

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 103 of 2013

BETWEEN : **HAFIZUD DEAN KHAN** and **MOHAMMED TAABISH AKBAR** and
NISAR AHMED ALI as Trustees of the **FIJI MUSLIM LEAGUE** a body
duly registered under the Registration of Religious Bodies Act.

PLAINTIFFS

AND : **FEROZ GULAM MOHAMMED** of Nakasi, Nausori, Businessman.

FIRST DEFENDANT

AND : **SUN (FIJI) NEWS LIMITED** trading as **FIJI SUN**

SECOND DEFENDANT

BEFORE : **Justice G. Deepthi Amaratunga**

COUNSEL : **Mr. Parshotam S and Mr Singh S** for the Plaintiff
Mr. O'Driscoll G for the 1st Defendant

Date of Hearing : **2nd July 2013 and 8th October 2013**

Date of Judgment: **17th October 2013**

Judgment

A. INTRODUCTION

1. The Plaintiff is seeking injunctive relief against the 1st Defendant on the basis that statements contained in the web site 'maintained' by the 1st Defendant, are defamatory to the Plaintiff as well as to the judiciary. The 1st Defendant states that the Plaintiff has failed to prove the ownership of the web site or that the said website is maintained by

the 1st Defendant and pleads justification of the allegations against the Plaintiffs. The 1st Defendant is not seeking justification, regarding the anonymous statements contained in the website, including allegations regarding judiciary. The statements regarding judiciary are mainly the comments and or criticisms on a judgment delivered in 2007 where certain interim orders were made against 1st Defendant and another person in an action by Fiji Muslim League (FML). The Plaintiff is seeking a direction from court to charge the Defendant for contempt by the Hon Attorney General for the statements regarding the judgment delivered by the court in 2007. The Plaintiff is seeking orders from the court, compelling the 1st Defendant to remove any matter concerning the Plaintiffs as the trustee of the Fiji Muslim League (FML), the FML and Judiciary of Fiji from the said website and also a restraining order from placing any further material on any website or maintaining any website having derogatory material published against the same parties. The Plaintiff also seeks a restraining order against publishing any defamatory or false material likely to cause pecuniary damages to the Plaintiffs as the final interim relief.

B. ANALYSIS

2. The Plaintiffs are the trustees of FML a body duly registered under Registration of Religious Bodies Act, and has its branches in various districts in Fiji. There are 23 branches and 3 subsidiary organizations and 17 international affiliations, to FML according to the affidavit in support of this application. The registered membership of the FML is believed to be over 4000 and it maintains 17 schools and 5 colleges. From the above facts FML is a large religious organization involved in various fields of activities in Fiji having even international affiliations. It need not be emphasized that such organization should be transparent in its affairs in the interest of all its stake holders and Lord Denning MR, gave a wide interpretation to ‘public interest’ in *London Artists Ltd v Little; [And Associated Actions]* [1969] 2 All ER 193 at 198 held,

‘Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.’

3. The Defendant was a member of the FML, and a former branch official, whose membership was purportedly suspended in 2007, and the membership was allegedly terminated on 31st March, 2013. The Defendant does not admit that he was expelled from the membership of FML, but the affidavit in support had annexed the purported letter of termination of the membership of the Defendant as 'B' to the affidavit in support. The said letter dated 2nd April, 2013 stated that the council of FML at a meeting held on 31st March, 2013 had unanimously resolved to expel the Defendant from the membership of FML. According to the affidavit in reply, the 1st Defendant had not taken any legal action regarding the said expulsion. Whether this expulsion was under the constitution of the FML or not cannot be decided as both parties had avoided those facts in these proceedings, and I will not make any comment on that at this juncture as it is irrelevant to the application before me as held in *London Artists Ltd v Littler; [And Associated Actions]*(supra) as the affairs of large religious entity like the FML, can be subject to fair comment even by a non-member of FML.
4. The reasons for the purported expulsion were given in the said letter dated 2nd April, 2013, *inter alia* one of the reasons are allegedly 'spreading malicious, defamatory and false statements through emails and through your website.' The issues in this application are mainly concerned with the contents of the said website and a paper advertisement published on 28th March, 2013.
5. The Defendant in the affidavit in opposition state that AGM of the FML was due on 31st March, 2013 and he was barred from entering the said AGM by personnel from private security company. Three days before the said AGM, on 28th March, 2013 the 1st Defendant had caused an advertisement in 2nd Defendant's news paper and it was annexed to the affidavit in support as 'D'. The Plaintiff claims that the said new paper advertisement as well as the contents of the website are defamatory and seeks injunctive orders preventing the publication of alleged defamatory material and removal of all materials referring to FML and or its trustees from the said website. The 1st Defendant denies that he 'maintains' the website but admits that he had contributed to the website and had also disclosed his name as the author of the statements he had made in the said website. The Defendant states that he can justify the statements he had made on the website, where his name is disclosed as the source of information as well as in the news

paper advertisement. Out of the two mediums of publication, the 1st Defendant admits the causing of publication in the news paper advertisement, but reject involvement in anonymous statements in the website and also to maintenance of website.

The News Paper Advertisement (published on 28th March, 2013 in Fiji Sun).

6. The 1st Defendant admits that he caused the publication of the content of the said news paper advertisement. The said advertisement titled ‘Members of Fiji Muslim League’ and was addressed to the Secretary, President and Trustees of FML. The said advertisement gave notice to the said officials that ‘members’ would move their grievances detailed in the said advertisement, at the AGM and after listing 9 specific grievances , stated as follows

‘All Brothers & Sisters are advised to attend this important AGM of Fiji Muslim League (even though you are not a member of FML) on Sunday 31/03/2013 at 9am at Nadi Muslim College. See our website... (URL of website deleted)’

7. The name of the 1st Defendant and his phone number and an email was also included in the said advertisement, presumably in order to get in contact with the persons who support the allegations contained in the said paper advertisement. The 1st Defendant categorically states in his affidavit in opposition at paragraph 24, that he can substantiate the contents in the said paper advertisement. So, the 1st Defendant is not only admitting the publication of the said paper advertisement , but also justifies the contents .In the said advertisement the website is referred to as ‘our website’ but had disclosed his name and phone number with an email address.
8. So, as to the contents in the said news paper advertisement, the 1st Defendant unreservedly admits the causing of the publication and as a defence claims the truth of the statements contained in it. It seems that the 1st Defendant had specifically made certain allegations as to the financial as well as other affairs of the FML and had given prior notice of the issues, that he and a section of members of FML would raise during the AGM of FML. The Defendant and presumably the persons who were supporting him were prevented from raising the issues that were made public by the paper advertisement prior to the AGM. When a defendant in a defamation action claims truth of the statement

contained in the allegations that he had made, it is a matter for the trial to decide the correctness of the allegations and injunction are not generally issued against such publication. This is a trite law in obtaining injunction against an allegation of defamatory statements. The rationale behind that was laid down in the decision of **Bonnard v Perryman** [1891]2 Ch269 in the judgment of Lord Coleridge,C.J (where Lord Esher MR and Lindly, Bowen and Lopes, L.JJ concurring). In the said judgment at p 284 it was held,

*‘.....But it is obvious that the subject matter of an action for defamation is so special as to require exceptional causation in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. 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, it is not clear that any right at all has been infringed; 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. We entirely approve of, and desire to adopt a our own, the language of Lord Esher, MR., in **Coulson v. Coulson** (3 Times L.R. 846)“ to justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libelous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable.” In the particular case before us, indeed, the libelous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is ne which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damage recoverable. Moreover, the decision at the hearing may turn upon the question of the general character of the Plaintiffs; and this is a point which can rarely be investigated satisfactorily upon affidavit before the trial, on which further it is not desirable that the Court should express an opinion before the trial.’ (reference added)*

9. The majority decision in **Bonnard v Perryman** (supra) is concurred by no less than four Lord Justices and even after 100 years this decision is applied in UK in regard to applications for injunctions relating to claims on defamation. The century old rationale is based on the right to free speech in the sphere of public interest. The only dissenting decision contained in the said **Bonnard v Perryman** (supra) was delivered by Kay L.J and the plaintiff’s counsel relied on the said dissenting decision where it was held that affidavit materials relating to the justification were necessary to determine the grant or

the refusals of injunction. I have not been referred to any case law that applied the only dissenting opinion of Kay L.J in **Bonnard v Perryman** (supra) in UK or in Fiji. The majority judgment had withered the test of time for over a century, and is still applied in UK as well as in Fiji, and I could not find a judgment referring to dissenting opinion, as contended by the Plaintiff's counsel who argued on the line of said dissenting decision. In such circumstances I would be reluctant to apply the dissenting opinion of Kay L.J and to proceed to curtail the freedom of speech universally recognized, by requesting affidavit materials as to justification of allegations complained of in this case at the interlocutory hearing. It should also be noted that the Defendant had tried to raise the same allegations in the AGM and was prevented from doing so and his request for internal dispute resolution mechanism to investigate the allegation has so far not seen the light of the day.

10. In **Bonnard v Perryman** (supra) emphasis was made to the fact that defamation trials in U.K were conducted with the assistance of jury, unlike in Fiji. But this overemphasis on the jury in the said judgment was seen as unwarranted, by Lord Denning M.R in **Frazer v Evans**[1968]3 W.L.R 1172 and referring to **Bonnard v Perryman** (supra) stated as follows

'.... The reason sometimes given is that the defence 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'

11. So, the rationale contained in **Bonnard v Perryman** (supra) is now based on the public interest that truth should be out and this decision as well as the said rationale was applied in Fiji High Court in **Ratu Ovini Bokini & ANR v Associated Media Ltd & ORS** 42 FLR 1(1996) by Justice Fatiaki (as he then was). The Plaintiff quoted a paragraph (G) in page 4 of the said judgment, but again this statement was an *obiter* statement where after carefully analyzing the existing law in Fiji and UK Justice Fatiaki refused to grant injunction. In that case Plaintiffs sought to injunct the publication of certain personal financial details, contained in a commission report regarding a defunct bank in Fiji. In that case, an article in a monthly magazine made revelations as to the names of the defaulters who defaulted large amounts of money to the defunct bank. Though the banking secrecy laws were in favour of the applicants in that case the High

Court refused to grant injunction considering the overriding public interest. The quotation that the Plaintiff relied is obiter and not the ratio of the said case and it cannot be taken out of the context in support of the present application before me to curtail the 1st Defendant's right to free speech.

12. In ***Herbage v Pressdram Ltd and others*** [1984] 2 All ER 769 Griffiths L.J succinctly laid down the principles relating to injunctions in defamation cases as follows([1984] 2 All ER 769 at 771

*'The principles which it is conceded generally apply to the grant of interim injunctions in defamation actions are help-fully summarised in counsel for the plaintiff's skeleton argument: 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 269, [1891-4] All ER Rep 965. Secondly, no injunction will be granted if the defence raises privilege, unless the evidence of malice is so overwhelming that the judge is driven to the conclusion that no reasonable jury could find otherwise that is, that it would be perverse to acquit the defendant of malice. Thirdly, that in the face of this long-established practice in defamation actions, the principles enunciated by the House of Lords in **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504, [1975] AC 396 relating to interim injunctions are not applicable in actions for defamation: see **J Trevor & Sons v Solomon** (1977) 248 EG 779. These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press, when balancing it against the reputation of a single individual who, if wrong, can be compensated in damages'*

13. The 1st Defendant states that he can justify the content in the said news paper advertisement. The contents were raised publicly in the news paper, as issues that (members) would move during the AGM. The news paper advertisement calls for 'all brothers and sisters' to come to the AGM of FML in order to move the nine issues that were specifically mentioned in the said advertisement. The issues No 1, 2, 3, and 9 are relating to financial dealings and specially the issue no 9 deals with alleged unaccounted fund of over millions of dollars. Issue no 8 deals with a notice to requests for dispute resolution committee, presumably under the constitution of the FML. According to the 1st Defendant, he had called for internal dispute resolution body to be set up for the

inquiry of the issues raised by him over the years, but there is no evidence of such a mechanism in process. So, the 1st Defendant states he can justify the allegations contained in the news paper article and applying the rationale in the *Herbage v Pressdram Ltd and others* [1984] 2 All ER 769 which was also applied in Fiji High Court in *Ratu Ovini Bokini & ANR v Associated Media Ltd & ORS* 42 FLR 1(1996) the application for injunction should fail, considering the public interest in such a large organization which even having numerous international affiliations, where the 1st Defendant is adamant as to the truth of the content of the news paper advertisement dated 28.03.2013 where issues of considerable amount of financial interest were involved.

Contents of the Website

13. The 1st Defendant had in his news paper advertisement specifically mentioned URL of the website in issue as 'our website'. The 1st Defendant denies that he maintains the website in issue. The Plaintiff was given an opportunity to file further affidavits to prove the nexus between the 1st Defendant and the said website, since the mandatory nature of the injunction which sought to compel the Plaintiff to remove the contents from the said website. Two supplementary affidavits were filed by the Plaintiffs, though an opportunity was granted the 1st Defendant refrained from answering to the said supplementary affidavits (relating as to the ownership of website).
14. The affidavit of a network engineer states that the website in issue was registered under a proxy, hence the person who registered the said web site cannot be ascertained. At paragraph 15 of his affidavit filed on 9th July, 2013 states as follows

'15. Domains by Proxy is a private registration process available to persons who wish to remain anonymous over the internet. The registration is done by a Proxy registrant which is a service provided by Godaddy.com for \$9.99 per year and the identity of the real owner is not revealed. The identity of the real owner cannot be revealed even on the Whoisnetwork (a network that registers the details of the owners and URLs) because the Registrant would be Domains by Proxy in their records as well.'

15. So, the said website can be analogous to anonymous publication in the digital medium, where no authorship or responsibility is attached. The anonymity of the owner of the website is central point that should be resolved at the trial of this action. The Plaintiffs were unable to submit any decision that dealt with website created through proxy, where anonymity was central, in relation to an action on defamation even after trial. This leaves injunctive relief in the nature of mandatory nature, compelling a party to remove offending material, from the 'proxy website' a near impossibility.
16. According to the Plaintiffs they could not find the owner of the website in issue with certainty, from the legitimate sources, but state that conduct of the 1st Defendant as well as previous correspondence would lead that it is 'maintained' by the 1st Defendant, but this is what the Plaintiff has to establish at the trial and cannot do so with affidavit material before me. The 1st Defendant denies that the website belonged to him or maintained by him, but state in his affidavit in opposition, that he continues to be a contributor of the website and he can justify all the allegations that made in the said website as a contributor. The 1st Defendant, further state that what he contributed to the said website disclosed his name as the contributor of the statement and he cannot be held responsible for anonymous allegations contained in the website. The 1st Defendant also states he has no authority over the said website other than as a contributor. These are issues that need further elaboration at trial and the conflicting evidence needs to be tested with cross-examination.
17. In the other supplementary affidavit (regarding the ownership of website) filed on 9th July, 2013 sworn by Abdul Hakim, who is a Vice President of FML who has attached an email that he received from the email stated in the news paper advertisement. In the said newspaper advertisement of 28th March, 2013 the website in issue was referred as 'our website' and the name of the 1st Defendant and a phone number and an email were given. Both phone number and email do not indicate ownership but the email generated from the given email in the said paper advertisement refers to the website in issue as 'my website'. According to the said affidavit of Abdul Hakim said email was sent by 1st Defendant. There is no reply to said affidavit by the 1st Defendant, but from the materials before me I cannot come to a conclusion as to who is responsible for maintaining of the said website. The newspaper advertisement published by the 1st Defendant refers to the website as 'our website' but the email generated from the email

given in the said advertisement state 'my website' and if I were to hold any opinion on this vital point only on affidavit evidence it would not be proper at this stage. These are matters that Plaintiff has to prove in the trial, by eliciting evidence and cannot be dealt summary manner.

18. The Plaintiffs are unable to ascertain the ownership of the website due to the prevailing system where websites are being registered by way of proxy where anonymity is secured. The statements contained in the website where the 1st Defendant had expressly claimed authorship, he claims truth and justification as a defence. So, applying the rationale in **Ratu Ovin Bokini & ANR v Associated Media Ltd & ORS** (supra) the 1st Defendant should be allowed to elicit evidence for his defence of truth at the trial. He could not air his alleged grievances stated in the new paper advertisement dated 28th March, 2013 and according to the affidavit in opposition not only him but also other members of FML who were presumably supportive of moving the said grievance were not allowed to participate in the AGM. So, not only the 1st Defendant but also the members whose details were annexed to the affidavit in opposition as FM2 were also not permitted to participate in the AGM held on 31st March, 2013 for allegedly supporting the 1st Defendant, in his effort to 'move' the grievances contained in the news paper notice.

19. The Plaintiff's written submission settled by Mr. S. Singh, contends in paragraph 11 that in UK, the ratio of **Bonnard v Perryman** [1891]2 Ch269 is 'somewhat watered down', and refers to the case of **Zam v C &W** [2011]EWHC 476(QB). I cannot agree with that contention. In the said case there is no mentioning of deviating from the century old ratio, but in contrary, had applied the well known case **Bonnard v Perryman** [1891]2 Ch269 and held that unlike in the case of **Bonnard** (supra) there was no plea of justification by the defendants in **Zam v C &W** [2011]EWHC 476(QB). Further, application of ratio of **Zam v C &W** [2011]EWHC 476(QB) to the matter before me is a clear misdirection as the said case was dealing with 'harassment' under UK statute of Harassment Act 1997, where statutory injunctive relief was available in terms of the ss1(1A) and 3A of the said law in UK. The grounds for such statutory injunction are set out in the Harassment Act 1997 of UK and there are limitations as to the defences available. (see paragraph 13 of **Zam v C &W** [2011]EWHC 476(QB). I do not wish to

elaborate more on that judgment as the issues before me are completely different and there is no need to deviate from the well established rules contained in **Bonnard v Perryman** [1891]2 Ch269.

20. In **Greene v Associated Newspapers Ltd** - [2005] 1 All ER 30 at 46 Brooke LJ after discussing law of defamation in UK for over century held,

‘This survey of the case law shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial. This is partly due to the importance the court attaches to freedom of speech.’

21. At the hearing of this application both parties admitted that contents regarding the judiciary have already removed from the website. So, there is no need of an order from the court to remove such content that dealt with the judgment delivered in 2007.

C. CONCLUSION

22. In **Bonnard v Perryman** [1891]2 Ch269 it was held that the subject matter of an action for defamation is so special one that require ‘exceptional causation in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong.’ The allegation of defamation refers to two mediums one is digital medium where the allegations are contained in a website. The Plaintiff is unable to establish that the 1st Defendant maintains or own the website in issue. The website is maintained through a proxy regime that guarantees anonymity as to the person who maintains or owns it. In the circumstances I cannot order a mandatory type of injunction to the 1st Defendant to remove the anonymous contents referring to FML or any other person or entity from the said website. The Plaintiffs were unable to cite a single judgment, local or foreign, where even after the trial, contents from a website created through proxy was ordered removed or compensation granted in such a case. This amply demonstrates the nature of the application before me. In the case of **Louis Bacon Vs Atomic Inc et al** [2011] EWHC 1072(QB) the plaintiff sought an order from the court directing the owners of the websites the details of the persons who published alleged defamatory articles in specific websites including Wikipedia website . Though the said

decision does not deal with the issue of defamation, the importance of ascertaining the identity of the persons who publish in the digital medium for an action against defamation is clear. Without establishing this vital link, the application for injunction seeking order of the court to 1st Defendant to remove all matters concerning Plaintiffs, FML etc is premature. In the circumstances it is not possible to grant an order to remove the contents of a website created by proxy, only based on conflicting affidavit evidence as to the ownership and or the maintenance of the said website. The content of the website where 1st Defendant claims authorship, cannot be ordered to be removed as the 1st Defendant is claiming defence of truth, and on the facts before me I cannot decide these allegations are plainly false. So, I refuse the order 1 of the *inter-partes* summons dated 15th April, 2013. The Plaintiffs under order no 2 of the said summons sought restraining order from 'placing any further material on any website or maintaining any website have derogatory material published against the judiciary' the Plaintiffs, FML etc. I cannot see the utility in inclusion of judiciary in the said order, as contempt of court is an offence and can be dealt, without any need of such order. Any derogatory publication regarding judiciary can be dealt in a contempt of court proceedings and I do not wish to add more on that as this case is not dealing with contempt of court. The orders sought in the No 2 of the inter partes summons are too wide, perhaps that may be the reason of inclusion of judiciary in order no 2. The Plaintiffs in the said order seeks to prevent the 1st Defendant from placing any material on any website relating to Plaintiffs as trustees of FML, and FML. This is again clearly infringes the right to free speech as long as no wrong is committed. The 1st Defendant should not be prevented from divulging truth about any issue including alleged financial mismanagement of FML if he can establish the truth about it, in the interest of the general membership and also in the interest of public at large considering the sphere of activities that FML involved. The 1st Defendant should be mindful of his limits of free speech, where he should not publish any false materials relating to the Plaintiffs. The order no 3 in the inter partes summons seeks similar order from the court in order to restrain the 1st Defendant from 'publishing any defamatory or false material likely to cause pecuniary damages to the Plaintiffs in any form media or medium whatsoever.' This order can be granted with minor variation. Thus the 1st Defendant is restrained from publishing any false defamatory material likely to cause damages to the Plaintiffs in any form, media or medium whatsoever. Since the issue of truth and justification are not affected by said order it can be issued considering the circumstances of the case in the exercise of my discretion. Though the utility of such

an order is not substantial, it can be used as aggravating factor if the 1st Defendant's allegations could not establish truth. The cost of this application will be cost in the cause.

23. **FINAL ORDERS**

- a. The order No 1, and 2 of the inter partes summons struck off.
- b. Order no 3 is amended and reads as follows
 '1st Defendant is restrained from publishing any false defamatory material likely to cause pecuniary damages to the Plaintiffs in any form, media or medium.'
- c. Cost of this application will be cost in the cause.

Dated at **Suva** this **17th** day of **October, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva