

ARVIN DATT (f/n CHANDAR DATT) v FIJI TELEVISION LTD (HBC214 of 2007)

5 HIGH COURT — CIVIL JURISDICTION

SINGH J

1, 12 June 2007

10 **Practice and procedure — applications — interlocutory injunction — allegations about Plaintiff were aired in prime time television news — Plaintiff had the onus to show that publication was clearly untrue — matters raised by parties were matter of public interest — freedom of press would assume a greater significance in matters of public interest — application refused.**

15 In May 2007, news bulletins highlighting allegations against the Plaintiff were aired on prime time television news. The allegations were that the Plaintiff had defrauded the Fiji Island Revenue and Customs Authority (FIRCA) of close to \$5000 while employed as board member of the FIRCA in 2004. The Plaintiff sought an interlocutory injunction to restrain the Defendant from making further statements or publishing certain material
20 which he alleged to be defamatory. The Plaintiff issued a writ of summons together with a statement of claim. The court granted an interlocutory injunction pending hearing and decision after the Defendant had filed its affidavits. The Defendant's affidavit alleged that the stories relating to the Plaintiff were not defamatory and, accordingly, pleaded the defence of justification or fair comment.

25 **Held** — (1) The consideration of an interlocutory injunction in defamation cases was laid down in *Bonnard v Perryman* [1891] 2 Ch 269 which provided that, as a general principle, an application to restrain publication would not be granted unless the court was satisfied that the publication was clearly untrue. The Plaintiff had the onus to show that indeed the publication was clearly untrue.

30 (2) The court will not restrain a publication unless it was clear that no defence would succeed at the trial. Therefore, where a Defendant pleaded justification as a defence, the Plaintiff should show that he was bound to succeed at the trial.

(3) The court found that the truth or otherwise of allegations could only be decided at trial. The matters raised by the parties were a matter of public interest considering that the Plaintiff was an employee of FIRCA and now appointed to its board. The background of persons who sit on high statutory bodies was a matter of public interest. It was critical at this juncture, when Parliament was not sitting and there was no usual ministerial accountability, that the freedom of the press would assume a greater significance in matters of public interest. Accordingly, it was appropriate to set aside the earlier interlocutory injunction granted in favour of the Plaintiff. The Plaintiff's application for
35 interlocutory injunction was refused with costs fixed at \$1200.

40 Application dismissed.

Cases referred to

Bonnard v Perryman [1891] 2 Ch 269, applied.

45 *Burns Philip (Fiji) Ltd v Associated Media Ltd and Ors* (1998) 44 FLR 145; *Coulson v Coulson* (1887) 3 TLR 846; *Mahendra Pal Chaudhary v Laisenia Qarase and Anor* HBC 385/2005; *Ratu Ovini Bokini and Anor v Associated Media Ltd and Ors* (1996) 42 FLR 1, cited.

50 *Cream Holdings Ltd v Banerjee and Anor* [2004] 4 All ER 619; *Greene v Associated Newspapers Ltd* [2005] QB 972; [2005] 1 All ER 30; [2005] 3 WLR 281; [2004] EWCA Civ 1462, distinguished.

R. Chaudhary for the Plaintiff

J. Apted and T. Waqanika for the Defendant
Singh J.

Background

5 [1] The background to this action arose out of a prime time television news at 6 pm and 10 pm on 14 May 2007. The news bulletin highlighted certain allegations against the Plaintiff who was a newly appointed Board Member of Fiji Island Revenue and Customs Authority. The Defendant relied on a draft audit report on FIRCA as the basis of its news bulletin. The allegations were that the
10 Plaintiff while employed at FIRCA in 2004 had defrauded FIRCA of close to \$5000. This bulletin led to the Plaintiff filing this action.

[2] The Plaintiff by way of an ex-parte summons (which I ordered to be made inter-parte) sought to injunct the Defendant from making further statements or publishing certain material which the Plaintiff alleges is defamatory of him.

15 [3] The Plaintiff issued a writ of summons together with a statement of claim on 17 May 2007. On 22 May 2007, I heard the summons at which stage the Defendant had not filed any affidavits and I granted an interlocutory injunction pending hearing and decision after the Defendant had filed its affidavits.

20 [4] The Defendant has filed two affidavits; one from Merana Kitone who is the Team Leader News at Fiji Television and second one from Mesake Nawari, the Chief Executive Officer. The text of what Fiji Television first telecast appears in one of the annexures to Plaintiff’s affidavit. It arises out of allegations in a Draft Management letter for Audit of Finance Statements — 2004.

25 [5] Merana Kitone in her affidavit states that the contents of draft management letter are a matter of public interest. It goes on to state that the Defendant will in its defence plead that the stories relating to the Plaintiff were not defamatory and in the alternative justified or fair comment.

30 **Law on injunctions in defamation cases**

Bonnard test applied in Fiji

[6] Any consideration of an interlocutory injunction in defamation cases would be incomplete without reference to *Bonnard v Perryman* [1891] 2 Ch 269
35 (*Bonnard*). The principles it endorsed have stood the test of time and are still applicable today. That principle asks of courts to exercise “exceptional caution” and held the “right of free speech is one which it is for the public interest that individuals should possess ... until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed, and the importance of leaving
40 free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions”.

[7] In short this means that as a general principle an application to restrain publication would not be granted unless the court was satisfied that the publication is clearly untrue. The onus is on the Plaintiff to show this.

45 [8] *Coulson v Coulson* (1887) 3 TLR 846 described this jurisdiction as a “most delicate jurisdiction ... to be exercised in the clearest case” where irreparable harm would be caused to the Plaintiff and “where any jury would say that the matter complained of was libelous”.

50 [9] The *Bonnard* principle has been applied and confirmed in three Fiji cases namely *Ratu Ovini Bokini and Anor v Associated Media Ltd and Ors* (1996) 42 FLR 1; *Burns Philip (Fiji) Ltd v Associated Media Ltd and Ors* (1998) 44 FLR

145 and *Mahendra Pal Chaudhary v Laisenia Qarase and Anor* HBC 385/2005. In the last of the above cases the court stated: “In *Bonnard v Perryman* [1891] 2 Ch 269 it was settled that the power to grant an interlocutory injunction was the same in defamation cases as in any other. In a proper case, an injunction could
5 be ordered. But whether the impugned statements are libelous or not is a matter for the trial court, not the court at the interlocutory state: *Coulson v Coulson* (1887) 3 TLR 846”.

English position

10 [10] The *Bonnard* principle has been upheld by modern English authorities. The Plaintiff has sought to rely on *Cream Holdings Ltd v Banerjee and Anor* [2004] 4 All ER 617 (*Cream Holdings*). That was a breach of confidence claim. Banerjee had been dismissed from her post as a financial controller in a group of
15 companies. When she left the post, she took with her copies of documents which she claimed showed illegal and improper activity. She passed the documents to the second Defendant, a recognised publisher which published two articles about the group. *Cream Holdings Ltd* sought an interlocutory injunction.

[11] In *Cream Holdings* the House of Lords was concerned with the test in cases of interlocutory injunction in breach of confidence cases in the context of
20 English Human Rights Act 1998. The Human Rights Act 1998 provided that the court must not grant an interim injunction “unless the court is satisfied that the applicant is likely to establish that the publication should not be allowed”.

[12] The court was concerned with what did this test “likely to establish” mean.

25 [13] Lord Nicholls with whom the other Law Lords agreed concluded that the word “likely” “should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace American Cyanamid standard of real prospect but permits the court to dispense with this higher standard where particular
30 circumstances make this necessary” — at [20].

[14] So what *Cream Holdings* proposed was a flexible test where the threshold was not as high as the *Bonnard* but higher than *American Cyanamid* test of real prospect of success.

35 [15] *Cream Holdings* however was distinguished in *Greene v Associated Newspapers Ltd* [2005] QB 972; [2005] 1 All ER 30; [2005] 3 WLR 281; [2004] EWCA Civ 1462 (*Greene*). In *Greene* the Plaintiff’s counsel argued that the *Cream Holdings* test should also apply to all defamation cases where interlocutory injunctions are sought.

40 [16] After reviewing a series of authorities the English Court of Appeal concluded that the common law position as expressed in *Bonnard* remained unaffected by the decision in *Cream Holdings*. The position therefore remains that a court will not injunct a publication unless it is clear that no defence would succeed at the trial. Therefore where a Defendant pleads justification, as the Defendant has done so in this case, the Plaintiff to succeed must show that he is
45 bound to succeed at the trial.

[17] The court went on to give its reasons why a higher threshold of proof was required in defamation cases than in breach of confidence or of privacy. Those reasons are that first in an application for interlocutory injunction in defamation cases it is difficult to assess chances of a party’s success which often depends on
50 credibility of witnesses and consideration of documents. Second, a reason which is not applicable to Fiji, that issues of justification are considered by a jury and

it is impossible to know in advance how a jury would react to witnesses. Third, that damage to reputation of an individual can be adequately compensated if he succeeds at the trial. In contrast, in breach of confidence cases, the confidentiality of the documents will be totally lost if injunction against directive is not given.

5 [18] The Defendant has in its affidavit disclosed that it relies on justification and fair comment as defences and that it intends to subpoena witnesses to testify even those witnesses who may for reason of being victimised may not wish to swear an affidavit at this stage.

10 ***Constitutional provisions — Freedom of speech***

[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. However it goes on to provide that the law may authorise the limitation of this right for the protection or maintenance of reputation — s 30(2)(b) — but only to the extent
15 that the limitation is reasonable and justifiable in a free and democratic society.

[20] The Constitution by incorporating freedom of expression in the Bill of Rights chapter gives it a high priority and therefore any restriction of that right needs to be carefully circumscribed. In *Greene* the Plaintiff's counsel had made the concession that the right to reputation was in Art 10 of the European
20 Convention expressed as a limitation on the freedom of speech — similar to what our s 30 provides. *Greene* concluded that the rule in *Bonnard* adequately protected the right to reputation and met the requirements of the Convention.

[21] The Plaintiff's counsel emphasised that the allegations contained in the draft management report were not contained in Auditor-General's final report and therefore the allegations were false. I am not too certain that one could jump to
25 such a conclusion in face of contradictory assertions in Merana Kitione's affidavit. At this stage I cannot say why the Auditor-General did not include the allegations in his report.

[22] I am of the view that the truth or otherwise of allegations can only be
30 decided at trial. The matters raised in the draft report and allegations made are a matter of public interest. They relate to FIRCA, the body responsible for collection of tax on which the economic wellbeing of the nation rests. At the time of draft report the Plaintiff was employee of FIRCA. Now he has been appointed to its board. The background of persons who sit on high statutory bodies is a
35 matter of public interest.

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

40 **Conclusion**

[24] Accordingly in the exercise of my discretion I dissolve the injunction granted earlier. The Plaintiff's application for interim injunction is refused with costs summarily fixed in the sum of \$1200 to be paid in 21 days.

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Application dismissed.

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