FIJI MILITARY FORCES and Anor v FIJI POLICE FORCE and 5 Ors (ABU0030U of 2006S)

COURT OF APPEAL — CIVIL JURISDICTION

GALLEN, ELLIS and SCOTT JJA

21, 28 July 2006

Practice and procedure — discovery — documents — relevance — admissibility of evidence — Army Act 1955 (UK) — Board of Inquiry Army Rules 1956 — High Court Rules O 24 rr 8, 13, 15.

The affidavit of the Commander of the Land Force Command of the Republic of Fiji Military Forces (RFMF) Col Iowane Naivalualua (Naivalualua), disclosed that there was a Board of Inquiry (BOI) that was established to investigate the involvement of the members of the First Meridian Squadron in the illegal takeover of the parliament. It further indicated that the RFMF members had been charged with offences and were on trial before a General Court Martial (GCM). The copy of the convening order for the BOI which listed some 31 questions to be considered by the BOI was annexed to the affidavit. The fifth Defendant (D5) alleged that as a parliament member, he was inside the parliament house performing his constitutional and legal duties when the third Defendants (D3) and members of the first Defendant (D1) entered the parliament house armed with weapons belonging to the RFMF and took members of the parliament and other persons present, including the Appellant hostage.

After the appropriate affidavit of documents had been filed, D3, Timoci Silatolu (Silatolu), issued a summons for better discovery by D1 and sought the BOI documents. D1 opposed the application and its notice of opposition was supported by BOI's president, Lt Col Evans (Evans), and Lt Col Dr Korovavala's (Korovavala) affidavit stating the confidentiality of the document. Silatolu stated that D1 claimed state privilege over the documents and that its disclosure would be injurious to the public interest. The judge concluded that the production of the documents was relevant and he doubted the national security claims by D1. He ordered the delivery of the documents to his chambers in a secure sealed envelope for photocopying and indicated appropriate measures to ensure that the material did not have any wider circulation than his own inspection. The Appellant appealed the judge's decision. The issue was whether the discovery and inspection of the BOI report and the recorded proceedings leading to the report were relevant and admissible in the present proceedings.

Held — (1) The BOI report was irrelevant and inadmissible in the present proceedings. The evidence of the specified witnesses was the only relevant matter and not the view of the BOI officers. The reference was not more than the selective opinion of the BOI officers and the evidence was irrelevant since it cannot be known how it was selected, on what basis and the nature and conduct of the inquiry which elicited such material was unknown. The material of this kind carried no weight and its admission might give rise to a suspicion that it had an influence to which it was not entitled. Thus, the BOI report need not be disclosed or inspected so that no public interest immunity can be invoked.

(2) The record of the proceedings was relevant and admissible on the basis that Silatolu can ascertain the names of the witnesses who were called at the inquiry, and the nature of the evidence which they are in a position to give which may be of importance to him in these proceedings and thus allow him to call them as witnesses in the case.

Appeal allowed.

Cases referred to

Air Canada v Secretary of State for Trade [1983] 2 AC 394; [1983] 1 All ER 161; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090; [1979] 3 All ER 700; *Compagnie Financier et Commerciale du Pacifique v Peruvian Guano Co* (1882)

11 QBD 55; *Duncan v Cammell Laird & Co Ltd* [1942] AC 642; [1942] 1 All ER 587; *Public Service Commission v Manunivavalagi Dalituicama Korovulavula* [1989] 35 FLR 22; [1989] FJHC 24, cited.

A. Rokomokoti for the Appellants

S. Banuve for the first, third and fourth Defendants

I. Sosefo for the second Defendant

V. Mishra and *P. Kenilorea* for the fifth Defendant

Timoci Silatolu and *George Speight* in person

Gallen, Ellis and Scott JJA.

[1] This appeal arises out of the interlocutory process of discovery in proceedings between Nareish Kumar as Plaintiff, the Fiji Military Forces and the Commander of the Fiji Military Forces as first Defendant (D1), the Fiji Police Force and the Commissioner of Police as second Defendant (D2), Timoci Silatolu and George Speight as third Defendants (D3) Attorney General of Fiji as fourth Defendant (D4) and the Republic of Fiji as fifth Defendant (D5).

[2] In his third amended statement of claim the Plaintiff alleges that on 19 May 2000 as a member of parliament he was inside Parliament House performing his constitutional and legal duties when the D3 and members of the D1 entered the Parliament House armed with weapons belonging to the Fiji Military Forces and took members of parliament and other persons present, including the Plaintiff, hostage.

[3] He specifically alleges that the members of the D1, who held the Plaintiff captive, were acting under the orders or directions of the D3 and or members of the D1.

[4] The Plaintiff specifically alleges that members of the D1 acted in accordance with orders given by other and/or more senior members of the D1 and claims to recover damages in consequence.

[5] He also alleges that the D3 acted with members of the D1 in the events of which complaint is made.

[6] It is unnecessary to particularise either the allegations contained in the statement of claim or the material contained in the various defences which have been filed.

[7] For the purposes of this appeal we refer to an affidavit from the Commander of the Land Force Command of the Republic of Fiji Military Forces, Col Iowane Naivalualua who disclosed that pursuant to the provisions of the Army Act 1955 UK and the Board of Inquiry Army Rules 1956, a Board of Inquiry was established by written orders dated 9 August 2000 and was required to assemble at the Queen Elizabeth Barracks on the 16 August 2000 to enquire into the circumstances surrounding the involvement of the members of 1st Meridian Squadron in the illlegal take over of parliament. The affidavit further indicates that the summary of evidence procedure was completed in April 2002 after 103 witnesses had made statements and had been examined in the presence of 42 accused members of the Republic of Fiji Military Forces. The affidavit indicates as a result of the procedures referred to 61 members of the RFMF had been charged with offences and at the time of the affidavit were on trial before a General Court Martial which had convened on 20 March 2003. Annexed to the

affidavit is a copy of the convening order for the board of inquiry which lists some 31 questions to be considered by the Board of Inquiry.

[7] After the appropriate affidavit of documents had been filed the D3 Timoci Silatolu issued a summons for better discovery by the D1. This summons sought the following order:

(1) That the D1 make better discovery by disclosing the following documents, such documents being relevant to the issue in this matter:

(a) The findings of the Board of Inquiry into the involvement of the 1st Meridian Squadron in the illegal take over of parliament on 19 May 2000 and the subsequent holding of hostages until the 13 July 2000, as directed by the Land Force Command and signed by Col A Tuatoko, consisting of Lieutenant Col J N Evans, Major A Mohammed, Major T Cucake and WO1H MaComber.

(b) The records of evidence taken in that Board of Inquiry.

(2) That the D1 pays the cost of the application.

[8] The D1 opposed the application and its notice of opposition set out the following grounds of opposition.

(1) That the D1 claims state privilege over the documents referred to in the application, in particular of the findings of the Board of Inquiry into the involvement of the First Meridian Squadron in the illegal take over of parliament on the 19 May 2000 and the subsequent holding of hostages until the 13 July 2000 as directed by the Land Force Command and signed by Col A Tuatoko, consisting of Lieutenant Col Evans, Major A Mohammed, Major T Cucake and WO1H MaComber and the Records of evidence taken in the Board of Inquiry.

(2) The First Respondent also opposes this application on the grounds stipulated in the High Court Rules O 24 r 15 that disclosure of this document would be injurious to the public interest.

(3) The First Respondent reserves the right to add and rely on additional ground of opposition at the hearing of this application.

[9] This notice of opposition was supported by an affidavit from Lieutenant Col Evans who was the President of the Board of Inquiry and which contained inter alia the following statement: "4 That whilst the Board sat to carry out its task, all proceedings was held in private". The D1 also relied upon an affidavit by Lieutenant Col Dr Lesi Korovavala which conceded that the documents sought might be relevant to the proceedings but asserted that disclosure of the contents of the documents would be injurious to the public interest if ordered to be disclosed or to be produced for inspection or adduced in evidence.

The affidavit also stated:

> That the document contains very important information relating to matters that affect the very core and fabric of the military institution. It relates to the structural and operational mechanisms of the Republic of Fiji Military Forces. It contains critical information concerning the RFMF, its capabilities, its strengths and its weaknesses which if disclosed will be injurious to the public interest.
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> That the document is a comprehensive report. The inquiry is one that is wholly an internal or rather a domestic investigation. The document although contains information relating to the illegal takeover of Parliament and related incidents, the emphasis of the document is on certain organizational structure and framework of the military institution, it's methodical set up, the favourable and unfavourable aspects of such a set up, and recommendations made accordingly. The matters contained in this document

could have an adverse effect on national security and national interest if disclosed. And further to disclose it will affect the proper functioning of the military institution.

That the document also highlights issues and opinions that borders on matters of secrecy and if disclosed will affect the proper functioning of the military.

That the 19 May 2000 incident of the takeover of Parliament is one incident that affected the stability and internal security of the whole of Fiji and the information contained in the document is one that could again possibly initiate serious threats to stability and national security of this country if disclosed.

[10] The claim to resist discovery on the grounds of state privilege was formally made by the appropriate minister, and initially at least the opposition indicated that the minister was opposing on the basis of information obtained from the chief executive of the ministry. In a later affidavit the minister indicated that he had subsequently read the material on which the opposition was based. No doubt it would have been possible to raise arguments as to the appropriateness or otherwise of the procedure adopted by the minister but in the circumstances of this case we do not think it appropriate to deal with the matter on the basis of technicalities, which would simply leave the substantial issues open for further dispute. In the circumstances therefore while we note that there might have been procedural irregularities we do not take into this account in arriving at our decision.

[11] The questions arising from the summons came before the judge dealing with the case on 24 November 2005 and he gave a formal ruling on the 27 January 2006. Having referred to the background the judge stated:

> Having read the affidavit by Col Naivalurua filed on the 25 June, 2003 (affidavit para 14) and the attached convening order for the Board of Inquiry I am satisfied that the documents would doubtless contain statements by civilian and military witnesses about the takeover of Parliament on the 19 May and the detention and treatment of plaintiffs which could fairly lead Mr Silatolu to a train of enquiry which may advance his case or damage that of any other party (*Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co*) (1882) 11 QBD 55 at 63 per Brett LJ.
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> I am satisfied that the production of the documents sought appears to be warranted as they are relevant to the issues earlier summarized in this decision.
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> In addition on this preliminary issue Order 24 Rules 8 and 13 it is clear that discovery should be ordered where it is necessary for disposing fairly of the cause or matter. I am satisfied that this is not a fishing exercise but a genuine attempt to secure the inspection of relevant and otherwise discoverable material (cf also *Air Canada v Secretary of State for Trade* [1983] 2 AC 394; [1983] 1 All ER 161).
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> That being so the onus is then on the first defendant to show why these documents should not be discoverable and also why I should not inspect them.
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> The Army by its Minister have claimed public interest immunity as the documents if produced could effect national security.

[12] After considering a number of authorities the judge came to the conclusion that the documents were relevant and he had doubts about the national security claims made in respect of both the class and contents of the documents. He reached the conclusion that he thought it proper for him to call for their production. He considered that the only way in which the court could reach a just decision on the matter was by a private inspection of them. He accordingly ordered production of the documents to be delivered to his chambers in a secure sealed envelope for photocopying, and went on to indicate appropriate measures to ensure that the material did not have any wider circulation than his own inspection.

It is from that decision that this appeal has been brought.

[13] The question of the right to oppose discovery on the basis of alleged public interest immunity has been the subject of a substantial number of decisions of the highest authority and in his careful decision the judge has referred to a number of these.

One such decision is a decision of this court in *Public Service Commission v Manunivavalagi Dalituicama Korovulavula* [1989] 35 FLR 22; [1989] FJHC 24 a decision which is in line with earlier and subsequent decisions of the House of Lords.

[14] The starting point is that the person claiming discovery and production must show that production of the documents is necessary for fairly disposing of the cause or matter or for saving costs. The first onus therefore clearly rests on the applicant and unless the applicant can meet the requirements of the test then there is no obligation to disclose so that the question of public interest immunity does not arise. The standard which the applicant must reach was considered in some detail in the case of *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090; [1979] 3 All ER 700. Lord Wilberforce considered that the applicant must show a strong positive case that the documents might be a help to him. Lord Keith of Kinkel put the test as being one of reasonable probability while Lord Edmund Davies referred to likelihood.

[15] The summons of the D3 is not supported by an affidavit but in submissions counsel stated "if the Board of Inquiry report shows that the soldiers acted without authority and there is evidence of that as the D1 alleges in its defence one would have thought that the report would have been disclosed". From this it appears that the basis of the request is the possibility that the report of the Board of Inquiry contains conclusions which support the D3's case.

[16] It is important to note that the order sought both the discovery and inspection of the report of the Board of Inquiry and of the recorded proceedings leading to that report.

[17] In our view the report of the Board of Inquiry is neither relevant nor admissible in the present proceedings. It amounts to no more than the opinion of the board on the material heard before it. A Board of Inquiry has its own procedures and takes its own course. The view of the officers constituting the board cannot amount to evidence and its only possible relevance to these proceedings is that it may refer to the evidence of specified witnesses. Such reference cannot be more than the selective opinion of the officers constituting the Board of Inquiry. Such evidence cannot be of assistance to the court in this case as it cannot be known how it was selected, nor on what basis. The nature and conduct of the enquiry which elicited such material is not known. Material of this kind can carry no weight and its admission might give rise to a suspicion that it has had an influence to which it is not entitled.

It is therefore our decision that no case has been made out for the disclosure or inspection of the report of the Board of Inquiry so that no question of public interest immunity need be considered, in respect of it, and to this extent at least, the appeal must be allowed.

[18] That leaves the record of the proceedings as distinct from the report.

[19] In our view a case can be made out in respect of the record of the proceedings on the basis that the D3 can ascertain the names of witnesses called at the enquiry and the nature of evidence which they are in a position to give which may be of importance to him in these proceedings and thus allow him to call them as witnesses in the case.

[20] On that basis the court must proceed to the second stage that is the balancing process between the interest of the applicant in obtaining access to the material and the interest of the public in favour of immunity.

[21] Clearly there will be a spectrum of situations within which the contentions for and against disclosure will need to be considered. One extreme is illustrated by the relatively early decision of *Duncan v Cammell Laird & Co Ltd* [1942] AC 642; [1942] 1 All ER 587 (*Duncan*). In that case the disclosure was sought of the plans of a new submarine, in war time. There could be no doubt that disclosure in such a case would be contrary to the public interest. Perhaps at the other extreme a situation might be envisaged where the only interest to be protected was the embarrassment of the agency concerned or perhaps one where the information is in any event largely already in the public domain.

[22] In this case the D1 has claimed on affidavit that the record contains very important information relating to matters that affect the very core and fabric of the military institution. It is alleged to relate to the structural and operational mechanism of the Republic of the Fiji Military Forces. It is said to contain critical information concerning the Republic of Fiji Military Forces, their capabilities and strengths and weaknesses and it is contended that this information if disclosed would be injurious to the public interest.

[23] The questions set for consideration by the board of enquiry cover a very wide range and it is obvious that the record will contain material which has a bearing on such matters both in the evidence given and the questions which elicit it. It is important that the persons charged with making the enquiry and those giving evidence are not inhibited by the knowledge that whatever is asked or stated in evidence may subsequently be used in other proceedings with a different focus and where the considerations are different.

[24] Such concerns must also be considered in the light of the events which gave rise to the enquiry and the instability within the state and community both at the time and subsequently. We can accept that such concerns follow from the affidavits and that they are genuine and affect the public interest. It can also be accepted that material which discloses weaknesses in the organisation, chain of command and loyalty of its members is not only detrimental to the army but also to the State the security of which is to a large extent dependant on the efficiency and loyalty of the armed forces. In one sense at least this is the human equivalent of the mechanical information sought in (*Duncan*) and forms a proper basis for a claim for immunity from production.

[25] The judge noted that counsel for the D3 had complained of a lack of particularity in the opposition put forward on behalf of the D1. He arrived at the conclusion that he was left in doubt as to whether or not the onus of establishing the need for immunity had been established and therefore, following authority decided that the matter would have to be resolved by inspection.

[26] The affidavits indicate that at the inquiry the evidence was taken of 103 witnesses and no doubt other material was placed before the board which forms part of the record and which with the record itself must constitute a very substantial volume of material, some of which may be entitled to immunity and some of which may not. In satisfying the initial onus resting on him to justify the disclosure of the material we consider the applicant ought to have indicated those areas of the evidence which he considered might assist him in his defence. He did not in fact do so.

[27] On the other hand it is also in the interest of the community that justice should be done and if there is evidence available which might assist the D3, and in due course the court, but which can be given without affecting any justified concern for immunity from disclosure then it should be disclosed. In our view it is possible that from this vast mass of material there may be some which could properly be made available but other parts which ought not. Nevertheless even such parts as may be innocuous only have evidential weight in context and even judicial selection might give rise to serious problems as to meaning, weight and relevance. There is also the risk that the judge might be seen in such a selection to be entering the arena on one side or the other.

[28] In our view the only material which might genuinely provide assistance to the D3 in preparing the presenting his case and which could not give rise to the anxiety which gave rise to opposition is the names of witnesses who gave evidence at the enquiry. Once the D3 has those names then he can consider those whom he should involve as possible witnesses. This cannot involve any risk to the D1, particularly since the names of most will already be known to the D3 as participants in the events of which the Plaintiff complains, and many were shown on television. There would be some who were not known to the D3 and whose involvement arose from their place in the chain of command but their evidence at the trial of these proceedings ought to be de novo rather than by a presentation of what they said at the enquiry which was conducted for a different purpose and in a different way.

[29] Rather than send the matter back to the judge, in order to expedite the resolution of proceedings which from the point of view of all concerned ought to be disposed of as soon as possible we propose to make rulings ourselves and do so in the following terms:

(1) The report and the associated documents of the Board of Inquiry are entitled to immunity from disclosure and are not to be disclosed or inspected.

(2) The record of proceedings at the Board of Inquiry is not be disclosed or inspected but the names of witnesses who gave evidence at the inquiry are to be disclosed to the D3 and to any others who are entitled to discovery under the provisions of the rules.

(3) In the event of the D1 objecting to the disclosure of the name of any witness then such objection is to be referred for decision to a single judge of this court.

[30] All costs are to be costs in the cause.

Appeal allowed.