1. RATU OVINI BOKINI
2. RATU INOKE KUBUABOLA

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v.

1. ASSOCIATED MEDIA LIMITED
2. YASHWANT GAUNDER
3. RICHARD NAIDU
4. JOE NATA
B **5. PAULA YAVALA**

[HIGH COURT, 1996 (Fatiaki J) 12 January]

Civil Jurisdiction

C *Defamation- libel- principles governing grant of interim injunction to restrain further publication. Banking Act (a/1995) ss 27 & 71; NBF Act (Cap 213) Section 20; Constitution (1990) Section 13.*

The Plaintiffs sought to prevent further publication of confidential information about their indebtedness to the National Bank of Fiji. Dismissing the application the High Court explained the principles which govern the grant or refusal of
D such applications. In particular it emphasised the constitutional right to freedom of expression.

Cases cited:

Bonnard v. Perryman (1891) 2 Ch. D. 269
D.D.S.A. Pharmaceuticals Ltd v. Times Newspaper [1973] 1 Q.B. 21
E *Ferris-Bank (Anguilla) Ltd. v. Lazar* [1991] 2 All E.R. 865
Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892
Frazer v. Evans [1968] 3 W.L.R. 1172
Herbage v. Pressdram Ltd. [1984] 1 W.L.R. 1160
Ratu Sir Kamisese Mara v. Fiji Times Ltd. (1984) 30 F.L.R. 119

F Interlocutory application in the High Court.

A.R. Matebalavu for Plaintiffs
R. Naidu for Defendants

Fatiaki J:

G The plaintiffs are both serving Ministers in the present Government of Fiji. They also apparently maintain accounts with the National Bank of Fiji (N.B.F.). The state of these accounts and many others were recently highlighted in a cover-story published in the November 1995 issue of "*The Review*" magazine under the headline : "Big-name Debtors".

The cover-story clearly discloses some of the contents of a confidential audit

report into the affairs of N.B.F. commissioned by Government and prepared by two chartered accountants and commonly known as the 'Aidney/Dickson report'. The first defendant company is the publisher of The Review magazine and the remaining defendants are officers and employees of the first defendant company.

In separate Writs issued by the plaintiffs on the 17th of November 1995 it is alleged that they were defamed in the cover-story published in The Review and were greatly injured in their credit, reputation and occupation. Both plaintiffs claim compensatory and exemplary damages and an injunction :

> "... to restrain the 1st-named defendant by its servants or agents or otherwise ... from further publishing or causing to be printed or published the matters and words or words to the like effect set out in the (above-mentioned cover-story)."

At the outset I confess that having perused both Statements of Claim and the 14 odd pages of the November 1995 issue of The Review magazine annexed thereto, I entertain serious doubts as to the adequacy of the plaintiffs' pleadings and the breadth of the injunction sought.

In D.D.S.A. Pharmaceuticals Ltd. v. Times Newspaper [1973] 1 Q.B. 21 Lord Denning M.R. in striking out the plaintiffs' Statement of Claim in a libel action based upon "a long (newspaper) article" said, in words that might equally apply to the plaintiffs' pleadings in the present action, at p.26 :

> "... the pleading is defective because it throws - and I use that word deliberately - on to the defendants a long article without picking out the parts said to be defamatory. Some of the article is not defamatory of anyone at all ... Other parts of the article are defamatory of some (other unnamed persons), but not of the plaintiffs at all. Yet other parts may be defamatory of the plaintiffs. To throw an article of that kind at the defendants and indeed at the court, without picking out the particular passages, is highly embarrasing."

I am not unmindful however that this matter arises at an interlocutory stage and there is a pending application by the defendants for further and better particulars of the plaintiffs claim. I have also borne in mind counsel for the plaintiffs' concession that the actual words complained of (which still remains unclear), may not of themselves be defamatory of the plaintiffs but, having regard to the whole context in which they appear including the tenor of the other articles in the cover-story, the words are libellous - a sort of "contextual defamation".

Specifically, counsel for the plaintiffs submits:

"(i) In publishing the plaintiffs' names in the manner that they have ... the defendants have contravened the laws prohibiting publication of confidential information of the nature complained of.

(ii) There is a very real likelihood that the defendants may make further unlawful publication pertaining to the plaintiffs, at some future date..

(iii) The balance of justice requires that the injunction sought should issue."

As to (i) although no relevant cause of action is pleaded in the plaintiffs' Statements of Claim for breach of confidence, counsel nevertheless urges the Court to consider the mischief, sought to be overcome by the various confidentiality and secrecy provisions contained in banking legislation including Sections 27 and 71 of the Banking Act (No.1 of 1995) and Section 20 of the National Bank of Fiji Act (Cap. 213) as indicative of the highly confidential nature of banking business.

I accept at once that confidentiality is a vital component of any banking business and therefore every effort should be made to maintain and reinforce such confidentiality.

But where Parliament has not seen fit to protect absolutely the public disclosure of banking information in its relevant legislation, then I cannot accept that it is the function of the Courts to provide that protection however desirable it may be. Much less ought the Courts to adopt an artificial and strained interpretation of such penal provisions as was advocated by counsel for the plaintiffs in seeking to extend the provisions of Section 20 of the National Bank of Fiji Act to the publishers of The Review.

In this regard suffice it to say that there is not the slightest evidence from which it might be inferred that the defendants or anyone else has or must have breached the above mentioned provisions which specifically refer to persons directly associated with a bank either as officers or employees or to persons to whom any information is disclosed by such officers or employers under various defined circumstances.

I do not doubt that the particular report obtained by The Review contains information of a highly personal, private and confidential nature, but I must resist the temptation of assuming that the acquisition of the report necessarily entailed the commission of criminal offences by the publishers of The Review albeit that the publication of the report may have been financially rewarding to them.

I am also mindful of the observations of Sir John Donaldson M.R. in Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892 when he said at p.898 :

> "The `media' to use a term which comprises not only the newspapers, but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour, and hypocrisy and in campaigning for reform and propagating the views of minorities, they perform a valuable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always."

Alongside that must be placed the observation of Lord Coleridge C.J. in the leading case of Bonnard v. Perryman (1891) 2 Ch. D. 269 when he said with the concurrence of four other Lord Justices at p.284 :

> "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done ; and unless an alleged libel is untrue, there is no wrong committed ; but on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel ... ; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

In my view those observations apply with equal force today and moreso in this country where the Constitution recognises and protects an individuals right to freedom of expression which includes, "freedom to hold opinions and to receive and impart ideas and information without interference."

This is not to say that the law does not also seek to protect the rights of citizens to their good names and reputations as was clearly alluded to in the judgment of the Fiji Court of Appeal in Ratu Sir Kamisese Mara v. Fiji Times Ltd. (1984) 30 F.L.R. 119 at 132 when it held that :

> "Subsection 2 of section 12 (now Section 13 of the Constitution) excludes from the effects of those provisions (relating to freedom of speech) the laws of this country as to defamation."

Clearly then, freedom of expression does not and cannot be read as a charter or licence for the media to publish whatever it wishes however defamatory or destructive of peoples reputations such information might be. Quite plainly it is not, and the Courts, undoubtedly have the necessary power to restrain by injunction and even by interlocutory injunction, the publication or further publication of any libellous matter.

Equally the Courts have the power to restrain by injunction the disclosure of confidential information received in the course of employment by an employee or the publication or use of such information by the media unless there is just cause or excuse in the public interest for breaking confidence.

In this latter regard counsel for the plaintiffs complains with some force that there is a vast difference between matters that may be interesting to the public and what it is in the public interest to make known. To take this case for example, plaintiffs' counsel concedes that the overall state of the business of the government-guaranteed N.B.F. is a matter in the public interest to be made known but the personal details of individual account holders in N.B.F. is not, however much such details may be of interest to the general public.

In opposing the application the second named defendant as managing director of the first defendant company denied that the various defamatory imputations and meanings suggested by the plaintiffs in their claims could be made out but in any event it is deposed : "... that the words are true in substance and in fact". As for the title of the particular article "Big-name Debtors", in which the plaintiffs are actually named, the second defendant raises a defence of fair comment in the public interest without malice.

Plainly the defendants swear that they will be able to justify any libel arising from the cover-story in The Review. In other words they are going to say that the words in the cover-story are true in substance and in fact. I also cannot ignore the fact that the present application has been brought after the cover-story was published and therefore in circumstances which counsel for the defendants quaintly describes as : "(one where) the horse has bolted". In such circumstances what ought the Court to do in exercising its discretion ?

In Frazer v. Evans [1968] 3 W.L.R. 1172 where the author of a confidential report commissioned by a foreign Government unsuccessfully sought to restrain the publication of the contents of the report by a newspaper, Lord Denning M.R. said at p.1178 :

> "In so far as the article will be defamatory of (the plaintiff), it is clear he cannot get an injunction. The Court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since Bonnard v. Perryman. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out."

Further, in rejecting an injunction based upon a claim for breach of confidence (not sought or pleaded in the present action) Lord Denning said :

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> "There are some things which may require to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret."

More recently in Herbage v. Pressdram Ltd. [1984] 1 W.L.R. 1160 where the plaintiff unsuccessfully sought to restrain the disclosure of his spent previous conviction by a newspaper, Griffiths C.J. reaffirmed the principle expressed by Lord Denning when he said at p.1162 : B

> "The principles which ... generally apply to the grant of interim injunctions in defamation actions are ...
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> First, no injunction will be granted if the defendant raises the defence of justification. This is a rule so well established that no elaborate citation of authority is necessary. It can be traced back to the leading case of Bonnard v. Perryman (1891) 2 Ch.D. 290."

Finally, reference may be made to the judgment in Ferris-Bank (Anguilla) Ltd. v. Lazar [1991] 2 All E.R. 865 where Sir Nicholas Browne-Wilkinson V.C. in refusing the injunction sought in that case to restrain the public disclosure of the personal affairs and dealings of the principals and associated companies of the plaintiff bank, said at p.870 : D

> "It is quite clear that, if the case had been brought in defamation, such an injunction could never be granted. There is a well-established and sound rule that in libel cases interim injunctions will not be granted to restrain the further publication of libellous material if the defendant says that he proposes to justify the libel by showing that the facts are true." E

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Then later at p.872 after concluding that there would be unquantifiable loss caused to the plaintiff for which damages would be an inadequate remedy his lordship nevertheless proceeded to identify the elements of public interest involved in the exercise of his discretion in the case as follows :

> "In the exercise of that discretion (to grant or refuse an injunction) the important questions are questions of public interest not of private rights. As I see it, there are two elements of public interest in this case. The first is the public interest in preserving freedom of speech generally : I will call that the wider public interest. The second element is the public interest in permitting allegations to be made and published, alerting investors and others concerned and alerting G

> regulatory authorities to the possibility of misfeasance in the conduct of this financial institution : I will call that the narrower public interest."

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As to the 'wider public interest' his lordship concluded at p.873 :

> "... the fact that the injunction will interfere with freedom of speech is an important factor to be taken into account. I would expect that only in the very clearest case ... would the interference with that public interest be justified by the grant of an injunction."

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As to the 'narrower public interest' he said, again at p.873 :

> "There is a real public interest in not suppressing discussion of matters which are inconvenient to those people who are running financial institutions."

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In the foregoing I have sought to canvass the law relating to the grant of interim injunctions restraining publication of libelous matter and also as it relates to the unauthorised disclosure of confidential information not because it is pleaded as a cause of action (as it should have been), but because it was urged upon me by counsel for the plaintiffs as a relevant factor in the exercise of the Court's discretion.

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I am very conscious that this case raises in an acute manner the need to balance the right of individuals to keep secret confidential information about their private lives and dealings, against the right of the public to be kept informed of matters which are of real public concern and the role and duty of the press in furthering that right.

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Bearing the above in mind I am not persuaded that this is an appropriate case for departing from the general principles applicable to applications of this nature, nor do the evidence and pleadings convince me that the plaintiffs will inevitably succeed in their libel claims or that damages would be an inadequate remedy.

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Furthermore having regard to the nature of the injunction sought viz to restrain further publication and the wider questions of public interest involved in the case, I am firmly of the view that the balance of convenience strongly favours the refusal of injunctive relief.

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Accordingly the application is refused with costs to the defendants to be taxed if not agreed.

(Application dismissed.)