Tonga Development Bank v Pohiva

10 Supreme Court, Nuku'alofa
Dalgety J
Civil Case C.192/92

11,12,13,14,15 October, 30 November, 1992

Breach of confidence - conditions under which actionable - relief obtainable.
Defences - not pleaded - unavailable.
Disclosure - informant to be revealed - in interests of justice.
Freedom of press - Cl.7 of Constitution - press no different to general public.
20 *Injunction - restrain future publication if breach of confidence - disclosure of sources.*
Practice - defence not pleaded.

The Plaintiff sued the Defendant, as editor and publisher of a newspaper, for permanent injunctions restraining him from using and publishing information confidential to the Plaintiff, from soliciting further such information, for damages and for an order that the Defendant disclose his source or informant.

30 HELD, restraining Defendant from such publications (but refusing the soliciting application as unnecessary and refusing damages)and ordering disclosure by Defendant of his informant, that:-

1. Before an action for breach of confidence, such as here, can lie and support a permanent injunction, the information must be confidential, the information must be imparted in circumstances importing an obligation of confidence and there must be unauthorised use of such information to the a detriment or potential detriment of the other party.
2. Information which is public knowledge and public property is not confidential.
3. The obligation not to disclose a confidence may be imposed on a third party who is in possession of information which he knows to be the subject of a duty of confidence. 40
4. The obligation of confidence is particularly important to a banker.
5. The Defendant, with actual knowledge of the confidentiality, made unauthorised use of the information to the detriment of the Plaintiff.
6. The various defences of a duty to disclose (and here a duty to disclose in the public interest, was claimed) did not apply as the Defendant was not protecting the public against fraud, crime, serious misdeeds or grave misconduct and the burden of proof is on the Defendant to demonstrate an over-riding public 50

interest displacing the protection over confidential information.

7 Statutory defences, not pleaded, could not be relied upon; and the Official Secrets Act, in any event, has no application to the Plaintiff.

8. Cl.7 of the Constitution does not alter the general proposition that the Press has no privilege to obtain information by methods that would be wrongful in the in the ordinary person.

9. Disclosure of informant can be ordered if necessary in the interests of justice.

60 Cases considered : Malone v Metropoliton Police Commsr. [1979] Ch.344
Morrison v Moat (1851) 68 E.R. 492
Fraser v Evans [1969] 1 Q.13 349
Attorney-General v Guardian Newspaper Ltd (No.2) [1988] 3 All ER 545
Coco v Clark Ltd [1969] RPC 41
Saltman Engineering Ltd v Campbell Engineering Co. Ltd [1963] 3 All ER 413
Mustad & Son v Allcock & Co. Ltd. [1963] 3 All ER 416
70 Attorney General (UK) v Wellington Newspaper Ltd [1988] 1NZLR 129
Seager v Copydex (No.1) [1967] 2 All ER 415
Prince Albert v Strange (1849) 1 Mac. & G.25
Duchess of Argyll v Duke of Argyll [1965] 1 All ER 611
Stephens v Avery [1988] 2 All ER 477
Townier v National Provident Bank [1924] 1 KB 461
Weld-Blundell v Stephens [1920] A.C. 956
Francome v Mirror Group Newpapers Ltd [1984] 2 All ER 408
Lion Laboratories Ltd v Evans [1984] 2 All ER 417
80 Seiler v Kingdom of Tonga [1992] Tonga LR 58
R v Shipley 21 St.Tr. 847
London Sporting News Ltd v Levy [1928] Macg. Cop. Cas.340
Peter Pan Manufacturing v Corsets Silhouette Ltd [1963] RPC 45
Johnson v Agnew [1979] 1 All ER 883
British Steel v Granada Television Ltd [1981]1 All ER 417
Handmade Films Ltd v Express Newspaper [1986] FSR 463
re Goodwin [1990] 1 All ER 608

90 Statutes considered : Constitution of Tonga Cl.7
Contempt of Court Act 1981 (UK)
Official Secrets Act
Tonga Development Bank Act

Counsel for Plaintiff : Mr Waalkens
Defendant in person.

Judgment

The Plaintiff is the Tonga Development Bank, a bank constituted under the Tonga Development Bank Act (cap.106). Out of an authorised share capital of 1,400,000 shares each of a nominal value of 10 pa'anga, 810,799 shares had been issued and fully paid as at 31st December 1991. Thirty five thousand of these shares were owned by the Bank of Tonga and the balance (some 97.69 per centum) by the Government of the Kingdom of Tonga. The function of the Plaintiff was -

> "to promote the expansion of the economy of Tonga for the economic and social addvancement of the people of Tonga by giving financial and advisory assistance in its discretion to any enterprise operating or about to operate in Tonga"
>
> : section 6(1) of cap.106.

In carrying out its functions the Plaintiff is required by section 6(2) to -

> "have due regard to (a) the prospects of the enterprise being or continuing to be successful and the prospects of repayment of any finance made available to it by the Bank; (and) (b) the general economic policies of Government as conveyed in writing by the Minister (of Finance) to (them) from time to time."

Its powers are consistent with these functions. It is a "development finance institution" section 7(1)(a) - and not a commercial bank: it is not a licensed deposit taker. Consistent with its status the Plaintiffs' eight man Board of Directors is primarily composed of Government nominees, although the Bank of Tonga is permitted to appoint one director: section 8(1). In its development role the Plaintiff has outstanding loans to customers in the order of 19.40 million pa'anga, funded out of shareholders' funds, and borrowings of some 14 million pa'anga from foreign governments (The United Kingdom and Australia), international institutions (such as the Asian Development Bank, the European Community, and the European Investment Bank), and the Bank of Tonga.

The Defendant, 'Akilisi Pohiva, is the Editor and Publisher of the bi-monthly newpaper "KELE'A". He has also been since 1987, a member of the Legislative Assembly of Tonga. It is only in respect of the former, namely his function as Editor and Publisher, that the Plaintiffs are pursuing this action against him.

This Action has been brought arising out of matters published in the January 1992 and February/March 1992 editions of "Kele'a". (The articles were then set out in full)

According to the Plaintiff these articles were based on the use by the Defendant of confidential information about the bank's customers which had been provided to him by a "mole" within that organisation. As a matter of fact I am satisfied that the Defendant published all the aforesaid matters referred to ad longum, in a newspaper "Kele'a" circulating within the Kingdom of Tonga and overseas. At the time he well knew the information upon which the various publications were based was confidential. In cross-examination he accepted without hesitation that the "information was confidential when I received it." The articles were based on information leaked to him by a male employee of the Plaintiff. It was within his knowledge that every employee of the Plaintiffs had sworn a Declaration of Secrecy upon taking up employment with the Bank. Nevertheless he accepted from that employee a considerable quantity of Documents concerning the nature and particulars of the accounts of customers of the Plaintiff including copies of correspondence from the files of the Bank, Board Papers marked Confidential, and photocopies of the Overseas Cheques Register. The Defendant "knew (this) employee

was breaking his secrecy undertaking when he gave me (these) Documents." The secrecy undertaking was in very precise terms. The employee declared before a witness that he would -

"faithfully and honestly keep secret the affairs and concerns of the (Plaintiff) and its transactions in business with its respective customers and the nature and particulars of the accounts of the several customers during my connection with the Bank and after the termination thereof and that I will not reveal or make known any of the matters affairs or concerns which may come to my knowledge by virtue of my office with the Bank or on the business of or in connection with the affairs of the Bank to any person or persons whomsoever except in the course of and in the performance of my duties or under compulsion of law or when authorsied in writing by the Board of Directors so to do or by the Auditors for the time being of the Bank or by the Auditors for the time being of the Bank or by the persons to whom such matters relate."

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The Plaintiff took this undertaking extremely seriously, and its breach by an employee was ground for summary dismissal. It was particularly anxious to identify the employee who obviously has no regard for the sanctity for the solemn and binding declaration he made when taking up employment with the Plaintiff. Not unsurprisingly it want rid of him. As a matter of fact I am satisfied that the Defendant had taken no active step to seek out or solicit such information as had been provided to him by the "mole" within the Plaintiff Bank.

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BREACH OF CONFIDENCE

The principle relief saught by the Plaintiff in this case is a permanent injunction against the Defendant restraining him from publishing confidential information about the affairs of customers of the Plaintiff Bank or from soliciting such information from any employee of the Plaintiffs.

As to soliciting such information, given my finding in fact that the Defendant has taken no active step to seek out the information referred to supra, a permanent no-soliciting injunction is unnecessary, cannot be justified and will not be granted. After receipt of some of his information the Defendant gave a promise that he would not reveal it s source. Mr Waalkens asked me to regard the giving of that promise as tantamount to an encouragement to the employee to continue "leaking" information about customers of the Bank. I do not agree. The Defendant never sought out this information. He did not cause it to be disclosed to him that was a decision taken unilaterally by the "mole". Nor in my opinion did he influence or induce any employee of the bank to provide such information.

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There remains the issue of future publication. An action for breach of confidence provides a civil remedy prohibiting the use or disclosure of information which is not in the public domain and which has been entrusted to a person from whom it has been obtained by a third party. The remedy is an important one for there is little jurisprudence to support the existence of a separate and distinct tort of breach of confidence: see Malone -v- Metropolitan Police Commissioner [1979] Ch.344 per Megarry V-C at page 360. English Chancery judges began granting injunctive relief for breach of confidence in about the mid eighteenth century, originally for the protection of unpublished manuscripts. The basis for the assumption of such jurisdiction is commented upon by Turner V-C in Morrison -v- Moat (1851) 68 E.R. 492 at page 498 -

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"That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I believe, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred : but, upon whatever grounds the jurisdiction
200 is founded, the authorities leave no doubt as to the exercise of it."

By the middle of the nineteenth century the Equity Courts were granting injunctions on the broad principle that "information obtained by reason of confidence reposed or in the course of a confidential employment, cannot be made use of either then or at any subsequent time to the detriment of the person from whom or at whose expense it was obtained : "Ashburner, "Principles of Equity" (2nd edition) at page 374. Thus a remedy which originated as a means of protecting unpublished manuscripts in the days before modern copyright legislation, was gradually extended judicially to cover any kind of marketable knowledge. In contemporary times the jurisdiction of the Court is based on a broad principle of good faith aptly stated thus by Lord Denning in Fraser v Evans [1969]
210 1 Q.B. 349 at page 361 -

"The jurisdiction is based not so much on property or on contract as on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence."

The remedy is "judge - made law" and demonstrates the "willingness of the Judges to give a remedy to protect people from being taken advantage of by those they have trusted with confidential information : "per Lord Griffiths in the House of Lords in
220 Attorney General -v- Guardian Newspapers Limited (No.2), [1988] 3 All E.R. 545 at 648 (The Spycatcher Case).

An action for breach confidence will not lie on every occasion upon which a confidence is broken. The remedy has been judicially circumscribed in various ways. In Coco -v- A.N. Clark (Engineers) Limited [1969] RPC 41 at page 47 Megarry J isolated the three elements normally required before a breach of confidence action can succeed as -

First, the information must be confidential;

Secondly, the information must have been imparted in
230 circumstances importing an obligation of confidence; and

Thirdly, there must have been unauthorised use of that information to the "detriment" of the party communication it, although Lord Griffiths in the Spycatcher Case preferred the term "detriment or potential detriment".

The "necessary quality of confidence" will not attach to information which is public knowledge and public property : Saltman Engineering Company Limited -v- Campbell
240 Engineering Company Limited [1963] 3 All E.R. 413 at page 415 per Lord Greene M.R.

Similarly, information once correctly described as confidential will shed that status if it subsequently enters the public arena. Thus if the confider himself publishes the information the confidant is released from his obligation of confidence: O Mustad & Sons -v- Allcock & Company Limited [1963] 3 All E. Likewise where a publication is widely available injunctive relief is "unacceptable" : Lord Goff in the Spycatcher Case at page 664-665 considered it -

"... an absurd state of affairs that copies of the (Spycatcher) book, all of course originating from (the author) Peter Wright, imported perhaps from the United
250 States, should now be widely circulating in this country, and that at the same time other sales of the book should be restrained "(because of the disclosure therein by the author of confidential matters acquired by him in the course of his past employment with the Security Service and in breach of his obligations under the Official Secrets Act declaration he had signed when so employed). "To me this simply does not make sense. I do not see why those who succeed in obtaining a copy of the book in the present circumstances should be able to read it, while others should not be able to do so simply by obtaining a copy from their local bookshop or library. In my opinion, artificially to restrict the readership of a widely accessible book in this way is unacceptable : if the information inthe book is in the public
260 domain and many people in this country are able to read it, I do not see why anybody in this country who waunts to read it should be prevented from doing so."

The same point was expressly made by the President of the Court of Appeal in the New Zealand sequel to Spycatcher, the case of Attorney-General for the United Kingdom -v- Wellington Newspapers Limited [1988] 1 NZLR 129 at page 175 -

"There is no doubt that, at least against a third party, a right of action for publishing material which prima facie would be the subject of an obligation of confidence will be lost if the defendant shows that the material has already been published to such an extent as to destroy its confidentiality. Whether there has been enough prior
270 publication to establish this defence must be a question of degree."

Where there is information to which the label "confidential" properly can be applied it is still necessary to establish that the information had been imparted in circumstances importing an obligation of confidence. Thus the misuse of information imparted in confidence is actionable. In Seager -v- Copydex (No.1), [1967] 2 All E.R. 415 a company was held liable for using, for its own ends, albeit honestly, a new type of carpet clamp, which the inventor had freely shown to the company executives during abortive discussions over developing the clamp. On the other hand, an inventor who inadvertently blurted out his invention at a party might well be denied redress against any third party
280 who published what the inventor had said, the necessary element of bad faith being absent. The obligation not to disclose a confidence is, as a general rule, also imposed upon a third party who is in possession of information which he knows to be the subject of a duty of cofidence : Prince Albert -v- Strange (1849) 1 Mac & G 25 : Margaret, Duchess of Argyll -v- Duke of Argyll [1965] 1 All E.R. 611. Otherwise, according to Lord Griffiths in the Spycatcher Case at page 649 -

"... the right would be of little practical value : there would be no point in importing a duty of confidence in respect of the secrets of the marital bed if newspaper were free to publish those secrets when betrayed to them by the unfaithful partner in the
290 marriage. When trade secrets are betrayed by a confidant to a third party it is usually

the third party who is to exploit the information and it is the activity of the third party that must be stopped in order to protect the owner of the trade secret".

It is a question of fact whether information has been used in an aunauthorised way but if it has then a breach of confidence has occured. In some instances any use made of the information may be an unauthorised use. Thus in Stephens -v- Avery [1988] 2 All E.R. 477 a woman told a close friend details of her past sexual relationship with another woman, who had then been killed by her husband: this information had been given on the express basis that it was secret, disclosed in confidence and must go no further. The so-called friend sold this information to a newspaper: her reprehensible conduct was held to amount to a breach of confidence.

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The obligation of confidence is of particular importance in the banking context. It is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain special circumstances: Tournier -v- National Provincial and Union Bank of England [1924] 1 K.B. 461 per Scrutton LJ at page 480. Tournier is now the leading case on the banker's obligation of secrecy and earlier authorities tot he contrary such as Hardy -v- Veasey (1868) 3 L.R.R. Exch. 107 and Tassell -v- Cooper are no longer good law. Gurry in "Breach of Confidence" at apage 144 considered that -

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"The banker's position differs from that of many other confidants because the nature of his position may give him access to a range of confidential information concerning his customer which is derived from sources other than the customer".

That much is self-evident. It is important therefore to identify precisely the information to which the obligation of secrecy extents. The Court of Appeal in Tournier considered that the obligation included not only the state of the account, namely whether there was a debit or a credit balance and the amount of that balance; but extended also to at least (1) all transactions that went through the account; and (2) securities given in respect of the account. This obligation continued beyond the period when the account was closed or ceased to be an active account. Beyond that there was a divergence of opinion but the majority (Atkin and Bankes L.JJ.), rightly in my opinion, considered that the obligation went further than that. Bankes L.J. at page 474 regarded all information acquired by the banker in his character as the customer's banker to be covered by the obligation of confidence. Atkin LJ at page 485 put the duty thus -

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"I further think that the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customer - for example, with a view to assisting the bank in conducting the customer's business, or in coming to decisions as to its treatment of its customer."

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In his pleadings the Defendant has admitted paragraph 10 of the Plaintiff's Statement of Claim that -

"At all material times the plaintiff bank was under an implied duty of confidence not to release or publish information as to the state of their customer's account and details as to any customers of it".

He further admitted Statement 11 that the Defendant knew or ought to have known that the information published in the Kele'a articles already referred to was confidential, and that the information contained in these articles was "information under the duty (of confidentiality) referred to in paragraph 10 (hereof)". There frank admissions in the

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pleadings were not inconsistent with the Defendant's oral testimony commented upon in paragraph 9 of this Judgment. A third party, such as the Defendant, who has actual knowledge that he is receiving information in breach of confidence when the information is communicated to him is affixed with an obligation of confidence at the time he receives such information : see the Prince Albert, Duchess of Argyll, Spycatcher and Stephens -v- Avery cases already referred to at the end of paragraph 11 of this Judgment, as also Lord Ashburton -v- Pape [1913] 2 Ch. 469; Liquid Veneer Company Limited -v- Scott (1912) 29 RPC 639; and Schering Chemicals Limited -v- Falkman Limited [1981] 2 All
350 E.R. 321. Megarry V-C in Malone (supra) aptly described the situation thus -

> "If A. makes a confidential communication to B., then A. may not only restrain B. from divulging or using the confidence, but also may restrain C. from divulging or using it if C. has acquired it from B., even if he acquired it without notice of any impropriety ... In such cases it seems plain that, however innocent the acquisition of the knowledge, what will be restrained is the use or disclosure of it after knowledge of the improperiety".

The Defendant in this case immediately upon receiving from the Plaintiff's dissident employee the information he subsequently published in Kele'a was subject to an
360 obligation of secrecy and confidence thereanent. He ought to be restrained from publishing like information in the future. The obligation attaching to him was of the same nature and extent as the obligation of secrecy and confidence which the Bank owed to its customers. The Defendant has admitted in his pleadings the publication of the offending articles. In the whole circumstances I am satisfied that -

(1) The information disclosed to the Defendant by the said unknown employee of the Plaintiffs was confidential:

(2) The information was imparted to the Defendant in circumstances importing an obligation of confidence:

(3) The confidentiality requirement attached to the Defendant who both knew that
370 the information was confidential and that it had been improperly disclosed to him:

(4) The Defendant made an unauthorised use of that information.

The evidence of the Plaintiff's' Managing Director, Mr. Vea was that it was very important that the Bank kept the affairs of its customers, and its own business, confidential both from the stand-point of its customers who would be concerned to see details of their banking affairs and financial status become public knowledge; generally to retain public confidence in the bank; and to protect the reputation of the bank in the international banking community where confidentiality was the sine qua non of responsible banking
380 practice. Any failure to keep secret it customers' affairs would inevitably lead to a loss of public and customer confidence in the bank, with potentially disastrous financial consequences. Certainly, I am satisfied on the basis of Mr. Vea's evidence and upon consideration of the authorities on banking confidentiality that -

(5) The publication of the information complained of was detrimental or potentially detrimental to the Plaintiffs.

DEFENCE TO BREACH OF CONFIDENCE

The Court of Appeal in Tournier was agreed that the banker's obligation of secrecy was not an absolute one. Bankes LJ (page 473) identified four categories which qualified
390 the contractual duty of secrecy implied in the relation of banker and customer, namely -

(a) where there is a duty to the public to disclose:

(b) where the disclosure is under compulsion by law:

(c) where the interests of the bank necessitate disclosure:

(d) where disclosure is made with the express or implied consent of the custome.

It is only with (a) that this case is concerned. Such a public interest defence Bankes LJ considered should be judged against the test suggested by Lord Finlay in Weld-Blundell -v- Stephens [1920] A.C. 956 at page 965 that there may be cases were a higher duty than the private duty of confidentiality is involved, as where "danger to the State or public duty may supersede the duty of an agent to his principal". "Scrutton LJ (page 481) appears to regard the public interest defence as applicable only "to prevent frauds or crimes". This was also the approach fovoured by Atkin LJ (page 487) who thought it safe to say that the obligation not to disclose confidential banking information was subject to the qualification that the bank enjoyed the right to disclose such information -

> "when, and to the extent to which it is reasonably necessary for the protection of .... the public, against fraud or crime".

The Court of Appeal judges all stressed the fact that public interest disclosure was an obligation on the bank itself. They did not consider its role as a ground of defence to an action for injunctive relief and damages pursued by the Bank against a third party purveyor of leaked confidential information.

The Defendant in effect pleads a public interest defence in Answers 16 and 17 of his Defence where he avers that -

> "the employees, servants or agents of the Plaintiff bank have a duty to the people of Tonga who owns 98% of the (Plaintiff). They are expected to protect the interests of the Plaintiff and its financial interests, the confidence of information relating to customers and their accounts only when the Plaintiff is seen carrying out its duties for the interests of the general public and not for the interest of the few":

And also that -

> "he is a representative of the people and he has a special duty to protect the interests of the people he represents. And there is no law prohibiting the Defendant from publishing the information which is the subject matters of this action".

As already observed this case has nothing to do with the performance by the Defendant of his public duties as a Member of Parliament. It is for him to carry out these duties as he sees fit without let or hindrance from the Courts. Tournier however is good law prohibiting him as a publisher disseminating the confidential information already referred to. His "public interest defence" (the passage underlined above) does not disclose any necessity to publish to protect the public "against fraud or crime". I do not consider that such a defence is available to the Defendant in a case such as this when his only ground of complaint appears to be the manner in which the Plaintiff is carrying out its duties as development Bankers. That is certainly a legitimate matter for discussion and comment in Parliament if the rules of the House so permit, and may well be a proper ground of action in appropriate declaratory prodeedings, but I am satisfied that it is not a valid defence to the present action.

A public interest defence generally is something very special. The burden will then be on the defendant to an action for breach of confidence to demonstrate that "some other over - riding public interest should displace the plaintiff's right to have this confidential information protected "per Lord Griffiths in Spycatcher at pages 649-650. Moral

imperative will not normally suffice. The difficulty in establishing such a defence was well illustrated by Sir John Donaldson M.R. in Francome -v- Mirror Group Newspapers Limited [1984] 2 All E.R. 408 at page 413 -

"However, I cannot over - emphasise the rarity of the moral imperative. Furthermore, it is also unheard of for compliance with the moral imperative to be in the financial or other best interests of the persons concerned. Anyone who conceive himself to be morally obliged to break the law should also ask himself whether such a course furthers his own interests. If it does, he would be well advised to re-examine his conscience. The media, to use a term which comprises not only the newspapers but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and progagating the views of minorities; they perform an invaluable function. However they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always. In the instant case, pending a trial, it is impossible to see what public interest would be served by publishing the contents of (tape recordings of telephone conversations illegally obtained by wire-tapping) which would not equally be served by giving them to the police or to the Jockey Club (who had an interest as the tapes allegedly revealed breaches of club regulations and possibly the commission of criminal offences by the Plaintiff, a jockey of some repute). Any wider publication could only serve the interests of the Daily Mirror (an English Daily newspaper of the tabloid variety)".

Perhaps the most comprehensive treatment of the "public interest" defence is to be found in the Court of Appeal decision in Lion Laboratories Limited -v- Evans [1984] 2 All E.R.417. That case concerned an electronic device used for measuring levels of intoxication by alcohol. The United Kingdom Government had approved the use of that device by the police in about April 1983. The Plaintiffs had a monopy of the market for the supply o f such machines. Early the following year two former employees of the Plaintiffs attempted to dispose of confidential company correspondence to the national press, which documentation cast considerable doubt upon the reliability and accuracy of the alcohol measuring devices. Patently this was a matter of legitimate public concern and the Court of Appeal allowed publication pending trial of the action. In so doing Stephenson LJ at pages 422-423 analysed the problem thus -

"The problem before ... this Court is how best to resolve, before trial, a conflict of two competing public interests. The first public interest is the preservation of the rights of organisations, as of individuals, to keep secret confidential information. The Courts will restrain breaches of confidence, and breaches of copyright, unless there is just cause or excuse for breaking confidence or infringing copyright. The just cause or excuse with which this case is concerned is the public interest in admittedly confidential information. There is confidential information which the public may have a right to receive and others, in particular the press ... may have a right and even a duty to publish, even if the information had been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer. The duty of confidence, the public interest in maintaining it, is a restriction on the freedom of the press which is recognised by our law ......; the duty to publish, the countervailing interest of the public in being kept informed of

matters which are of real public concern, is an inroad on the privacy of confidential matters".

There are however four further considerations which a Court must take into account-

First, there is the wide difference between what is interesting to the public and what it is in the public interest to make known. "The public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know".

500 Secondly, "the media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners" by publication.

Thirdly, 'there are cases in which the public interest is best served by an informer giving the confidential information not to the press but to the police or some other responsible body".

Fourthly, "that some things are required to be disclosed in the public interest, in which case no confidence can be can be prayed in aid to keep them secret". Serious misdeeds or grave misconduct are just examples of a just cause and excuse for breaking confidence.

510 In this case I require to make a decision after trial and to that extent much of the reasoning in Lion is not relevant. However, at the core of that case were the circumstances in which public interest could outweigh commerical confidence and in that context that case is of considerable importance. I have no difficulty in adopting as appropriate the approach taken by Stephenson LJ. In the present case however I cannot discern any compelling public interest in disclosing in the media confidential information about the customers of the Plaintiff. The evidence in this case did not establish any crime or fraud as the basis therefore, not any other serious misdeeds or grave misconduct. At very most the Defendant's case as pled was one of incompetent administration and favouritism by 520 the Plaintiff to certain of their customers. That is not a sound basis for upholding a public interest defence. In any event such a case was not established in fact to my satisfaction.

When it came to his Closing Speech it became apparent that the Defendant wished to base his defence on Section 7 of the The Act of Constitution of Tonga (cap.2); the Official Secrets Act (cap.5); and various provision of the Tonga Development Bank Act (cap.106). These statutory defences were not pled, as in my opinion they ought to have been if the Defendant intended to rely thereon: in this regard I would draw attention to my own decision in Seiler -v- Kingdom of Tonga (reported immediately above), particularly paragraphs 3-5 thereof! Accordingly, the Defendant cannot rely on them. In any event, 530 these statutory defences would not have assisted the Defendant in this case. Although a creature of statute (cap.106) the Plaintiff is a body corporate engaged in the private sector albeit in pursuit of objectives which are in the interest of the Kingdom of Tonga. They are not part of the Government of Tonga, a Government Department or an instrumentality of the State. It is in effect a private company and functions as such, notwithstanding that its shares are to the extent of almost 98 per centum owned by Government. Of itself that does not make the Bank a Government Department. Accordingly, the Official Secrets Act has no application to the Plaintiff : that Act applies only to Government Departments (Section 3) and Government Servants (Section 4). The Declaration of Secrecy taken by 540 employees of the Bank is not the same as the Official Secrets Oath which a Head of

Department can require Government Servants to swear (Section 6).

The curiously worded Section 7 of the Constitution provides -

> "It shall be lawful for all people to write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of slander or the law for the protection of the King and the Royal Family".

There is a considerable difference between facts and opinions, a distinction of critical importance in the law of defamation. It is the writing and printing of opinions which the first sentence of this section protects, not facts. The freedom of the press is guaranteed but the term "freedom of the press" is open to judicial interpretation. There is no definition of the term "freedom of the press" in the Constitution or the Interpretation Act (cap.1). Blackstone in his Commentaries, IV.151 regarded this liberty as "laying no previous (i.e. prior) restraints upon publication, and not in freedom from censure for criminal matter when published". The term was further refined by Lord Mansfield in R -v- Shipley, 21 St.Tr.847 at page 1040 as "printing without any previous licence, subject to the consequences of law" (that is, criminal as well as civil law). Street in "Freedom, the Individual and the Law" at page 101 stated that -

> "freedom of the press means freedom to publish ... not licence for the press to acquire news as it thinks fit, immune from the restraints of the law as it does so".

The effect of this statement is that the press has no privilege to obtain information by methods that would be wrongful in theordinary person. Although normally no prior restraints should be placed on publication of information in the press, in exceptional circumstances this may be required. In the context of the abuse of confidential information (that is the acquisition of news) injunctive relief such as now saught in this case does not in my opinion conflict with the constitutional rights to freedom of the press.

DAMAGES

There was no evidence to vouch any financial loss by the Plaintiff as a result of the aforesaid Kele'a articles. Accordingly the Plaintiff has restricted its claim for damages to a nominal award only in addition to an injunction. It is competent to claim both. Such an award was made against a third party recipient in London and Provincial Sporting News Agency Limited -v- Levy [1928] Macg. Cop. Cas 340 (1923-1928). Pennycuick J. in Peter Pan Manufacturing Corporation -v- Corsets Silhouette Limited [1963] RPC 45 regarded the claim for damages "as a matter of right that the plaintiffs are entitled at their own option to claim" as an alternative to an accounting for loss of profits. In this case the Plaintiff has waived its right to an accounting. Where however damages are claimed in addition to an injuction for breach of an equitable duty fo confidence they will cover only loss caused by past breaches on the part of the Defendant: Gurry pages 441-442. On the facts of this case I am satisfied that the Plaintiff has suffered no financial loss to date. To order the Defendant to pay it even nominal damages in my opinion is objectionable in principle for the great rule is that the assessment of damages is compensatory, not punitive, "that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed": Johnson -v- Agnew [1979] 1 All E.R. 883 or page 896 per Lord Wilberforce (House of Lords). This approach is applicable also to actions for breach of confidence -

"and the aim in each case will be the place the plaintiff, in so far as money can do so, in the same position as that in which he would have been had the defendant not breached his obligation of confidence" (Gurry, page 442).

I shall not award the Plaintiffs any damages in this case.

DISCLOSURE ORDER

The Plaintiffs also seek an Order against the Defendant requiring him to file an Affidavit naming his informant. At Common Law both the Scottish and the English Courts have refused to recognise any right of a journalist, editor or publisher to refuse to reveal the source of information when required to do so by the Court : H.M. Advocate -v- Airs 1975 J.C. 64; Attorney General -v- Clough [1963] 1 All E.R. 420; British Steel Corporation -v- Granda Television Limited [1981] 1 All E.R. 417. The majority of the House of Lords in the British Steel Corporation case considered that where someone took documents to which he was not entitled and gave them to the media, the informant was a wrongdoer, the third party recipient no innocent, and the interests of justice lay in favour of making a disclosure order : see Viscount Dilhorne at page 467. On that page he continued -

"If in a case such as this, where the taker of the documents had no right to take them, where he was clearly a wrongdoer, and where Grenada (the media) were involved in handling the documents and used them when they had no right to do so, no order for the discovery of the identity of the wrongdoer could be made with the result that (the plaintiffs) could not obtain redress for the wrong they had suffered at the hands of the taker, there would be a denial of justice to (the plaintiffs) and the gap in the law would constitute a charter for wrongdoers such as the taker of the documents in this case".

Even under the (English) Contempt of Court Act 1981, which in my opinion is not an act of general application which has the force of Law in Tonga, a journalist can still be required to disclose his source where it is proved to the satisfaction of the Court that disclosure is necessary in the interests of justice, or national security, or for the prevention of disorder or crime. It is only the first of these categories that the Plaintiff would be able to rely on here. The Plaintiff wishes to stop the leakage of confidential customer information and for that purpose need to know the identity of its disloyal employee. Only then can it contemplate his dismissal, or civil proceedings against him (a) arising out of his misconduct and (b) to prevent a repetition of his wrongdoing. I am well satisfied that it is in the interests of justice that it be granted the order they seek in circumstances such as the present. The phrase "the interests of justice" now means that legal proceedings must be contemplated : see Handmade Films (Productions) Limited -v- Express Newspapers p.l.c. [1986] FSR 463 per Browne-Wilkinson V-C. Hoffman J. in Re Goodwin [1990] 1 All E.R. 608 took the same approach. He also considered that "business could not function properly if (a Draft business plan) could not be kept confidential". He granted a disclosure order satisfied that it was necessary for the plaintiff to take action to identify the informant while the information was still sensitive (page 615). If the present Plaintiff is not granted the disclosure order it seeks the informant will be at liberty to continue with his treachery unmolested, all efforts to determine his identity having so far failed. The order is necessary and in the interests of justice.

ORDER

In the foregoing circumstances I shall pronounce an Order in the following terms :

IT IS ORDERED THAT ADJUDGED THAT -

(ONE) The Defendant whether by himself, or through his servants or agents, or by anyone acting under his control or upon his instructions be restrained and prohibited from publishing whether in the "Kele'a" newspaper or otherwise any information whatoever about or concerning (a) any account held with the Plaintiff by a customer of that Bank; and (b) any business dealings or arrangements past, present or projected between the Plaintiff and any of its customers, except in so far as publication thereof has been consented to, as the case may be, by the Plaintiff or the customer or customers concerned.

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(TWO) The Defendant do lodge in process with the Registrar of the Supreme Court at Nuku'alofa on or before the 11th January 1993 an Affidavit sworn by him naming the employee or servant of the Plaintiffs who provided him with a copy of Documents 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the Defendants' Inventory of Documents dated 28th October 1992, being pages 48 to 13 inclusive of the bound file of exhibits produced to the Court by Gounsel for the Plaintiff.

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(THREE) Hearing on Costs be fixed for 30th November 1992.

(FOUR) Quoad ultra the Prayer of the Statement of Claim (as amended) be refused.