otherwise occasioned but the very nature of the deposit is such that it must of necessity attract only minimal or low interest. A commercial enterprise even though in liquidation should be able to use its surplus funds in a manner that affords the maximum benefit to its shareholders subject of course to priority being given to payment of any debts owing.

We have taken into account all the relevant factors and have come to the conclusion that the sum of $100,000 ordered to be retained does not merely constitute an "over provision" but it is indeed manifestly excessive. We are conscious that the Order in question is only an interlocutory one and that an appellate court should be slow to intervene. However if it is convinced that the primary court's assessment as to the quantum necessary to protect a plaintiff's interest is clearly erroneous i.e. it is so extremely high or is so extremely small, then the appellate court would be justified in intervening even though it is satisfied that the primary court has not acted on wrong any principle in the legal sense. (See observations of Greer L.J. in Flint v. Lovell [1935] 1 K.B. 354 at page 360 as to circumstances which would justify interference with a lower court's estimate.)

In our view a sum not exceeding $50,000 would more than adequately protect the interests of the appellants should they be successful in their claims. This would be so even after allowing for the fall in value of the Fiji dollar in recent years. This is not to pre-judge what damages the appellants should receive if they are successful in their claims. Any assessment of damages in an action for libel is a matter for the trial court as it must be based upon full consideration of the facts including the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and the whole conduct of the defendant. Nevertheless a court cannot act in a vacuum. It has to base its assessment as to the quantum necessary to avoid the possibility of a successful litigation being rendered nugatory on the realities of the situation existing where the litigation takes place. In this respect the quantum of damages awarded in past defamation cases in Fiji must be taken to provide some guidelines in the light of changing circumstances. We however agree with the submission that comparisons with awards made in personal injury litigations are inappropriate for the reasons explained by Lord Hailsham LC in Cassell & Co. Ltd. v. Broome (1972) A.C. 1027, 1070.

This appeal succeeds but only partly. The sum ordered to be retained in the Bank by the appellant's solicitors is reduced from $100,000 to $50,000. In all other respects the primary judge's Order remains intact. There will be no order as to costs.

T. U. Tuivaga

President, Fiji Court of Appeal

Sir Moti Tikaram

Justice of Appeal

K. D. Palmer

Justice of Appeal