Kingdom of Tonga v Pohiva

Supreme Court, Nuku'alofa
Dalgety J
Civil Case 1059/92

9, 10, 11, 12 March & 12 July 1993

Breach of confidence - restraint of future - principles - defences
Constitution - Freedom of press - public interest
Employment - contract of - inducing breach

The Defendant as editor and publisher of a newspaper published a number of articles revealing Cabinet decisions and papers, internal governmental and departmental documents and communications, Privy Council reports, Ministerial reports.

The Plaintiff sought to restrain the Defendant from

(i) seeking or soliciting such confidential information from Crown servants
(ii) inducing Crown servants to breach their employment contracts
(iii) inducing Crown servants to breach their statutory duties
(iv) using and/or misusing future confidential information

The Plaintiff also sought an order that the Defendant disclose his informant(s).

Held (dismissing all claims):-

1. as to (i) above, there was no evidence of such soliciting, influence or persuasion.
2. as to (ii) above, there was no evidence establishing any inducing by the Defendant, of Crown servants to breach employment contracts. (Considerable obiter discussion of a Crown servants terms of employment and duties owed, which a servant could be induced to breach and which might then be actionable).
3. as to (iii) above, there was again no evidence establishing any such inducing (and obiter discussion as to whether an injunction would be available in any event, even if such inducing was proved given the provisions of the Official Secrets Act which provide a serious criminal (not civil) sanction for such a breach).
4. as to (iv) above, the law is as set out in Tonga Development Bank v Pohiva [1992] Tonga LR.; given that law the Defendant did obtain confidential information in circumstances where an obligation of confidence attached to him. But that the Plaintiff had not established that the public interest would suffer detriment; and in addition, although clause 7 of the Constitution would

not prevent an injunction being granted restraining future publications, yet as Clause 7 amounts to a presumption in favour of freedom (of the Press), on the evidence here, on balance; it had not been shown that there were any public interest considerations necessitating a permanent injunction being granted or that grave injustice would result if such an order were refused.

Cases Considered:
Attorney General v BBC [1980] 3 All ER 161
Attorney General v Observer (1987) Times LR
Attorney General v Ashborne [1903] 1 Ch 101
Attorney General v Bastow [1957] 1 All ER 497
Attorney General v Harris [1960] 3 All ER 207
Attorney General v Ely [1869] 4 Ch App 194
Attorney General v Premier Line [1932] 1 Ch 303
Attorney General v Guardian (2) [1988] 3 All ER 545
Attorney General v Wellington [1988] 1 NZLR 129
Attorney General v Cape [1975] 3 All ER 484
Commonwealth of Australia v Fairfax [1980] 147 CLR 39
Coco v Clark [1969] RPC 41
Denis v US [1951] 341 US 494
Fraser v Evans [1969] 1 QB 349
Hector v Attorney General [1990] 2 WLR 606
Hinds v R [1976] All ER 353
Handmade Films v Express Newspaper [1986]FSR 463
Institute of Patent Agent v Lockwood (1894) 21 R (HL) 61
Lion Laboratories v Evans [1984] 2 All ER 417
Liquid Veneer v Scott [1912] 29 RPC 639
Lord Ashburton v Pape [1913] 2 Ch 469
Magistrates (Budzhaven) v Wemysn Coal [1932] SC 201
Malone v Metrop. Police Commsr. [1979] Ch 344
Margaret, Duchess of Argyll v Duke of Argyll [1965] 1 All ER 611
Minister of Home Affairs v Fisher [1979] 3 All ER 21
Morrison v Moat [1851] 68 ER 492
Mustad v Allcock [1963] 3
Pohiva v Prince Tu'ipelehake C 7/86 (Martin CJ; 6/5/88)
Prince Albert v Strange [1849] 1 Mac. & E. 25
R v Shipley 21 St. Tr. 847
Saltman v Campbell [1963] 3 All ER 416
Schering v Falkman [1981] 2 All ER 321
Seager v Copydex [1967] 2 All ER 415
Silkin v Beaverbrook [1958] 1 WLR 743
Stephen v Avery [1988] 2 All ER 477
Tonga Development Bank v Pohiva [1992] Tonga LR
Tu'itavake v Porter [1989] Tonga LR 14

Statutes Considered : Civil Law Act s.3
Constitution, Cl 7

Estacode Regulations
Official Secrets Act

Counsel for Plaintiff : Solicitor General
Counsel for Defendant : Mr Appleby

Judgment

AGREED FACTS

In large measure the factual issues in this case have been agreed between the parties in the pleadings. Accordingly, and without further ado, I am able to find-in-fact as follows, namely -

(ONE) That the Plaintiffs are the Kingdom of Tonga, representing the Government of Tonga and bring this action under that name in terms of Section 3 of the Crown Proceedings Act (Cap.13).

(TWO) That the Defendant, Mr 'Akilisi Pohiva, is the editor and publisher of an occasional newspaper called "KO E KELE'A", published bi-monthly, and widely distributed throughout the Kingdom of Tonga, as well as overseas.

[There then followed a recounting of some eleven articles in the Kele'a]

(FOURTEEN) The Defendant gained access to the information contained in the said KELE'A articles, being the articles referred to in the foregoing Findings-in-fact, from person or persons unknown within the employment of the Plaintiffs.

DISPUTED FACTS

The Plaintiffs at Paragraph 12 of their Statement of Claim aver that the Defendant "saught, solicited, influenced or persauded" the person or persons in the service of the Crown who supplied said information to him to do so for the purpose of enabling him to publish this information in the KELE'A. These averments the Defendant had denied. The Plaintiffs led three witness, Mr Taniela Tufui, the Chief Secretary & Secretary to Cabinet; Mr Kalafi Moala, the Editor of the weekly newspaper 'TAIMI 'O TONGA"; and Chief Inspector Sione Talanoa of the Tonga Police Force. There was no direct evidence from any of them which persuades me that the Defendant saught, solicited, influenced or persauded the unknown informant or informants to provide him with such information with a view to publication in the KELE'A, nor am I prepared to draw such an inference from their evidence. The Defendant did not give evidence, and no witnesses were led on his behalf. The "access" gained by the Defendant to this information was apparently fortuitous and uninvited for there was no acceptable evidence that the Defendant secured this information as a result of any approach to or solicitation of any Crown Servant by him, or as a result of any influence or persuasion exerted by him on any employee of the Plaintiffs. In Paragraph 13 of their Statement of Claim the Plaintiffs believe and aver that the Defendant "will continue" to receive confidential Government information, which he is not entitled to receive from person or persons unknown within the employment of the Plaintiffs, and "will continue" to cause same to be published in the KELE'A. Again, the Defendant denies these averments directed against him. In this instance however there is some positive evidence. In the article already described in Finding-in-Fact (SIX) the Defendant concludes by saying the "there are still other things regarding the Minister of

Police's confidential report to the King and Privy Council which I still wish to speak of, but I will leave that till later". It is open to me to infer from this, and I do, that the Defendant is likely to return to a commentary on the report at a later date. In additon, the range and volume of the information from Government sources relative to the period from 8th January 1987 (Finding FOUR) until 18th may 1992 (Finding FIVE) which he published in the KELE'A between March 1990 and December 1992 is such that I have no difficulty it finding that any confidential Government information which might come into the possession of the Defendant in the future is likely to be the subject of publication by him in the KELE'A if he considers publication to be in the public interests. Given his past track record it is unlikely that his source or sources of information, whoever he or they are, will henceforth cease to make available purloined Government papers. The Defendant's own answers to Statement 17 is not without its relevance. Therein the Defendant avers that he is a journalist "and has a duty to the public" and that all the information published by him which is the subject of the foregoing Findings-in-Fact "are matters of public interest and members of the public have a right to have access to the said information". Although in process there is a letter dated 22nd December 1992 (Production 19) from Crown Law to the Defendant requiring him to undertake in writing (1) not to publish Government information which is "subjected to the Official Secrets Act (cap.5) or is otherwise confidential" and (2) not to seek or encourage or solicit information from any Crown employee, servant or agent who "is subjected to the (said Act) or is otherwise confidential" that document was not referred to in evidence nor was it agreed to by Counsel as being a letter sent to the Defendant by the Plaintiffs' "in-house" legal advisors. It has not been proved, and I place no reliance upon it. Accordingly, I shall find-in-fact -

(FIFTEEN) That the Defendant did not seek or solicit from Crown servants confidential Government information no did he influence or persuade any such servant to provide him with such information and, that the information he published from Government sources in the KELE'A (and which is the subject of this action) was not secured as a result of any approach to or solicitation of any Crown Servant by him, nor as a result of any influence or persuasion exerted by him on any employee of the Plaintiffs.

INDUCEMENT OF BREACH OF CONTRACT

The Plaintiffs' Second cause of action is that the Defendant induced employees of theirs to breach their contract of employment with the Plaintiffs by providing information to the Defendant in breach of their duty of fidelity and of confidence (Paragraphs 18 and 19 of the Statement of Claim). Given my findings-in-fact, I do not consider that this cause of action has been established. I was not persauded that the Defendant had done anything to "induce" any Crown Servant to breach his contract of employment. For the avoidance of any doubt I am satisfied beyond peradventure that a Crown Servant has a duty of fidelity to the Plaintiffs, is obliged to respect the confidence of information which he comes into possession of in the course of his public duties, and is in clear breach of contract releasing any such confidential information to someone outside the public service, unless such disclosure is authorised.

Upon being found acceptable for a position in the Civil Service any new candidate is sent a job offer in terms of Production 1 which includes at Paragraph 3 a provision to effect -

"You will be subject to provisions of the Estacode Regulation and any other rules, regulations, instruction etc., as amended from time to time, relating to the Civil Service. You will also be liable to posting to any part of the Kingdom as Government deems fit. Newly appointed officers are required to take an oath under the Official Secrets Act, and penalties are provided for any infringement of this Act."

Paragraph 5 requests the successful candidate, if he accepts the offer of employment, to complete "the note at the foot of . . . this letter". That note is in the following terms -

"I hereby accept the appointment offered above, together with the terms and conditions specified therein".

In that offer of engagement reference is made to the Estacode Regulations (Production 2).

For present purposes it will suffice to refer to only certain provisions in Section 16 of these Regulations, which section is entitled CONDUCT. Subsection 1 is a general provision and makes is abundantly clear that these Regulations govern the conduct of all civil servants except Policeman and Prison Officers. The subsection says -

"With the exception of the Police and prison staffs whose conduct are governed by the Police Act of 1968 and Prison Act respectively, this subsection sets out the rules which govern the conduct of all other civil servants. In practice, the character of the Tonga Civil Service depends largely on the existence and maintenance of a general code of conduct which, although to some extent will be undefined, is of very real importance. There are, however, a number of things on which it has been found expedient from time to time to issue general instructions and these are to be found in the subsequent paragraphs of this sub-section."

Sub-section 12 and 13 remind Civil Servants that it is a criminal offence to disclose confidential information to an unauthorised person, and provide a mechanism for ensuring that is done -

"12-Disclosure of official information. Under the Official Secrets Act, 1964, it is an offence for any officer to disclose to an unauthorised person, either orally or in writing, any information he has acquired through his official duties unless he has received official permission. There is, however, no objection to his repeating information which has already been officially made public. Information in this context covers material published in a speech, lecture, document, plan, sketch, model, radio or television broadcast, in the press or in book form.

13-Establishment Division therefore has a duty to bring the provisions of the Official Secrets Act to the notice of all government officers and employees, so that they are aware of the serious consequences which may follow any breach of these provisions. This is done by requiring all new entrants to the Service to sign a copy of the Official Secrets Oath prescribed under the Act, which is then lodged with their personal file in Establishment Division. All the oaths must be retained for so long as the signatory may be presumed to be alive, even though he may have left the Service. A facsimile of the Oath is shown at Ka Appendix 1."

The Appendix does no more than set forth, no doubt for ease of reference, the terms of the Secrecy Oath prescribed by Section 6 of the Official Secrets Act. That section provides that -

"Any Government Officer or employee to whom this Act applies shall on being required to do so by the Head of the Department in which he is employed or about

to be employed take the oath set forth in the Schedule to this Act in the presence of the Head of the Department concerned or other officer authorised by the Head of the Department concerned . . ."

Under ther terms ofthe Estacode that Act applies to all civil servants bar those employed in the Police Force and the Prison Service. The terms of the Oath set forth in the Schedule to the Act (and repeated verbatim in Appendix 1 to the Estacode) are thus -

"I . . . (name of employee) . . . swear by Almighty God that I shall not communicate any document or sketch, plan or model or information obtained by me by means of my holding or having held an office or employment in or under any Government Department to any person to whom the same or any of them ought not in the interest of the state or otherwise in the public interest to be communicate. So help me God."

The deponent signs and his signature is witnessed.

The Regulations continue with a Sub-Heading of ACTIVITIES INVOLVING THE USE OF OFFICIAL INFORMATION OR EXPERIENCE. Sub-sections 14, 16 and 17 merit repetition at length for they set out the general considerations which apply to the use of official information.

"14. The need for greater openness in the work of Government is accepted. Openness in this context means two things:-

(i) the fullest possible exposition to the Legislative Assembly and to the public of the reasons for Government policies and decisions when those policies have been formulated and are announced;

(ii) creating a better understanding about the way in which the processes of Government work and about the factual or technical background to Government policies and decisions.

It is essential therefore, that control over what is made public should rest with the appropriate authorities in departments."

"16. The rules which follow cover all activities involving the use of official information, or experience which, in the main, are the publication of books or articles, contacts with the Press, broadcasts, speeches or lectures and participation in outside conference."

"17. The following general principles apply to activities of this kind:-

(i) there must be no disclosure of 'Secret' or 'Confidential' information;

(ii) there should be no discussion of matters of current or potential political controversy;

(iii) the relations between Ministers and civil servants, or the confidential advice given to Ministers, should not be disclosed;

(iv) there should be no comment on individuals or organisations in terms which the Department would regard as objectionable;

(v) the activity should not conflict with the interests of the Department, or the Civil Service generally, to bring in into disrepute."

The Cabinet Secretary gave evidence, which I accept, that in order to become a Civil Servant a candidate must take and sign the Oath of Secrecy; and that each person offered employment is sent an offer letter in terms as set forth in Production 1. He stated that no Civil Servant was allowed to give out information to the public without his authority and that this was especially true in relation to Cabinet Decisions. Information of lesser import

a Head of Department may order released to the public. Within the Civil Service, information is circulated only on "a needs basis". Outwith the Government information is released only "with proper authority". In Cross-Examination he stated that there were no exceptions to this rule. The rule of confidentiality be regarded as "absolute" except perhaps in extremis, where a life or death situation occured which necessarily prevented proper authority being obtained before information was released into the public domain. He was firmly of the view that all Civil Servants will know of the requirement not to release confidential information without proper authority. He had not authorised the release of any of the information referred to earlier in this judgement which became the subject of publication in KELE'A. As far as he was aware no other senior member of the Civil Service had authorised its release. He did not know how the Defendant came by this information but as none of the Documents referred to in KELE'A were "made readily available" the obvious source was a Civil Servant or Minister accustomed to handling important and confidential government documents. There were "many outlets from which (such) documents could leak". Mr Tufui could not say, and did not say, that such information would not be released by a Civil Servant unless he had been induced to breach the terms of his contract. No witness said this.

Had I been presented with reliable evidence that the Defendant had induced a Civil Servant to provide confidential information in breach of the employee's contract with the Plaintiffs I would have found this cause of action established but, as already explained, there was no acceptable evidence in this regard. Whether or not I could have granted the orders saught, a permanent injunction and a disclosure order, depends on the validity or otherwise of the Defendant's constitutional defence, which is a subject I will return to later.

INDUCEMENT OF BREACH OF STATUTORY DUTY

The Plaintiffs' Third cause of action was that the Defendant had induced a civil servant into a breach of statutory duty. As with the case for breach of contract, this cause of action also has not been established. There was no acceptable evidence that the Defendant had induced anyone into a breach of statutory duty.

In any event I am not convinced that the Plaintiff are entitled to an injunction in respect of breach of statutory duty where the Act relied upon is the Official Secrets Act. Although Section 6 thereof requires a government officer or employee to sign the statutory oath of secrecy the only sanctions provided in the Act for breach thereof are criminal, not civil. It is made an offence to communicate official information contrary to the public interest (Section 4) or to a foreign State (Section 5) or to incite or counsel the commission of such an offence (Section 7). Similarly Section 3 creates a number of crimes related to the use or misuse of information or documents in the possession or care of a civil servant. If it was intended that any of these offences was also to be a specific civil wrong which could be relied upon in civil proceedings or the basis of a civil remedy then I would have expected to see a provision to that effect in the Act. That was certainly the view of the High Court of Australia in the Commonwealth of Australia -v- John Fairfax & Sons Ltd (1980) 147 CLR 39 at page 150 where Mason J, referring to an Australian criminal provision not unlike some of the provisions in the Tongan Official Secrets Act, stated -

> "It may be that in some circumstances a statutory provision which prohibits and penalises the disclosure of confidential government information or official secrets

will be enforceable by injunction. This is more likely to be the case when it appears that the statute, in addition to creating a criminal offence, is designed to provide a civil remedy to protect the government's right to confidential information. I do not think that s.79 is such a provision. It appears in the Crimes Act and its provisions are appropriate o the creation of a criminal offence and to that alone. The penalties which it imposes are substantial. There is nothing to indicate that it was intended in any way to supplement the rights of the Commonwealth to relief by way of injunction to restrain disclosure of confidential information . . ."

In my opinion that is the correct approach for Tonga and it applies with equal force to the Official Secrets Act. I consider that where a new offence has been created by statute and fenced with a penalty, that is intended to be the sole sanction and a person contravening the Act is not also liable to be restrained by injunction from committing the offence. The House of Lords so ruled in the case of the Institute of Patent Agents-v-Lockwood (1894) 21 R (HL) 6 at pages 68 and 69 where it was held that a person not registered as such, who practised as a patent-agent, rendered himself liable to the penalty for so doing, but not to relief by way of injunction at the instance of registered patent-agents. The law in Scotland is exactly the same. The Appellate Division of Scotland's Supreme Court, the Court of Session, in the Magistrates of Buckhaven and Methil -v-Wemyss Coal Co., [1932] SC 201 held that a local authority had no title to seek interdict (injunction) against a coal company's discharge of refuse onto the foreshore within the burgh as that conduct was a statutory offence with a penalty attached. Lord President Clyde, Scotland's Lord Chief Justice and Master of the Rolls combined, said -

"It has long been settled in Scotland that a statutory body which is set up to enforce a system of statutory regulations, or to establish and enforce a system of bye-law of its own, has no power to resort to the common law process of interdict for the purpose of enforcing such regulations or bye-laws when the statute provides penalties for their breach and authorises recovery of such penalties. To protect a private right from invasion or abuse is one thing, to enforce conformity to a public regulation is another. The remedy of interdict is appropriate in the first case, but not in the second."

In England the approach now is slightly different. There, there is no absolute right to an injunction for the purpose of enforcing a public right. Only the Attorney-General may institute such proceedings but the Courts have a discretion whether or not to grant an injunction even though the public right was conferred by a statute which prescribed criminal remedies for its enforcement: Attorney-General -v- Bastow [1957] 1 All ER. 497 at page 500; Attorney-General -v- Ashborne Recreation Ground [1903] 1 Ch.101 per Buckley J. at page 107. In exercising its discretion whether to grant an injunction in such a case the English Courts have regard to the existence of other remedies available to the Attorney General. In Bastow, Devlin J. at pages 502/3 remarked that the Attorney-General was the officer of the Crown interested with the enforcement of the law. He continued -

"If he, having surveyed the different ways that are open to him for seeing that the law is enforced and that it is not defied, has come to the conclusion that the most effective way is to ask this court for a mandatory injunction . . . then I think that this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances".

That case arose out of the refusal of the Defendant to obey an enforcement notice issued under the Town and Country Planning Acts and his continued presence on land which he had been required to vacate despite several convictions in the Magistrates Court for breach of the enforcement notice. In the present case I am not persuaded that there has been any clear breach by the Defendant of the public right involved : there is no acceptable body of evidence that he induced any civil servant to breach his statutory duty concerning the provisions of the Official Secrets Act. In the case of the Attorney-General -v- Harris [1960] 3 All ER. 207 the Court of Appeal felt able to grant the injunction saught given that there had been persistent flouting of the Sunday (non) trading laws by certain market traders. There had been some 237 convictions of the defendants and at the trial of that action they had admitted their intention to continue their course of action, trading in breach of a local enactment which provided a criminal penalty for offenders (pages 215H). Pearce LJ (pages 215-6) considered that -

> "It is not, of course, desirable that Parliament should habitually rely on the High Court to deter the law-breaker by other means than the statutory penalties instead of taking the legislative step of making the penalties adequate to prevent the offence which it has created. Especially is this so where the offences are of a trivial nature. Yet it is, on the other hand, highly undesirable that some members of the public should with impunity flout the law and deliberately continue acts forbidden by Parliament, and in cases where, under the existing law, this court alone can provide a remedy, it should, in general, lend its aid to enforce obedience to the law when that aid is invoked by the Attorney-General on behalf of the public."

There is no tradition in Tonga, at least in recent times, of the Attorney-General as a matter of public right attempting to enforce obedience to criminal statutes by recourse to private law civil remedies. That practice is consistent with the peculiarities of the English legal system, but does not export well. It has been ignored in Scotland and is not followed in Australia. It is in any event a modern development in England. In the nineteenth century the general rule in England had been that where an Act created an offence and provided a penalty for breach, that was the only remedy available and injunction should be refused : see Attorney -General -v- Ely, Haddenham & Sutton Railway Co. (1869) 4 Ch. App. 194 and Attorney-General -v- Premier Line Limited [1932] 1 Ch.303. In the whole circumstances, for Tonga, I prefer the approach taken in Scotland and Australia. The English approach is a speciality of English Public Law and not of Civil (or Private) Law. Even if the English approach were followed I would on the facts of this case and in the context of the Plaintiffs' Third cause of action have refused to grant the injunction saught. The Official Secrets Act is a statute of immense importance to the state. It is not concerned with matters of regulation in sectors such as commerce or planning. Its penalties are substantial, not trivial. The Defendant has not been prosecuted under Section 7 for inciting, counseling, or attempting to procure a Civil Servant to provide him with Government information or documents. That remedy (prosecution) is available. The Solicitor-General for the Plaintiffs did not give me any good reason for concluding that the only effective remedy against the Defendant would be by means of injunction. In any event this public law remedy is available only in a relator action initiated by the Attorney-General : this is not such an action.

MISUSE OF CONFIDENTIAL INFORMATION

The Plaintiffs' principal cause of action concerns "Breach of or Misuse of Confidential

Information" by the Defendant. In this respect the Plaintiffs pled in Statement 14 that -

"At all material times Crown employees were under an express or implied duty of confidence not to reveal or publish information contrary to the Official Secrets Act (cap.5) or otherwise confidential information relating to the Government of Tonga.

They continued in Statements 15 and 16 to expand upon that duty -

"15: The Defendant knew or ought to have known (a) the information contained in the said articles was made available to him contrary to the Official Secrets Act or was otherwise confidential, and (b) the information contained in the articles is information under the duty (of confidence) referred to in (Statement 14)"

"16: The Defendant is also under a duty to the Crown to protect the confidentiality of the information and not to publish the same."

These averments the Defendant had denied. In Statement 17 the Plaintiffs averred that "in breach of or misuse of the confidential information" the Defendant published the same in the various KELE'A articles which are the basis for the present proceedings. The Defendant denied that, and added -

"The Defendant says that he is a journalist and has a duty to the public. All the information (published in KELE'A having been obtained from Government sources) are matters of public interest and members of the public have a right to have access to the said information. Only civil servants have a duty to protect the confidentiality of the said information. Further, clause 7 of the Tongan Constitution gives the Defendant the liberty to publish (said) information . . . "

On the basis of these pleadings the principal relief, saught by the Plaintiffs was a permanent injunction restraining the Defendant (1) obtaining from or seeking, causing, influencing or inducing Crown servants to provide him with information he is not authorised to receive under the Official Secrets Act or otherwise, and (2) publishing in the KELE'A or otherwise any Government information he is not authorised to receive under the Official Secrets Act or otherwise. As to (1), giving my earlier finding 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. There remains the issue of future publication of confidential government information.

BREACH OF CONFIDENCE - GENERAL DUTIES

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 -

"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 conferred ; but, upon whatever grounds the jurisdiction 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 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] 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 Attorney-General -v- Guardian Newspapers Limited (No.2), [1988] 3 All E.R. 545 at 648 (The Spycatcher Case).

An action for breach of 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 circumstances importing an obligation of confidence: and Thirdly, there must be have been unauthorised use of that information to the "detriment" of the party communicating 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 Engineering Company Limited [1963] 3 All ER 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 & Son -v- S. Allock & Company Limited [19963] 3 All ER 416. 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 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 in the book is in the public domain and many people in this country are able to read it, I do not see why anybody in this country who wants 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 Attorney-General for the United Kingdom -v- Wellington Newspaper 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 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, [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 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 know to be the subject of a duty of confidence : 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 a little practical value : there would be no point in importing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner in the 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 unauthorised 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 is Stephen -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.

BREACH OF CONFIDENCE - GOVERNMENT INFORMATION

The obligation of confidence is of particular importance in a variety of contexts. Its relevance in the banking context was examined in the case of Tonga Development Bank -v- Pohiva [1992] Tonga LR. Different considerations apply in the case of information emanating for Government sources. Gurry in his admirable treatise on "Breach of Confidence" summaries the position insofar as relating to Government Secrets thus, at page 103 -

> ". . . information generated by the government in the discharge of its functions is capable of being protected through an action for breach of confidence against unauthorised disclosure by Ministers or civil servants, or by third parties to whom the information is improperly passed . . . (But) the right to restrain the use of confidential government information is subject to different considerations from those which govern the right of an individual or firm to restrain the use of information which has been confidentially imparted. Whereas inaccessibility is the fundamental criterion which determines whether trade secrets and personal or artistic information are confidential, inaccessibility alone is an inssufficient test for assessing whether government information should be protected as confidential. In order to restrain the disclosure of government information, it must be shown not only that the information for which protection is saught is inaccessible, but also that it is in the public interest that such information remains inaccessible."

This is a considerable additional hurdle which a state must overcome before it could obtain an order restraining the publication of confidential government information. In Attorney-General -v- Jonathan Cape Limited [1975] 3 All E.R. 484 Widgery LCJ considered (page 495 H) that before a state could obtain a permanent injunction against a firm of publishers restraining them for publishing the "Crossman Diaries", in which the author (a former Cabinet minister) had made extensive use of cabinet and cabinet committee records, the Crown was required to satisfy the Court -

> "(a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained; and (c) that there are no other facets of the public interest contradictory to and more compelling than that relied on. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirements of public need."

In any case in which Governments seeks to interdict the publication of state secrets of confidences a "balancing exercise" is necessary : Attorney-General -v- Guardian Newspapers Limited (No.2), [1988] 3 All E.R. 545 per Scott J. at page 578H. On appeal to the House of Lords, Lord Keith at page 640H was firmly of the view that a communication about some aspect of government activity which does no harm to the interests of the nation "cannot, even where the original disclosure was been made in breach of confidence, be restrained on the ground of a nebulous equitable duty of conscience serving no useful practical purpose". See also Lord Goff at page 660c, and Lord Griffiths at page 651a to effect that Government "must establish, as an essential element of the right to the remedy, that the public interest will suffer detriment if an injunction is not granted." The House of Lords were much impressed with the decision in the Australian Fairfax case to which reference has already been made.

In that case Mason J. at pages 52 had made it clear that the Court would determine a government's claim to confidentiality -

> "by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected. The court will prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained."

In the present case I am in no doubt whatsoever that the civil servant or servants who released confidential information to the Plaintiff did so in breach of the duty of confidence they owed their employers. The Defendant reasonably ought to have known that such disclosure was a breach of confidence by his informant as also that by making such disclosure his informant was exposing himself to prosecution under the Official Secrets Act. The Defendant is a former civil servant and well aware of the legal and contractual obligations imposed upon a servant of the Crown not to disclose to any unauthorised person information which came into his possession in the performance of his official duties. The information that was "leaked" to him he published in the KELE'A. That was information disclosed in breach of confidence which prima facie he ought not to have published : (I shall return to his defences later).

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 in 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 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 impropriety."

The Defendant in this case immediately upon receiving from the Plaintiffs' dissident servant or servants the information he subsequently published in Kele'a prima facie was subject to an obligation of secrecy and confidence thereanent. The obligation attaching to him was of the same nature and extent as the obligation of secrecy and confidence which the Civil Servant owed to his employer, the Plaintiffs. 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 servant of the Plaintiffs was confidential:

(2) The information was imparted to the Defendant in circumstances importing an

obligation of confidence: and

(3) The confidentiality requirement attached to the Defendant who both knew (or reasonably ought to have known) that the information was confidential and that it had been improperly disclosed to him.

The Defendant has several defences upon which he relies which, in his submission, prevent the Court granting the injunction against him saught by the Plaintiffs.

PUBLIC INTEREST

The Defendant's case is that the information published by him is a legitimate matter of public interest and that public dissemmination of that information through the KELE'A is justified and in the public interest. Strictly speaking this is not a defence at all in cases involving government secrets. It is otherwise when the secrets involved are personal or commercial, and not governmental. Then, a public interest defence properly so-called may be available. 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 his 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 Newspaper Limited [1984] 2 All E.R. 408 at page 413 -

> "However, I cannot over - emphasise the rarity of the moral imperative. Furthermore, it is almost unheard of for compliance with the moral imperative to be in the financial or other best interests of the persons concerned. Anyone who conceives 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 peculiary 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 monopoly of the market for the supply of 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 right 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 were however four further consideration 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".

Second, "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 of listeners" by publication.

Third, "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".

Fourth, "that some things are required to be disclosed in the public interest, in which case no confidence can be prayed in aid to keep them secrets."

Serious misdeeds or grave misconduct are just examples of a just cause and excuse for breaking a confidence.

With government information the onus lies with the Plaintiffs to satisfy the Court that it is in the public interest that publication be restrained. It is an essential ingredient of the remedy saught by the Plaintiffs that they establish in evidence that the public interest will suffer detriment if a permanent injunction is not granted: "Spycatcher case" per Lord Griffiths at page 651A. Lord Goff accepted that additional requirement upon the Crown and rationalised it thus at page 660 C/D-

> "The reason for this additional requirement in cases concerned with government secrets appears to be that, although in the case of private citizens there is a public interest that confidential information should as such be protected, in the case of government secrets the mere fact of confidentiality does not alone support such a conclusion, because in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism. From this it follows that, in such cases, there must be demonstrated some other public interest which requires that publication be restrained."

As already noted this was also the approach favoured by the Lord Chief Justice in the "Crossman Diaries" case and Mason J. in Fairfax.

The Cabinet Secretary in his evidence stated that government information remains confidential even after it has been wrongfully or illegally disclosed to a third party. He continued that there were cogent reasons why some documents were confidential such as those relating to Security or relations with Foreign Governments, but nowhere in government records could he discover any attempt to justify treating all government information as confidential. The "weight" of confidence differed from document to document but all were confidential and could not be released without proper authority. That was a practice of long-standing in Tonga. Publication of government information "could" have an adverse affect on government if its release was untimely; and it "could" affect negotiations with foreign governments and agencies. At one stage in examination-in-chief he ventured the opinion that any release of government information "would" have an effect on Government, but such a definite statement was unique, for throughout the rest of his testimony Mr Tufui proceeded with comendable care not to overstate the adverse effects of publication of the documents with which this case is concerned. He preferred "could" to "would". He was speaking of possibilities, not probabilities. His restrained language and the care he took in venturing opinions made him an impressive witness, and his testimony utterly reliable. But is it enough? He recognised that the Government was there to serve the people of Tonga. As to the effect on the Government of publication, early in cross-examination he stated that "apart from what I have said already... I cannot comment" on the effect on Government of publication of these documents. Near the end thereof he replied that the release of documents "could" sometimes, but not always, cause problems to Government. It very much depended on the nature of the documents involved. Some documents if published would cause great harm, and some no damage at all. "The release of every (government) document would not necessarily cause harm (to Government)". It was however embarrasing. The sort of harm he envisaged might occur was that -

(i) members of the Civil Service might not feel able to communicate with each other;

(ii) national security might be imperilled; and,

(iii) sensitive relationships with foreign states could be affected : they might not trust Tonga if confidential dealings with them could not be protected.

He did however recognise that other countries had the same problem of unauthorised disclosure as the Plaintiffs were founding upon in this case.

The Permanent Secretary of the Defence Department (Mr Pritchett) in Fairfax did not state that any particular document would be prejudicial to national defence, although he did state that their high security classification indicated that disclosure would be prejudicial to national security. Mr Tufui in this case also gave evidence that there were three security classifications in Tonga, "Top Secret", "Secret", and merely "Confidential". Productions 9, 10 and 23 cerainly have security implications. But they refer to an Intelligence Report marked "Secret" and dated 17th May 1991 which on any fair reading does not suggest that the security of the state or of the persons of their Majesties the King and Queen of Tonga was endangered by the limited publication made from the Report in KELE'A. On the basis of the evidence available to me I would adopt the same approach as Mason J. in Fairfax (page 53) namely -

> "I am not prepared to assume that publication of any of (Documents 9, 10, 23) will now prejudice national security, except perhaps in the limited sense . . . that publication might make other countries less willing to provide information on a confidential basis."

There was in fact insufficient evidence to entitle me to conclude that the public interest required future publication of government information to be restrained by injunction. I am not persuaded such relief is, in the language of Widgery LCJ in the "Crossman Diaries" Case, "necessary to ensure that restrictions are not imposed beyond the strict requirements of public need". Where is the detriment the state will suffer if an injunction is not granted? I look in vain for such evidence. I fully accept the evidence of the Cabinet Secretary that there is a possibility of adverse consequences for government if confidential government information becomes the subject of comment in the press, but that is not enough. There must be a real probability of or actual evidence of demonstrable harm before the Plaintiffs could satisfy the detriment test. In this case the Plaintiffs have not proved that essential element of their case, namely that the public interest will suffer detriment if a permanent injunction is refused.

CONSTITUTION

In paragraph 18 of my judgment in the case of Tonga Development Bank v Pohiva briefly I made certain remarks on Clause 7 of the Act of Constitution of Tonga (cap 2) hereinafter referred to as "the Constitution". In that case the Constitution had not been pled as a defence and my remarks thereon were plainly obiter. I have now heard extensive constitutional arguments in a case in which the Constitution was relied upon by the Defendant in his pleadings, which submissions persuade me that the views I expressed on the Constitution in that earlier case are less than a complete statement of the law and, in any event, inapplicable in the present context.

As a preliminary matter Counsel both submitted that I should interpret the Constitution "in the broad sense" and not narrowly or legalistically as might be appropriate with an Act of Parliament or Subordinate Legislative. This practice has previously been adopted in Tonga: Tu'itavake -v- Porter [1989 Tonga LR 14 and Pohiva -v- HRH Prince Tu'ipelehake (Case No.07/86, 6th May 1988 per Martin CJ). Shortly put the interpretation of a constitution involves special principles. It is unlike other written instruments affecting legal rights or obligations and should be construed "in the light of its subject-matter, and of the surrounding circumstances with reference to which it was made": Hinds -v- Regina [1976] 1 All E.R. 353 (Privy Council per Lord Diplock at page 359). It requires to be accorded a "generous interpretation" and should avoid what has been called "the austerity of tabulated legalism": Minister of Home Affairs -v- Fisher [1979] 3 All E.R. 21 (Privy Council per Lord Wilberforce delivering the judgment of the Board at page 25H). In that case he went on to say (page 26) that -

> "A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to its language.".

Similar views have been expressed elsewhere in the Pacific when interpreting local constitutions: Attorney-General (for Western Samoa) -v- Olomalu (Court of Appeal, Case No.5895/81, 20th August 1981); Henry -v- Attorney General (for the Cook Islands) (Court of Appeal, Case No.01/83, 19th April 1983); and Reference by the Queen's

Representative [1985] LRC (Constitutional) 56, another decision of the Cook Islands Court of Appeal. The Canadian and Australian approach is not dissimilar : James v Commonwealth of Australia [1936] 2 All E.R. 1449 (Privy Council); Attorney General for Ontario -v- Attorney General for Canada [1947] 1 All E.R. 137 (Privy Council); and Regina -v- Beauregard [1987] LRC (Constitutional) 180 (Supreme Court of Canada). Accordingly, I shall approach the interpretation of Clause 7 of the Constitution as suggested by counsel.

The Kingdom of Tonga acquired a written Constitution in 1875, in no small measure due to the efforts of H.M. King George Tupou I. In its original 1875 form Clause 7 declared that -

> "It shall be lawful for all people to speak, write, and print their minds and opinions, and no law shall be enacted to forbid this forever. There shall be freedom of speech and newspapers (Press) for ever. But this does not nullify the law relative to libel, and the law for the protection of His Majesty and the Royal Family."

That clause in its present form now reads -

> "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 defamation, official secrets of the law for the protection of the King and the Royal Family."

This right, which is entitled 'freedom of the press", was clearly intended to prevail unto eternity, hence the specific exclusion of any law designed to restrict the liberty of "all people to write and print their opinions." The first sentence of this Clause refers to opinions only, but there is no such qualifications in the second sentence. It is plainly intended that the freedoms declared in that sentence should be wider, covering matters such as facts and comment as well as opinion, except as specifically provided for. Thus freedom of speech and freedom of the press are constitutional rights to be enjoyed in Tonga for ever, except only that these freedoms cannot "outweigh" the law relating to defamation, official secrets or for the protection of the King and Royal Family. This case is not concerned with the first or the last of these exceptions, and as I have already decided that the Official Secrets Act is esentially a criminal statute then it is not concerned either with the second exception either for this is a civil action in which the Plaintiffs seek to rely on private law remedies. The insertion of the exception relating to "official secrets" was no doubt designed to ensure that in any prosecution brought under the Official Secrets Act an accused could not claim that Act was unconstitutional, a restriction on the rights granted under Clause 7 of the Constitution.

It should also be noted that until recently one of the exceptions was "slander". This was amended by Section 4 of the Act of Constitutionof Tonga (Amendment) Act 1990 (cap.23) by deleting "slander" and substituting therefor "defamation, official secrets". The original "libel" of 1875 became "slander" in 1975 and is now "defamation". At least these terms all relate to the same subject matter. The protection afforded to the Monarch and the Royal Family remains intact subject to the semantic substitution of "the King" for "His Majesty". The introduction of "official secrets" in 1990 was an innovation. The Constitution clearly envisages that there will be some exceptions to the constitutional right of freedom of speech and freedom of the press but these can be only such exceptions as are expressly set forth in the Constitution. There does not appear to me to be any

constitutional barrier to the list of exceptions being either removed in toto, restricted or augmented!

The Defendant relies upon Clause 7 as a defence claiming that it gives him the liberty to publish the government information with which this action is concerned. "Freedom of the Press" is not a term defined in the Constitution or in the Interpretation Act (cap.1). Such freedom is guaranteed by the Constitution, but exactly what this freedom comprehends is a matter left open to judicial interpretation. I am informed that this is the first case brought before the Supreme Court in which the press freedom provisions of Clause 7 have been pled and relied upon as a defence. Certainly I was cited no earlier Tongan authority on this topic. To what sources therefore should I pay heed. Given that I am dealing with a Constitution any information as to what the makers of that law intended would repay consideration. Having regard to the Civil Law Act (Cap.25) I am obliged to consider "the common law of England and the rules of equity, statutes of general application in force in England" (Section 3) but only insofar as the circumstances of the Kingdom of Tonga and its inhabitants permit and subject also to such qualification as may be necessary having regard to local circumstances (Section 4). The experience of the United States of America cannot entirely be ignored given the long experience of its Supreme Court in interpreting a written constitution and the voluminous jurisprudence which has been amassed on the meaning and effect of the First Amendment. Furthermore the Declaration of Rights provisions of the 1875 Tongan Constitution "followed very closely those of the Hawaiian Constitution of 1852" (Latukefu: "The Tongan Constitution" at page 45): Hawaii, a onetime independent monarchy is now a state of the United States.

In its reference to freedom of the press Clause 7 does not in my opinion do any more than to incorporate into Tonga, common law principles which have long prevailed in England, and were well recognised by 1875. This is perhaps none too surprising when one considers that the 1875 Constitution was designed to ensure "efficient administration as a means of attaining internal stability, and to encourage the recognition of the country's sovereignty by the main powers" as also to "safeguard the welfare of the country in perpetuity:" (Latukefu). The United States clearly thought that the basic freedoms it included in its constitution were no more than a restatement of English common law. Frankfurter J. in Denis -v- United States (1951) 341 US 494 approved the statement in Robertson -v- Baldwin (1897) 165 US 275 that -

> "the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."

That he regarded as 'the authentic view of the Bill of Rights and the spirit in which it must be construed . . ." Blackstone in his "Commentaries of the Laws of England" IV 151 recognised the need for a free press, describing it as an essential liberty -

> "The liberty of the press in indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right

> to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free : the abuse only of that free will is the object of legal punishment."

That approach is markedly similar to that adopted by Lord Mansfield in R -v- Shipley, 21 St. Tr. 847 at page 1040, namely freedom to print "without previous licence, subject to the consequences of law". All this is wholly consistent with the statement by Professor Street in "Freedom, the Individual and the Law" at page 101 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."

There can of course be no dubiety about the need for a free press. In the Spycatcher case Scott J. at page 589 considered the ability of the press freely to report allegations of scandals in government as "one of the bulwarks of our democratic society. It could not happen in totalitarian countries. If the price that has to be paid is the exposure of the government of the day to pressure or embarassment when mischievous and false allegations are made, then, in my opinion, that price must be paid". Lord Bridge (in the Privy Council) went somewhat further in Hector -v- Attorney General of Antigua and Barbuda [1990] 2 WLR 606 at page 608 -

> "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticisms amounts to political censorship of the most invidious and objectionable kind."

However, the freedoms enshrined in English Common Law are not absolute. "The right of fair comment is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom" : per Scott L.J. in Lyon -v- "Daily Telegraph" [1943] 1 K.B. at page 753. An editor has exactly the same rights, neither more nor less, than any other citizen : see Silkin -v- Beaverbrook Newspaper [1958] 1 W.L.R. 743 per Diplock J. at page 746. As with any journalist -

> ". . . his privilege is no other and no higher . . . the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of every other subject. No privilege attaches to his position." per Lord Shaw in Arnold -v- King-Emperor (1914) 83 L.J.P.C. at page 300.

That however is not to underestimate the crucial role played by the "Press" in modern society. It has ". . . a legitimate role in exposing scandal in Government. An open democratic society requires that to be so" : Attorney-General -v- "Observer" ("Times" Law Report, 22nd December 1987). As Martin CJ stated in Rex -v- Pohiva (Case No. 11/87, 15th January 1988) -

> "If a newspaper believes that wrong has been done it is right that it should report it.

But it must first take careful steps to ensure that what it alleges is true."

In "Spycatcher" at page 623 Bingham LJ makes reference to a distinguished American author, Archibald Cox who recently wrote in "Freedom of Expression" at page 4 that -

> "Freedom of expression, despite its primacy, can never be absolute . . . At any time unrestrained expression may conflict with important public or private interests . . . Some balancing is inescapable. The ultimate question is always, where has - and should - the balance be struck/"

How the balance will be struck will of course depend on all the facts and circumstances of each particular case.

This case is primarily concerned with the prevention of publication in the future of information yet to be "leaked" from sources within Government. The Plaintiffs on the basis of past experience clearly believe that such leaks will continue. I am sure they are right in that. Their fear is that without a permanent injunction publication of government information will continue. On the basis of the evidence I have not found that such a measure is necessary in the public interest. Even if I were wrong in so concluding (which I do not consider I am) is the Defendant still able to prevent me granting such an order by relying on Clause 7 of the Constitution? What in effect the Plaintiffs seek is prior restraint upon publication, something the Courts are reluctant to sanction except in exceptional circumstances. The protection of confidentiality in the private sector on cause shown is one such exception. Likewise government information at Common Law merits such protection if the public interest requires that such protection be afforded to the government. The guiding principle was put thus by Lord Scarman in Attorney-General -v- BBC [1980] 3 All E.R. 161 (House of Lords) at page 183 -

> "But the prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech [or of the press where the order is saught against the media] and should only be ordered where there is a substantial risk of grave injustice."

The words in brackets are my own. Of its own I do not consider that Clause 7 grants to the Defendant an absolute right to publish government information however it might come into his possession. In principle I see no Constitutional barrier to any newspaper, editor or journalist being restrained by injunction from inducing a public servant to procure confidential government information. If however the press come into possession of such information, as Cox suggests, a balance must be struck. The Common Law, and the language of the Clause, clearly amount to a presumption in favour of freedom, but in my opinion the language of Clause 7 does not prevent an injunction being granted against the press in an appropriate case. This is not one. On the evidence I am not persauded, on balance, that there are any public interest considerations which necessitate a permanent injunction being granted or grave injustice which would result if such an order was refused.

I am reinforced in my view that freedom of the press is not an absolute right when recourse is had to the American authorities cited by Counsel. The First Amendment states that the United States Congress cannot abridge the citizen's right to freedom of speech though legislation has in fact been enacted which purports to do exactly that: see an article by Ira Glasser "The American Civil Liberties Union and the Completion of the Bill of Rights" published in Grundman's the "Embattled Constitution : Vital Framework or Convenient Symbol" The American approach is generally to refuse an order for prior

restraint against anyone, including the press, except in circumstances of "clear and imminent danger". Even in his dissenting judgment in Abrams -v- United States (1919) 250 US 616 Holmes J at 627/8 conceded that "I do not doubt for a moment that . . . the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace . . ." He had little alternative than to say this given the decision in Schenck -v- United States, 249 US 47. The First Amendment gave the press the protection it was considered necessary for it to enjoy to fulfill its essential role in a democratic society. "It enacted that the freedom of the press, as one of the great bulwarks of liberty, shall be invisible." Yet despite its ex facie absolute terms the Supreme Court has frequently stated that this freedom is no more than a "heavy presumption" which can be overcome but only in exceptional circumstances. In the case of an application by Government for a prior restraint order there is imposed upon Government a "heavy burden of showing justification." Bantam Books Inc -v- Sullivan 372 US 58 and Austin -v- Keefe 402 US 415. The Government failed to meet that test in the infamous "Pentagon Papers" case, New York Times Company -v- United States (1971) 403 US 670. In Whitney -v- The State of California (1927) 274 US 357 the Supreme Court stated (373) that although certain constitutional rights such as the right of free speech were fundamental rights which could not be denied or abridged such rights -

> ". . . are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

The American experience is not too dissimilar from the position at common law. Government has no absolute right to prevent publication of its "secrets" or confidential information in the press unless it can first satisfy the Court that there is compelling justification in the particular circumstances for such a restriction on the liberty of the press. If they can in any case then Clause 7 would be no bar to such an order being made. The necessary justification has not been made out in this case.

The approach taken in the Crossman Diaries case and in Fairfax, the Court of Appeal in Spycatcher considered to be in accord with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4th November 1950), more popularly known as the "European Convention on Human Rights" : per Bingham LJ at page 627. It is instructive to note the terms of Article 10 thereof -

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing, of broadcasting, television or cinema enterprises."

(2) The exercise of these freedoms, since it carries with it duties and responsibilites, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of

> disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary."

I must demur at accepting in its entirely Bingham LJ's assertion that Article 10 coincides with common law. It is certainly an elegant statement which more or less restates common law, but it neglects to give prominence to the key provision that no permanent injunction will be granted to a state unless necessitated in the public interest. Had Clause 7 of the Constitution been drafted along the lines of Article 10, which includes a specific provision about information received in confidence, then the legal arguments in this case would have been markedly different and I reserve my position as to the outcome. On this subject the former Fijian Protection of Fundamental Rights and Freedom of the Individual Decree, 1988 contained a provision at Section 11 (3) excepting from the general right to the enjoyment of freedom of expression ("that is to say freedom to hold opinions and to receive and impart ideas and information without interference") any rules made "for the purpose of . . . preventing the disclosure (of information) received in confidence." That is an express provision akin to that included within Article 10.

DISCLOSURE

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 Courts : H.M. Advocate -v- Airs 1975 J.C. 64; Attorney General -v- Clough [1963] 1 All E.R. 420; British Steel Corporation -v- Granada 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 identify 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."

The Plaintiffs certainly wish to stop the leakage of confidential government information and for that purpose need to know the indentity of their disloyal employee. Only then can they comtemplate his dismissal, prosecution under the Official Secrets Act, or civil proceedings against him (a) arising out of his misconduct and (b) to prevent a repetition of his wrongdoing. The phrase "the interests of justice" now means that legal proceedings must be contemplated: see Handmade Films (Productions) Limited -v- Express Newspaper plc [1986] FSR 463 per Browne - Wilkinson V-C. Hoffman J. in Re Goodwin [1990] 1 All E.R. 608 took the same approach. In this case the Cabinet Secretary did not give unequivocal evidence that legal proceedings were contemplated against the miscreant

when his identity was known. I shall therefore refuse to make a Disclosure Order. In the circumstances I do not require to consider whether or not I could grant such as Order having refused to grant the primary relief of a permanent injunction.

ORDER

Accordingly, I shall dismiss the Plaintiffs' action. Costs will follow success. I shall therefore make an ORDER in the following term -

IT IS ORDERED AND ADJUDGED THAT (FIRST) the Plaintiffs' action be dismissed and (SECOND) the Plaintiffs be found liable to the Defendant in Costs as same shall be agreed or as taxed by the Court.