IN THE HIGH COURT OF FIJI

At Suva

Civil Jurisdiction

CIVIL ACTION NO. 0464 OF 2007

Between :

FIJI NATIONAL PROVIDENT FUND BOARD Plaintiff

- and -

FIJI TELEVISION LIMITED Defendant

Counsel : Mr. S. Parshotam for the Plaintiff
Mr. J. Apted and Ms. T. Waqanika for the Defendant

Date of Hearing : 15th October 2007
Date of Ruling : 19th October 2007

RULING UPON APPLICATION TO CONTINUE INTERLOCUTORY INJUNCTION

[1] The plaintiff is the Fiji National Provident Fund Board. That Board is established under section 3 of the Fiji National Provident Fund Act Cap. 219. Section 7 states "there shall be a fund to be called the Fiji National Provident Fund ... into which shall be paid all contributions required to be made under the provisions of this Act and out of which shall be met all payments required to be made by the Fund under the provisions of this

Act". Subsection 2 continues "the Board shall be the trustee of the Fund ...". By Section 3(2) members of the Board are "to be appointed by the Minister who shall appoint one of such persons to be Chairman of the Board".

[2] All employers in Fiji are obliged under the Act to make monthly contributions to the Fund equivalent to 16% of the monthly wages payable to their workers who are members of the Fund. Half of this contribution comes from the individual employees by way of compulsory statutory deductions from their wages. Save for a few limited exemptions, all workers in Fiji are required to be members of the Fund and to have contributions made on their behalf.

[3] The current number of members of the Fund is put at more than 330,000. Contributions are held to each members individual credit. According to the plaintiff "the Board is the largest financial institution in Fiji with a fund base exceeding one billion dollars". The defendant states that the total funds under the control of the Board amount to more than $3.2 billion. Mr. Aisake Taito, the acting General Manager of the Board, is quoted in the Fiji Times of 14th of March 2007 as stating "the Fund is the biggest financial institution in the country, holding 60% of Fiji's gross domestic product ... the FNPF also controls 40% of the country's financial system, which is more than any bank and all the banks combined".

[4] By the Fiji National Provident Fund (Amendment) Act 2005 a significant change was made in the Board's power to invest. Previously it had been limited to "safe" investments whereas now it may invest in diverse adventures subject to a statutory requirement to exercise "due care and diligence" and meet "a prudent person of business" approach. Section 7(4) of the Act reads,

"The Board shall :

(a) exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of others ;

(b) without limiting the matters that the Board may take into account, consider the following factors :

(i) the purposes of the Fund and the needs and circumstances of the members of the Fund ;

(ii)-(xiii) ..."

[5] The new sections 12A and 12B read as follows :

"12A Part III of the Trustee Act (Cap.65) does not apply to investments made under section 7.

Duties to be Exercised by the Board as Trustees

12B(1) The Board must abide by all rules and principles of law which impose any duty on a trustee exercising a power of investment including all rules and principles which impose :

(a) any duty to exercise the powers of a trustee in the best interests of all beneficiaries of the trust ;

(b) any duty to act impartially towards beneficiaries and between classes of beneficiaries ; and

(c) any duty to take advice."

[6] Aisake Taito is the Acting Chief Executive Officer and Acting General Manager of the Board. At paragraph 3, of his first affidavit he states,

> "My role as the Acting Chief Executive Officer and General Manager involves, amongst other things, administering funds paid to FNPF by way of contributions on behalf of employees in Fiji for their providence."

[7] Following the 2005 Act but prior to December 2006 the "old" Board (see below) announced investments in various projects including "the Natadola Project".

[8] On 5th December 2006 the Republic of Fiji Military Forces removed the Executive and Legislative Branches of the Government of Fiji and there has been no Parliamentary sitting since that date. The legality of these events is now the subject matter of a number of cases currently before the High Court. I make it absolutely clear that nothing in this Ruling should be taken in any way as expressing any opinion upon the legality of these events.

[9] In January 2007 the Board's Chief Executive Officer and its Deputy Chief Executive Officer were sent on leave and their appointments were later terminated. Mr. Taito was appointed Chairman of the Fund in January 2007 and became acting Chief Executive Officer and General Manager on 2nd of April 2007. Other changes to the Board and executive management were made.

[10] At paragraph 5 of his first affidavit Mr. Taito states,

> "On or about 20th of March 2007, FNPF engaged Ernst and Young, Chartered Accountants, Sydney, Australia to prepare a report on, inter alia, the internal functioning of FNPF over the years 2002 to

2006 and the processes used by FNPF with respect to decisions employed by management of FNPF in the investment of the Fund".

[11] The Board duly received "the Ernst and Young Final Report" on or about the 16th of July. Eight copies were distributed, one to each of the six Board members, one to the Minister of Finance and one to the Board's secretary. Mr. Taito states that a copy would have been held by Ernst and Young and that to the best of his knowledge and belief there were no other copies.

[12] Mr. Taito then states,

> "7. The report was a confidential report, to be available only to the Board members of FNPF and to myself (as Acting Chief Executive Officer and General Manager) and to any other person as may be authorised by the Board of FNPF.
>
> 8. The report was purely a report on the internal processes used by FNPF and was commissioned with a view to determining how the decision-making processes were applied during the years 2002-2006 and, in the event of any deficiencies or short-comings in the processes, for the authors to make recommendations for the better application of the Fund."

[13] The defendant, Fiji Television Limited,is a company incorporated in Fiji and provides television services through a free to air channel under the name "Fiji One" and through pay channels under the generic name of "Sky". On Wednesday the 19th, Thursday the 20th and Friday the 21st September 2007 news items concerning the Report were aired on "One National News" at 6.00 p.m. and on "Sky Plus Channel" at 7.30 p.m. and on the "Late News" at 10.00 p.m. The main news broadcasts were in

English although brief news items at other times were broadcast in Hindustani and Fijian.

[14] Those reports stated that Fiji TV had a copy of the Report, it was displayed and reference was made to excerpts.

[15] The plaintiff takes objection to Fiji Television having a copy of the Report and broadcasting excerpts from it. Proceedings were filed on 28th of September. The Writ of Summons has an endorsement of claim which reads as follows,

"The plaintiff's claim is for :

A. A declaration that the document being a report titled "Ernst and Young Final Report" dated 15th July 2007, marked "Strictly Confidential" and commissioned by the plaintiff, a copy of which was in the possession of the defendant during 19th September 2007 to 21st September 2007 constituted confidential information the property of the plaintiff.

B. A declaration that the said copy as was in the possession of the defendant on or about 19th September 2007 to 21 September 2007 constituted confidential information the property of the plaintiff.

C. A declaration that the use by the defendant of the said Report in its several news bulletins over the period 19th September 2007 to 22 September 2007 was unauthorised by the plaintiff.

D. (An order for the return of all copies).

E. (An order that the defendants delete all copies)

F. (An order that the defendants provide an undertaking that in future if it receives a copy of the Report then it will make no further copies and return the copy to the plaintiff)

G. An injunction restraining the defendant whether by itself or by its servants or agents or otherwise howsoever from using the Report in anyway whatsoever in the dissemination of any news items on any of its television channels or on its website or howsoever or to report any comments on the said Report or to otherwise use the said Report in any news bulletins aired by the defendants howsoever.

H. Further or other relief.

I. The costs of and incidental to this application."

[16] There was, filed with this Writ of Summons, an ex parte summons requesting a variety of interlocutory injunctions together with the supporting affidavit of Aisake Taito dated the 28th September 2007.

[17] Following upon an ex parte hearing on the 1st October 2007 an interlocutory order was made that,

"1. That the defendant be restrained whether by itself or by its servants or agents or otherwise howsoever from using the Report titled "Ernst & Young Final Report" dated 15th July 2007, ... in any way whatsoever in the dissemination of any news items on any of its television channels or on its website or howsoever to report any comments on the said Report or to otherwise use the said Report in any news bulletins aired by the defendants howsoever together with temporary injunction precluding the disposal or relaying to another of the Report or its contents until further Order of this court.

2. All papers to be served on the defendant (including this Order) by 3.00 p.m. on Tuesday 2nd October 2007.

3. Matter adjourned to Tuesday 9th October 2007 at 10.00 a.m."

[18] On 9th October counsel for the defendant expressed its strong opposition to the continuation of the interim injunction. Issues of freedom of speech, freedom of the press, public interest and several others were raised. By agreement the matter was adjourned to 15th of October for the filing of further affidavits and preparation of arguments.

[19] On 15th October I heard the application for further continuance of the interlocutory injunction. I have before me the affidavits of Aisake Taito filed on 28th September and 15th October for the plaintiff. For the defendant I have the affidavits of Anish Chand, filed on 10th October, Salote Poate, Mesake Nawari and Merana Kitione filed on 12th October. I have received the oral and written submissions of the parties and their supporting authorities.

[20] This case raises a number of issues of great importance to Fiji.

[21] In essence, the plaintiff says that it commissioned a confidential report. The report was directed to the internal workings of the plaintiff and was strictly confidential. It was marked as such. By some means the defendant came into possession of a copy of that Report and started to use the contents thereof in news items. The plaintiff says that the Report "constituted confidential information the property of the plaintiff", the use in news bulletins was unauthorised and that any further use should be stopped and all copies returned to the plaintiff.

[22] The defendant opposes the continuation of the interim injunction. First, the defendant says that the Board is a public statutory body. It handles

massive amounts of money which have come from working members of the public. Second, the way the Board operates and in particular invests that money is of the greatest public interest and to suppress the Report's contents would be to stifle the constitutional right of freedom of expression and run counter to the constitutional principles of and public interest in the accountability of the government and its agents.

[23] The defendant further states that the plaintiff was not as full and frank as it should have been in obtaining an ex parte order in the first place, it has not established an arguable case, it would appear on the face of the plaintiff's affidavits that copyright and any confidentiality right belong to Ernst and Young rather than the plaintiff and that Ernst and Young have not taken any proceedings. There are other objections.

[24] The plaintiff states that I should apply American Cyanamid Principles when deciding this application and that the onus is upon the defendant to show there is a public interest in publication. The defendant responds that the American Cyanamid Principles do not apply once it is shown that the plaintiff is a public body and the information or document in question relates to the workings of that public body. It is for the plaintiff to show the greater public interest lies in the withholding of publication or it is for the court to decide where the balance of the public interest lies.

[25] The defendant does add a further and important consideration. This is not a case where the court can err on the side of caution by continuing the injunction and then, if the plaintiff is unsuccessful, permitting publication. First, the defendant says that there is a positive public interest in publication and secondly that "news is a perishable commodity" and its effect is lost if there is delay, particularly in the absence of any other injunctions restraining other news outlets.

[26] The plaintiff responds that once the information is published the very substance of their action is taken away and is irretrievable.

[27] The starting point is the Constitution. In Chapter 4 - entitled "Bill of Rights" there is a section entitled "Freedom of Expression" which states,

> "30-(1) Every person has the right to freedom of speech and expression, including :
>
> (a) freedom to seek, receive and impart information and ideas ;
>
> (b) freedom of the press and other media.
>
> (2) A law may limit, or may authorise the limitation of, the right to freedom of expression in the interests of :
>
> (a) national security, public safety, public order, public morality, public health or the orderly conduct of national or municipal elections ;
>
> (b) the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons, including :
>
> (i) ...
>
> (ii) the right of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law ;
>
> (c) preventing the disclosure, as appropriate, of information received in confidence ;
>
> (d)-(g) ...
>
> but only to the extent that the limitation is reasonable and justifiable in a free and democratic society."

[28] The interpretation section for Chapter 4 states,

> "43(2) In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter."

[29] Chapter 11 of the Constitution is headed "Accountability". Part 1 is entitled "Code of Conduct" and sets out the principles by which holders of public offices, in the broad sense, including "persons who hold statutory appointments or governing or executive positions in statutory authorities" must conduct themselves. By section 156(3) Parliament "must, as soon as practicable after the commencement of this Constitution, make a law to implement more fully the conduct rules set out in subsection 2, to provide for the monitoring of standards of conduct in relation to the performance of public duties and if the Parliament considers it appropriate to make provision for investigation of breaches of standards and their enforcement".

[30] Part 2 of Chapter 11 establishes the Office of Ombudsman and sets out the functions of the Ombudsman in relation to matters of administration. Part 3 establishes the Office of an Auditor General and Part 4 sets out "general provisions relating to certain constitutional offices".

[31] Part 5 is very short. It is entitled "Freedom of Information" and consists of one section. It states,

> "S.174 As soon as practicable after the commencement of this Constitution, the Parliament should enact a law to give members of

the public rights of access to official documents of the government and its agencies."

[32] It is now nearly ten years since the Constitution came into being. Parliament has not yet enacted a law giving members of the public rights of access to official documents of the government and its agencies. In my judgment, this is a grave shortcoming and should be rectified at the earliest opportunity.

[33] I cannot speculate about precisely what would be in any such law. However, I do consider that I can take into account, when considering the issues in this case, the fact that the Constitution specifically exhorts the Parliament to enact a law giving rights of access to official documents of the government and its agencies.

[34] In this regard and in the general interpretation of the provisions of the Constitution I look to section 3 which is entitled "Interpretation of Constitution" and states,

"3. In the interpretation of a provision of this Constitution :

(a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object ;

(b) regard must be had to the context in which this Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments, especially :

(i) developments in the understanding of the content of particular human rights ; and

(ii) developments in the promotion of particular human rights."

[35] The importance of the right of freedom of expression and public access to official documents of a government and its agencies are set out in constitutions, judgments and learned treatise throughout the world. I cite the European Court of Justice case of Fressoz and Roire v. France [1999] ECHR 1. When considering article 10 of the European Convention on Human Rights, the right to freedom of expression, the court, at paragraph 45, stated,

"The court reiterates the fundamental principle under its case law concerning Article 10.

(i) Freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, (similar provisions to section 30(2) of the Fiji Constitution), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broad mindedness without which there is no "democratic society" ...

(ii) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart - in a manner consistent

with its obligations and responsibilities - information and ideas on all matters of public interest ... . In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation ...

(iii) As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established ...

(iv) ..."

[36] I respectfully adopt these dicta. They have just as much application in Fiji as they do in France and the European Union. Although the Court spent much time considering issues arising from Article 10 which are not present in this case, these broad statements of principle arise from "the right to freedom of expression".

[37] In the Fiji case of Arvin Datt v. Fiji Television Limited [2007] FJHC 20 Mr. Justice Singh stated,

"[19] Section 30 of the Constitution provides that every person has the right to freedom of speech including freedom of the press and other media ...

[20] The Constitution by incorporating freedom of expression in the Bill of Rights Chapter gives it a high priority and therefore any restriction of the right needs to be carefully circumscribed. ...

[21]-[22]

[23] It is critical at this juncture when Parliament is not sitting and that there is no usual Ministerial accountability as such, the freedom of press assumes a greater significance in matters of public interest,.":

[38] There are two important points. First, it must not be overlooked that the freedom set out in section 30(1) of the Fiji Constitution states "every person has the right to freedom of speech and expression, including : ... (b) freedom of the press and other media" (underlining added). It must be remembered that the freedom of expression encompasses not just the right to freedom of speech and expression but also freedom of the press and other media. The freedom of the press and media is not a right which is established for the benefit of the press and media but is for the benefit of the public as a whole.

[39] The second point is this. The current circumstances of Fiji are well known. I respectfully agree with the words of Singh J. when he states that in these circumstances "the freedom of press assumes a greater significance in matters of public interest". In the context of this case the Commander of the Royal Fiji Military Forces, Commodore Josaia Voreqe Bainimarama on the 15th of December 2006, namely ten days after the takeover, made a press statement concerning the FNPF Board in which he said,

> "I have seriously reviewed the status of the Fiji National Provident Fund. This is a major financial institution with billions in assets. Its main beneficiaries are the workers in this country and their families and also serve as a stable fund source. It is therefore highly encumbent upon us to ensure that FNPF always remains in good hands and is operated according to law and due diligence ...

> The Military Council is a strong believer in the efficient, fair, accountable and profitable operation of the Fund. Furthermore, this national treasure, which belongs to the workers of this nation, must be protected and preserved in such a manner that it does not meet the same fate as the collapse and failures of other financial institutions recently recorded in our history. FNPF must be, and remain, completely free of scams, fraud and corruption. ...
>
> "The new Board I am putting together will have its first task to investigate all these (alleged failures and improper use of funds) and put the FNPF and its members funds back to financial sustainability. It is a task which needs to be done straightaway so that the ordinary members and contributors continue to have confidence in this important institution and its investment activities."

[40] I emphasise that on the documents before me it would appear there are no findings of "scams, fraud or corruption" in the Ernst and Young Report. There do appear to be suggestions of failures and shortcomings by the Board as constituted before December 2006.

[41] The defendant says this speech is important in the context of this case on three grounds. First, there was recognition of the importance of accountability in the operation of the Fund. Second, Commander Bainimarama looked to a new Board to "investigate all these", referring to failures or improper use of funds. Third, the issues concerning the past performance of the Board were placed clearly in the public domain. A degree of care must be taken when approaching statements from the interim government in relation to these issues as they might contain self serving or self justifying elements.

[42] I reiterate that nothing in this judgment must be taken as indicating any view as to the legality of the events on 5th December 2006 and

subsequently. The defendant relies on this speech to show that, irrespective of freedom of expression and public interest considerations themselves, the conduct of the Board prior to December 2006 had already been made a matter of public interest. It was against this background that appointments including that of Aisake Taito were made and the Ernst and Young report commissioned.

[43] It is pertinent to note that following upon the amendment Act of 2005 granting the Board much greater scope to invest but before December 2006, the Board, as then constituted, made various public statements concerning their new investment powers, in particular in relation to two hotels and the Natadola Project. These pronouncements were carried in various news media outlets.

[44] On the 14th of March 2007 The Fiji Times newspaper carried a report concerning the Board's appointment of Ernst and Young to carry out an audit of the Fund. Mr. Taito is quoted as saying "the decision (to send the previous Chief Executive Officer and Deputy on leave) is necessary to facilitate the implementation of a thorough and clinical inquiry into areas of the FNPF". It was at that juncture that apparently Mr. Taito became Acting Chief Executive Officer and General Manager of the Fund and Peceli Vocea became Chairman.

[45] On the 28th of April Mr. Vocea gave a media release concerning the Board and the Natadola Project. This was reported in the print media. Over the next weeks there were then further stories touching upon this and related subjects.

[46] The Board received the Report on or about 16 July. On 30th of August Mr. Vocea provided a media release which referred specifically to the Report which was stated to have "identified a number of governance, control and structural weaknesses that potentially exposed FNPF to

unnecessary risks". There were also references in the media release to the commencement of legal recovery actions in relation to two former executives, and the finding of actions that the Board considered were not lawful.

[47] In the chronology of events Fiji Television Limited's news broadcasts then took place on 19th, 20th and 21st September.

[48] These proceedings were commenced on the 28th of September. On the 2nd of October 2007 Mr. Vocea was reported in Fiji Times of 3rd of October as saying,

> "... the Fiji National Provident Fund would be releasing the Ernst and Young Report gradually for public consumption.
> He said it was comprehensive and too big to release at once.
> "We want to ensure the public read it and we can debate on the issues and how we can deal with the recommendations of the report," Mr. Vocea said.
> He said teams will be working on releasing the Report slowly to make public consumption easier.
> The Natadola Bay Resorts Limited (NBRL) said the decision to invest in the Natadola Hotel Project was made by the fund without carrying our proper independent due diligence.
> Chairman of NBRL Felix Anthony said the company was a subsidiary of the Fiji National Provident Fund Limited and was established to invest in the Natadola Project."

[49] Mr. Felix Anthony, the Chairman of Natadola Bay Resorts Limited, "a subsidiary of FNPF Investment" released a press statement on 5th of October specifically disclosing what he stated were parts of the Report concerning the Natadola Bay Resort Project and saying that further releases would be made.

[50] Counsel for the defendant therefore says that their argument is not just based upon freedom of expression, freedom of the media, freedom of access to government information, and accountability of government and its agencies but the actions of the plaintiff have placed the whole issue in the public domain.

[51] The plaintiff avers that to establish a claim for breach of confidence, the claimant must show that the information is capable of being protected, the defendant owes the claimant an obligation to keep the information confidential and the defendant used the information in a way that breached that duty. Once these three factors have been shown the defendant may raise its defences, the most significant being that the disclosure was justified in the public interest.

[52] Plaintiff's counsel continued that an indirect recipient of the information who is aware of its confidential status will normally be bound by a duty of confidence. In Attorney General v. Guardian Newspapers [1990] A.C.109 ("The Spy Catcher Case"), Lord Keith said,

> "It is a general rule of law that a third party that comes into possession of confidential information which he knows to be such, may come under a duty not to pass it on to anyone else."

[53] If a person receives information innocently, but subsequently discovers that the information is confidential, they will be bound by a duty of confidence.

[54] Counsel for the plaintiff continued the nature of the information is a most important factor. If a disclosure related to a misdeed of a serious nature and importance to the country, then it is likely to be justified as being in 'the public interest'. However, the unauthorised disclosure of information that is merely 'interesting to the public' is not permitted, (Lion Laboratories v. Evans [1985] QB 526 at page 537).

[55] In the case of European Pacific Banking Corporation v. Fourth Estate Publications Limited [1993] 1 NZLR 559 (The Winebox No.1 Case) Mr. Justice Henry granted the plaintiffs interim relief restraining the National Business Review and the Independent newspaper from making use of documents that had been obtained in breach of confidence. The newspapers had sought to resist the injunction saying they would raise a public interest defence of disclosing iniquity. Mr. Justice Henry concluded that a defence based on iniquity was not amenable to assessment at the interlocutory stage and said,

> "Where the information is confidential there is prima facie an entitlement to protection, the public interest or "iniquity rule" being a defence to the claim for protection. Accordingly it is in my view incumbent on a party resisting protection to identify and establish the public interest if that is to be relied upon."

[56] He continued that whether, and if so to what extent, publication of confidential information should be allowed could not satisfactorily be determined at an interlocutory state of the proceeding. He stated,

> "Two principal factors weigh with me in reaching that conclusion. First, the unrestricted ability to publish would effectively and permanently deprive the plaintiffs of what he sought as their primary form of relief ; the protection will be lost for all time. Second, I can discern no real need for present disclosure, even assuming public interest should be seen as requiring disclosure."

[57] Henry J. then applied the American Cyanamid test.

[58] In European Pacific Banking Corporation v. Television New Zealand High Court of New Zealand, 3rd of February 1994, (the Wine Box No. 2 case) Mr. Justice Robertson stated,

"The core issue before the Court is, are the defendants using confidential material which has been unlawfully obtained ? If they are or have, then does what is described in shorthand as the "in iniquity concept" overcome the right to confidentiality which would otherwise exist.

"I have no difficulty on the evidential material available in concluding that the plaintiffs have established that the defendants have material which is confidential, which it is prima facie entitled to have treated in confidence and which was unlawfully obtained."

[59] On how an application for an injunction is to be treated, Robertson J. stated,

"I am hearing an application for an interim injunction. The base tests are well known ; Klissers Farmhouse Bakeries Limited v. Harvest Bakeries [1985] 2 NZLR 129. The purpose of the proceeding is to seek the balance (many cases speak of balance of convenience but I prefer the approach of Donaldson MR in Francome v. Mirror Group Newspapers Limited [1984] 1 WLR 892 who speaks of the balance of justice) pending the final determination of matters. What I am required to do is weigh the competing interests and the matters which have been advanced to determine what is to occur pending the resolution of the substantive matter."

[60] Counsel for the plaintiff added that in the case of Ashton v. Telegraph Group Limited [2001] 4 All ER 666, the English Court of Appeal recognised that, except in rare cases, copyright protection will prevail over freedom of expression.

[61] Counsel continued that in an action for breach of confidence in New Zealand, the defendant carries the onus of proving that disclosure is in the public interest. This is the case, whether the information concerned is about government, commercial or private matters. He accepted that the English and Australian approaches are different (see Attorney General v. Guardian Newspapers (No.2) [1988] 3 ALL ER 545, 640 to 642 and Commonwealth of Australia v. John Fairfax and Sons Limited [1980] 32 ALR 485, 492-493 respectively) where the courts have accepted that government information should be disclosed unless those opposing disclosure can prove that the public interest requires non-disclosure.

[62] In the "New Zealand Spycatcher case" (Attorney General of United Kingdom v. Wellington Newspapers Limited [1988] 1 NZLR 129), Cooke P. applied the standard test for breach of confidence. The plaintiff only had to show that the information was prima facie confidential then "the claim may then be rebutted by a public interest defence". Having rejected the English and Australian approach on the onus of proof, he recognised that determining the public interest "will or may require a balancing exercise of the kind undertaken ... in the cases last cited".

[63] Counsel continued that in his submission the test is on the balance of probabilities rather than the establishment of a prima facie case, even at this stage.

[64] Counsel for the defendant accepts the general test for the consideration of an interlocutory injunction is to be derived from the House of Lord's decision in American Cyanamid Co. v. Ethicon Limited [1975] AC 396. Three principal factors are considered,

(a) Whether a serious issue has been raised (on the pleadings) ;

(b) Whether or not damages would be an adequate remedy; and

(c) Where the balance of convenience or justice lies.

[65] Counsel avers that this is a general rule but different legal principles apply in various circumstances depending on the cause of action and other circumstances, including the identity of the parties. He continues that in this particular case there is no allegation of a contractual breach of confidence. The traditional elements for a cause of action for breach of confidence in a non-contractual case are set out in the judgment of Megarry J. (as he then was) in Coco v. A.N. Clarke (Engineers) Limited [1969] RPC 41 at page 47 where he stated,

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the Saltman case page 215 must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

[66] In Attorney General v. Guardian Newspapers Limited (No.2) [1990] and [1988] 3 All ER 545, Lord Goff of Chievely said that the broad principle is subject to three limitations,

(i) 'The principle of confidentiality only applies to information to the extent that it is confidential' ;

(ii) it applies neither to useless information nor to trivia ;

(iii) the public interest protecting confidence may be outweighed by some counterveiling public interest which favours disclosure'.

[67] In Lion Laboraries Limited v. Evans and Others [1985] 1QB 526 the English Court of Appeal held that a broad public interest defence applied to breach of confidence and copyright claims and that at the interlocutory injunction stage, the defendants had only to show an arguable case that they might establish at the substantive hearing to defeat an application for an injunction.

[68] These matters have been considered in two cases previously in Fiji. First, Bokini v. The Associated Media Limited [1996] FJHC 88 when Fatiaki J. (as he then was) relied on the dictum of Lord Denning in Fraser v. Evans [1968] 3 WLR 1172 where he stated,

> "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."

[69] He also applied the judgment of Sir Nicholas Browne Wilkinson VC in Femis-Bank (Anguilla) Limited and Others v. Lazar and Another [1991] 2 ALL ER 865 where at page 873 he stated,

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

[70] In the second case, Fiji Public Service Credit Union v. Fiji Times and Others (Civil Action HBC0210 of 1996) Pain J. granted an interlocutory injunction prohibiting the Fiji Times from continuing to run stories on the shareholdings and loans taken by officials of the Credit Union that were set out in a computer print out, which the Credit Union claimed was confidential information that had been disclosed by an employee in breach of confidence. Pain J. applied Lion Laboratories but granted the injunction because of the strong public interest in maintaining confidentiality of personal financial records and also the tenuousness of the claims. He found the defendants had not raised an arguable case that the public interest involved merited the breaching of the confidence.

[71] In both those cases the rights of private individuals to confidentiality were in issue. In the case before me the plaintiff is a statutory body. Counsel for the defendant points out that there is a further, well established, special rule which applies to information claimed by the government to be confidential.

[72] In Attorney General v. Jonathan Cape Limited [1976] QB 752 when considering circumstances similar to those in this case Lord Widgery CJ stated at pages 770-771,

> "The Attorney General must show (a) that such publication would be in breach of confidence ; (b) that the public interest requires that the publication be restrained, (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon. However, the Court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need."

It must be borne in mind in considering the English cases that decisions were made against the background of no written constitution setting out a Bill of Rights, and later the Human Rights Act.

[73] The defendant further relies on the High Court of Australia case of Commonwealth of Australia v. John Fairfax and Sons Limited [1980] 147 CLR 39 where Mason J. (as he then was) considered an application by the State for an interlocutory injunction to restrain publication of a book containing text from sensitive foreign relations documents that appeared to have been leaked by a public servant. At pages 51 to 52 he stated,

> "However, the plaintiff must show, not only that the information is confidential in quality and that it was imparted so as to import an obligation of confidence, but also that there will be 'an unauthorised use of that information to the detriment of the party communicating it' ... The question then, when the Executive Government seeks the protection given by equity, is : What detriment does it need to show ?
>
> The equitable principle has been fashioned to protect the personal, private and proprietory interests of the citizen, not to protect the very different interests of the Executive Government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the Government, but it is to say that when equity protects Government information it will look at the matter through different spectacles.
>
> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its

actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to Government when the only vice of that information is that it enables the public to discuss, review and criticise Government action.

Accordingly, the Court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

The Court will not prevent the publication of information which merely throws light on the past workings of Government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of Government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public interest in knowing and in expressing its opinion, outweigh the need to protect confidentiality."

[74] Both these cases were cited and applied by the House of Lords in Attorney General v. Guardian Newspapers (No.2) [1990] 1 AC 109 where at page 270 Lord Griffiths of Kinkel stated,

"But whatever may be the position between the private litigants, we have in this litigation to consider the position when it is the Government that seeks the remedy. In my view, for reasons so cogently stated by Mason J. in Commonwealth of Australia v. John

Fairfax and Sons Limited (supra) ... a Government that wishes to enforce silence through an action for breach of confidence must establish that it is in the public interest to do so. This is but another way of saying that the Government must establish, as an essential element of the right to the remedy, that the public interest will suffer detriment if an injunction is not granted."

[75] In the more recent case of Steen v. The Attorney General [2001] 403 EWCA, Silber J. stated at page 12 paragraph [46],

"The position can be summarised as follows. The Crown has no right to restrain a newspaper from publishing information about Government unless (i) disclosure of the information will be contrary to the public interest and (ii) the information has not already been disclosed."

[76] In Attorney General v. Punch Limited [2003] 1 ALL ER 289 the House of Lords had to balance the competing considerations of national security and freedom of speech. At pages 296-297 Lord Nichols stated,

"This appeal concerns a restraint on the freedom of expression. Freedom of expression includes, importantly, the right to impart information without interference by public authority, to use the language of Article 10(1) of the European Convention on Human Rights. Restraints on the freedom of expression are acceptable only to the extent they are necessary and justified by compelling reasons. The need for the restraint must be convincingly established. Restraints on the freedom of the press call for particularly rigorous scrutiny."

[77] What then is the position in Fiji ? In my judgment, the Constitution of Fiji contains strong assertions of the right to freedom of speech and

expression, including freedom of the press and other media. There is provision for that right to be limited by law, but only in set defined circumstances and only to the extent that the limitation is reasonable and justifiable in a free and democratic society. This is supplemented by an entire chapter in the Constitution entitled "Accountability" and in particular Part 5-"Freedom of Information" where section 174 enjoins the Parliament to enact a law to give members of the public rights of access to official documents of the Government and its agencies.

[78] The right to freedom of speech and expression is supplemented by the breadth of the interpretation provision at section 43 and in particular subsection 2 which enjoins the Court to "promote the values that underlie democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter". Both considerations are further supplemented by section 3 which is headed "Interpretation of Constitution" and requires a construction that would promote the purpose or object underlying a provision, taking into account the spirit of the Constitution as a whole and paying regard to the context in which the Constitution was drafted and the intention that Constitutional interpretation take into account social and cultural developments, especially developments in the promotion of particular human rights.

[79] Limitations on the right to freedom of expression are acceptable only to the extent set out in subsection 2 of section 30. The limitations must be necessary and justified by compelling reasons. The need for the limitation must be convincingly established. Limitations on the freedom of the press call for particularly rigorous scrutiny. Any limitation can only be to the extent that it is reasonable and justifiable in a free and democratic society.

[80] I have referred to the events of December 2006 and in particular to the statements of the military commander and the replacement of key officials of the Board.

[81] I reiterate that in the current circumstances of Fiji the freedom of the press assumes an even greater significance in matters of public interest.

[82] I respectfully adopt the words Mason J. in the Fairfax Case when he stated,

> "It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to Government when the only vice of that information is that it enables the public to discuss, review and criticise Government action.
>
> Accordingly the Court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected."

These words apply with equal force to the current circumstances of Fiji, even though the "interim government" was not democratically elected.

[83] It accordingly follows therefore that I reject the use of the American Cyanamid principles when confidentiality of information is claimed by Government to stop its publication. In seeking an interlocutory injunction to restrain the publication of Government information, the Attorney General, or Government agency must show :

1. That such publication would be in breach of confidence.

2. That the public interest requires the publication be restrained in accordance with one of the heads set out in section 30(2)(a)-(g) of the Constitution, and

3. If any restraint upon publication is to be made then the Court must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement that the limitation is reasonable and justifiable in a free and democratic society.

A necessary and important part of consideration 2 is whether the information is already in the public domain.

[84] I now look at the particular facts of this case as they appear to me upon the face of the affidavits. I do find that the above principles apply to this application by the FNPF Board for an interlocutory injunction. It is a statutory body and an agency of Government. Its Board is appointed by the Government Minister. It was not argued by the plaintiff that any "right to personal privacy" (section 37 of the Constitution) was engaged or could apply for the benefit of the plaintiff in this case.

[85] Although in his written submissions counsel for the plaintiff suggested some four potential grounds of claim there is only one set out in the endorsement of claim on the Writ, namely that the Ernst and Young Final Report "constituted confidential information the property of the plaintiff". I therefore must disregard the other three heads of claim set out in the written submissions.

[86] There is a fundamental difference between the first and second affidavit of Mr. Taito. In the first affidavit at paragraphs 23-27 he sets out what he describes as the plaintiff's "proprietary interest". He states the Report is the property of FNPF, it was commissioned and paid for by FNPF and

any copies belong to the FNPF. In his second affidavit Mr. Taito at paragraph 5 quotes the terms of engagement of Ernst and Young. Paragraph 8 of the terms which is entitled "Intellectual Property Rights" states that, subject to Clause 7 (Tax advice - Confidentiality) Ernst and Young retains all copyright and other intellectual property rights in all reports, written advice or other deliverables provided, including systems, methodologies, software and know how.

[87] It therefore follows that FNPF must confine itself to some form of breach of confidence. This would appear to be consistent with the wording of the endorsement of claim.

[88] According to the face of Mr. Taito's first affidavit none of their copies of the report are missing and there is not even a reasonable suggestion as to how a copy might have been made by someone and reached Fiji TV. Further, Mr. Taito accepts that Ernst and Young must have retained in their possession at least one copy of the report. No copy of the report was annexed to the affidavit or presented as available, and only at the hearing were transcripts of the broadcasts placed before the Court. And that was done by the defendant.

[89] The evidence from Fiji TV Limited is that the copy report they received was delivered by an unknown male Fijian who simply left it at the reception desk for the news service. Nothing further is known of that person nor where the copy came from. It cannot be said with any certainty how the unauthorised copy came to be made or who it came from. The fact the Report is marked "Strictly Confidential" does not in itself mean there is any enforceable right to prevent its publication.

[90] The matter does not rest there. Ernst and Young have not sought in any way either to be joined in this action or commence proceedings of their own. Ernst and Young must be aware of the reporting in the media of

their Report and in any event the plaintiff could have alerted them thereto. Ernst and Young have not come to Court alleging breach of copyright or breach of confidence.

[91] It appears there was a period of seven days between the first broadcast and the filing of these proceedings, (excluding the date of the broadcast and the date of the filing themselves). I do find that given the level of sensitivity which the plaintiff claims attaches to this Report seven days does amount to an unreasonable delay in seeking the relief of the court to prevent any further disclosure. Whilst this in itself is not fatal to an application for an interim injunction it militates against the issue of one and allowed the further placing in the public domain of the information it seeks to injunct.

[92] According to the Fiji Times of 3rd October Peceli Vocea said the Report would be gradually released for public consumption. This appears to be completely at odds with the raison d' etre of this action and the affidavits of Mr. Taito. What must necessarily cause further surprise is that an interim injunction having been granted to the plaintiff ex parte on 1st October, on 5th October, the Chairman of Natadola Bay Resort Limited "a subsidiary of FNPF Investment" released a press statement disclosing important parts of the Report and promising more. The release was taken up in the Fiji Sun of 8th October. I do endorse defence counsel's comment when he describes the remark that the Report was "comprehensive and too big to release all at once" as patronising. These and other factors leave wide open the question as to whether all relevant matters were placed before the Court in the original affidavit supporting the ex parte application for interim injunction and in Mr. Taito's affidavit of 15th October. When ex parte applications for interim injunctions are made the applicant must place all relevant matters before the Court, including those the defendant could be expected to raise.

[93] All this must be placed along side the evidence that before December 2006 the then Board put these matters in the public domain, and after December 2006 they were kept firmly in the public domain.

[94] At the heart of this matter is the fact that the Fiji National Provident Fund Board is responsible for millions upon millions of dollars belonging to ordinary people. It is their money. It is being collected, invested and later paid out for their benefit. The entire operation of the Fund and the Board is directed to these ends. The Board cannot seek to prevent the public from knowing the contents of a Report concerning the conduct of its affairs involving the investment of millions of dollars of their money over a period of years.

[95] In reaching this conclusion I have taken into account section 3(4) of the Fiji National Provident Fund Act which states "A member of the Board shall not reveal or communicate to any person any matter which shall be brought under his consideration or shall become known to him as a member of the Board, except as may be required for the due discharge of his duties". This does not, in itself, under cut the right to freedom of expression, nor does the right absolve Board members from this obligation.

[96] Accordingly I find the following :

1. To found the application for an interim restraining order the Fiji National Provident Fund Board has to show that publication would be in breach of confidence. Fiji National Provident Fund Board, on the affidavits before me, has not shown that vis-à-vis the Board there has been any breach of confidence in respect of the Ernst and Young Report.

2. The Board has to show that the public interest requires that the publication be restrained in accordance with section 30(2) of the Constitution. On the evidence before me they have failed to do that. Indeed, this is so given the fact that the Board is an agency of government and that it was the Board that both before and after December 2006 placed these matters in the public domain. Even after the granting of the ex parte restraining order the chairman of a subsidiary or related company of the Board specifically placed important points from the Report in the public domain and promised that the remainder would follow.

3. Since I do not impose a restraint upon publication in these proceedings I need not consider the third limb of the test.

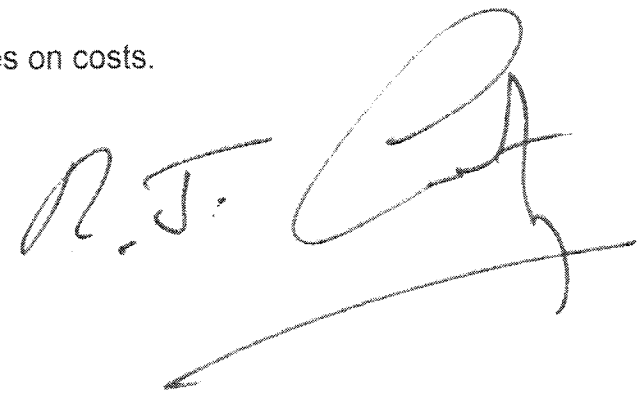
[97] Any publication must, of course, be in accordance with any other lawful limitation, for example if a particular matter is 'sub judice'. Further, this judgment must not be taken as absolving employees of the Board from any contractual duties of confidence which they might have.

[98] I would add that in the light of Part 5 of Chapter 11 of the Constitution "Freedom of Information" it is essential for the honest and diligent discharge of the business of Government and its agencies that a Freedom of Information Act be passed at the first opportunity.

[99] It is essential for the well-being of Fiji that all "Accountability" sections of the Constitution are actively and vigorously pursued.

[100] Therefore, I discharge the ex parte interim order of 1st October 2007.

[101] I will hear the parties on costs.



(R.J. Coventry)

JUDGE