FIJI PUBLIC SERVICE CREDIT UNION

v.

FIJI TIMES LIMITED
ALAN ROBINSON
SAMISONI KAKAIVALU

[HIGH COURT, 1996 (Pain J) 4 September]

Civil Jurisdiction

Equity- breach of confidence- publication of allegation of improper conduct by officers of credit union- whether to be restrained by injunction- defence of public interest.

The Defendants published allegations that officers of a credit union had improperly obtained loans from the union. The union sought to restrain further publication on the ground that the materials published were confidential. The Defendants failed to establish that the loans were in breach of the union's by-laws. Granting the injunction sought, the High Court stressed that the public interest in the disclosure of misdeeds had carefully to be balanced against the public interest in maintaining the duty of confidence.

Cases cited:

American Cyanamid Co. v Ethicon Ltd. [1975] AC 396
British Steel Corporation v Granada Television Ltd. [1981] AC 1096
Distillers Co. (Biochemicals) Ltd. v Times Newspapers Ltd. [1975] 1 Q.B. 613
Femis-Bank (Anguilla). Ltd. & Ors. v Lazar & Anr. [1991] 2 All ER 865
Fraser v Evans & Ors [1969] 1 QB 349
Initial Services Ltd. v Putterill Anr [1968] 1 QB 396
Lion Laboratories Ltd. v Evans & Ors. [1985] 1 QB 526
Schering Chemicals Ltd. v Falkman Ltd. & Ors. [1982] 1 QB 1
Woodward & Ors v Hutchins & Ors [1977] 1 WLR 760

Interlocutory application in the High Court.

R. Matebalavu for Plaintiff
R. Naidu for Defendants

Pain J:

The Plaintiff is a credit union registered under the provisions of the Credit Unions Act. The first named Defendant company is the owner of a daily newspaper called the Fiji Times. The second and third named defendants are respectively. the publisher and editor of that newspaper.

The plaintiff commenced proceedings by way of writ against the defendants. The statement of claim alleges that the defendants published confidential information of the plaintiff, in particular details of shareholdings and borrowings of officers and members of the plaintiff credit union. The plaintiff alleges that such publication was unlawful and in breach of a duty of confidence and trust owed by the defendants to the plaintiff and has caused loss and damage to the plaintiff. The plaintiff seeks final relief of an injunction restraining the defendants from further publication and damages. The defendants have filed a defence that denies the substantive allegations of the plaintiff and affirmatively pleads that any publications justified in the public interest.

The plaintiff also filed an ex parte motion for an interlocutory injunction restraining the defendants from further publishing such confidential information until further order of the court. The Court determined that the application should be heard inter partes. As an early hearing could not be given an interim injunction was made restraining further publication until the determination of the application after an inter partes hearing. I have carefully considered the affidavits filed by both parties and the submissions made by counsel at the inter partes hearing.

The plaintiff is registered under the provisions of the Credit Unions Act (Cap. 251). Every credit union has a capital that is "unlimited in amount and shall be divided into shares of a par value of not less than $2 each" which "may be purchased outright or by instalments" by members and "shareholders shall receive dividends only on fully paid up shares" (Sections 12, 13 & 14). In terms of Section 16 the principal object of a credit union is "to promote thrift among its members" This is done by "receiving savings from members either as payment on shares or as deposits". The credit union is also empowered "to make loans to members exclusively for provident or productive purposes" Section 22 provides for the election of a board of directors of not less than 5 members, a credit committee of not less than 3 members and a supervisory committee of three members. The powers and duties of these officers are prescribed in Sections 26 (Directors), 27 (Credit Committee) and 34 (Supervisory Committee). In essence, the Directors make the policy decisions, the Credit Committee approves loans and the supervisory committee regularly examines the affairs of the credit union and audits its books.

A credit union also has by-laws. These may be the standard by-laws prepared by the Registrar of Credit Unions and approved by the Minister or supplementary by-laws adopted by the credit union at a general meeting and approved by the Registrar (Section 11 Credit Unions Act). In this case a copy of the plaintiffs supplementary by-laws are annexure E to the affidavit of the third named defendant sworn on the 29th May 1996.

The basic facts in this case are not disputed. An employee of the plaintiff credit union provided the defendants with 33 pages of computer printouts which are

attached to the affidavit of the third named defendant as annexure F. These show the monthly contributions, shareholdings and loan balances of some of the members of the plaintiff credit union including all members of the Board of Directors, Credit Committee and Supervisory Committee. On six occasions over the period from 30th April 1996 to 9th May 1996 the defendants published articles in the Fiji Times newspaper which alleged a "loan scandal" involving officers and members of the plaintiff "taking out extra loans well above their shares". Those articles included details taken from the computer printouts of the 6 Directors, 3 members of the Credit Committee, 3 members of the Supervisory Committee and 15 other members. By way of example, the first person identified in the first article was the chairman of the Board of Directors and particulars were given of a shareholding of $2,179 and a loan balance of $48,845. The various articles also gave further details about particular members such as recent advances made to them and their monthly payments to the plaintiff. For instance, it was highlighted that a named Director had a loan of $59,415 and was making payments of only $9.75 per month.

Counsel for the plaintiff submits that the information contained in the 33 pages of computer printouts obtained by the defendants is confidential to the plaintiff. Its disclosure to the defendants was in breach of confidence owed to the plaintiff by the employee who disclosed it. These circumstances give rise to a duty of confidence owed by the defendants to the plaintiff. There is no circumstance justifying publication in the public interest. The principles in American Cyanamid Co. v Ethicon Ltd. [1975] AC 396 favour the granting of an interim injunction to the plaintiff restraining further publication.

Counsel for the defendants accepts that the information is confidential in nature but submits that the defendants can raise a defence that the public interest in disclosing the information outweighs the interest of the plaintiff in keeping it confidential.

I appreciate the comprehensive submissions made by both counsel and the copies of relevant authorities supplied by them. All these have been considered and taken into account but is unnecessary and impracticable to refer to every argument and decision in detail.

The law on this topic was succintly expressed by Lord Denning almost 30 years ago. In Initial Services Ltd. v Putterill Anr [1968] 1 QB 396 he said at pages 405 and 406:

> "In support of the appeal, Mr. Michael Kerr said that in the employment of every servant there is implied an obligation that he will not, before or after his service, disclose information or documents which he has received in confidence. Now I quite agree that there is an obligation. It is imposed by law. But it is subject to exceptions ....."

A

> [The exception] "extends to any misconduct ..... of such a nature that it ought in the public interest to be disclosed to others ...."

> "The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest".

B

> "The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press".

C

This exposition of the law has been approved and applied in later cases (see for instance Fraser v Evans & ors [1969] 1 QB 349 and Lion Laboratories Ltd. v Evans & ors [1985] QB 526.)

D

An action for a breach of confidence (by disclosing the information) lies at the suit of the person to whom such confidence is owed against the person who is in breach of the duty including any subsequent recipient of the information who, with knowledge of the confidence, makes disclosure. Remedies that are available include damages, an order for return of the information and an injunction (including an interim injunction] to restrain disclosure of the information. It is a defence to such a claim that disclosure is justified in the public interest (Fraser v Evans & ors [1969] 1 QB 349; Schering Chemicals Ltd. v Falkman Ltd. & ors. [1982] 1 QB; Lion Laboratories Ltd. v Evans & ors. [1985] 1 QB 526 and Femis-Bank (Anguilla) Ltd. & ors. v Lazar & anor. [1991] 2 All ER 865).

E

F

In the present case the defendants have been provided with pages of computer printouts relating to the accounts of approximately 400 members with the plaintiff credit union. Copies are attached as Exhibit F to the affidavit of the third named defendant. These give details of (inter alia) each member's shareholding, loan balance and monthly contribution. The printouts are undoubtably part of the records of the plaintiff and contain personal financial details of its members. They comprise confidential information and this is properly conceded by counsel for the defendants. The defendants are under a duty of confidence to the plaintiff not to disclose this information.

G

The defendants raise the defence of public interest. It is not necessary for the defendants to prove the defence at this interlocutory stage. They need merely show that they have an arguable defence. That means "a serious defence of

public interest which may succeed - not, of course, will succeed - at the trial" (Stephenson LJ, Lion Laboratories Ltd. v Evans & ors [1985] 1 QB 526, 538). If that is shown, then the Court must conduct a balancing exercise to determine whether publication should be restrained at this stage.

Counsel for the defendants submits that the elected officials of the plaintiff credit union, by granting large loans to themselves and others, have been acting outside their own by-laws and contrary to prudent lending guidelines. Such mismanagement (if not misconduct) ought, in the public interest, to be disclosed for the information of the plaintiffs 8,000 present members and potential members. It is submitted that there is also a wider public interest of ensuring that financial institutions are properly managed.

Counsel for the plaintiff submits that the affairs of the plaintiff credit union have been properly managed and there is no public interest that would justify the disclosure of identity and loan details of officials and members. The defendants have improper motives for publishing this information and the proper place for any concerns to be raised is at a General Meeting of the plaintiff credit union.

The nature of the public interest claimed by the defendants for disclosure of the confidential financial information can best be gauged from a consideration of the articles that have already been published on six separate days. These are annexed as exhibits to the first affidavit of Josaia Taka. The headlines for the first article published on 30th April 1996 state "Credit Union Loan Scandal Revealed - Figures Show Senior Public Servants Overdrew Shares". The article says that "Senior civil servants who are members of the Fiji Public Service Credit Union, are involved in a loans scandal involving overdrawn shares totalling over $1.3 million". Several examples are given, for instance, "The biggest loan balance belongs to a director whose share is $7,185 but who owes $99,925". The article then says "other civil servants including two permanent secretaries and senior officials in the Public Service Commission were given loans which exceeded their shares by at least 5 to 7 times". The article also includes a prominent table with columns giving the name of each Board member, the value of shares held and loan balance.

The subsequent articles contain considerable repetition and regurgitation of the same facts and allegations. An illustration is the continual reference (as in the article published on 3rd May 1996) to the "scandal involving senior civil servants who had taken out huge loans from the FPSCU. The big loans were about $1.3 million above what the respective members held as their shares". It is also said in the same article that "The list of those who took overdrawn loans include all directors some of whom have loans exceeding their shares by as much as 1500 per cent". Interspersed throughout the articles are tables showing the names, shareholdings and loan balances of all officials of the plaintiff credit union and 15 other members. In each case the loan balance is considerably greater than the share value.

In every case where confidential information has been disclosed by the defendants the amount of the loan has been contrasted with the shareholding of the member. It is the disparity between the two that is identified as the scandal.

Some other alleged irregularities are mentioned such as the granting of a loan to a particular member who had retired from the civil service and additional advances having been made to members who had outstanding loans. The articles also include other matters such as extracts from an audit report and statements from the general secretary of the Public Service Association the general manager of the Fiji Credit Union League and unnamed members of the plaintiff credit union. However the dominant and virtually exclusive use of the plaintiff's confidential information is to contrast the amount of the loan with the amount of the shares held by the particular member. The excess of loans over the shares is described as a "loan scandal involving overdrawn shares". It is the disclosure of the confidential information on this basis that the defendants are seeking to justify as a matter of public interest. This necessarily involves an assertion that lending by the plaintiff must be related to the shareholding of a member. Loans in excess of shareholding are unauthorised.

The defendants assert that clause 75.2(c) of the plaintiff's Supplementary By-Laws prescribes this restrictive lending policy. This states:

> "Secured loans may be granted in excess of $200 of a member's savings. The above formula will only be applicable where a member has clear savings. In a case of previously outstanding loan a netting effect will be applied, provided that the Board for good reason considers and approves loans as it deems fit."

This somewhat abstrusely worded clause is difficult to comprehend and falls far short of establishing an unequivocal policy regarding the ratio required between a loan and shareholding. It appears to say that security should be provided for loans of more than $200 in excess of a members shareholding. However that appears to be subject to the discretion of the Board to approve loans as it deems fit. It is also subject to the provisions of the Credit Unions Act and should be considered with other provisions contained in the Supplementary By-Laws.

Neither the Credit Unions Act nor the Supplementary By Laws prohibits loans being granted for amounts in excess of a members shareholding. They lay down general rules, policy and practice for loans. For instance

(a) The Board of Directors determines the maximum loan, with or without security, and the rate of interest (Section 26 of the Act and Rules 39 and 62 of the By laws)

(b) The Credit Committee, subject to directions of the Board,

reviews loan applications, approves loans, fixes the amounts of loans, fixes the terms of repayment and determines the security, if any, to be provided (Sections 27 and 29 of Act and Rules 51, 53 and 55 of the By Laws).

(c) Loans to members are to be for provident or productive purposes (Section 28 of Act and Rule 61 of By Laws)

(d) To maintain a sound liquidity, the Credit Committee must ensure that the plaintiffs total deposits are always greater than a figure calculated by deducting the total amount of loans from the total of members shares (Rule 54 of By Laws).

Moreover there are provisions in the Credit Unions Act and By-Laws which show that it is acceptable for a member to be granted a loan in excess of his shareholding. Thus

(i) Section 30 of the Act provides that no officer of the Board, Credit Committee or Supervisory Committee shall be allowed to borrow in excess of the value of his shares except with the approval of the other members of the Board, Credit Committee and Supervisory Committee. This is an express authorisation for such officers to borrow in excess of their shareholdings with approval. It is clearly intended as a safeguard and check in respect of loans obtained by officers. The corollary to this requirement is that other members can borrow sums in excess of their shareholdings without any approval being needed.

(ii) Rule 10 of the By Laws provides that a member who retires the field of membership may retain his personal membership but will not be eligible to borrow in excess of his shareholding. This clearly indicates that members are otherwise permitted to borrow in excess of their shareholdings. This rule also provides that a member who resigns from the public service shall lose his membership and (inter alia) if his outstanding loan balance is more than his shareholding, immediate recovery action will be commenced. Again, this is clear recognition of a members ability to borrow in excess of his shareholding.

There is also evidence that, in practice, the plaintiff regularly allows loan advances to exceed shareholdings. The defendants have produced 33 pages of computer print-out records of the plaintiff. A perusal of the entries shows that many members have loan balances that exceed their shareholdings. No analysis of those records has been done by either party. However, by way of illustration, a close

study of the first 100 entries with loan balances shows that approximately one-third of those members have loan balances of a sum less than their respective shareholdings, approximately one-third have loan balances moderately in excess of shareholdings and approximately one-third have loan balances significantly in excess of shareholdings.

Having regard to all the matters that have been mentioned, on the basis of the evidence presently before the Court, the defendants have not shown a serious defence of public interest on the ground that the plaintiff has been granting loans in excess of a members shareholding which is contrary to the By-Laws and unauthorised. That is the specific issue and justification raised by the defendants in the articles that were published.

Counsel for the defendants submitted that, even if no breach of the By-Laws has been established there are wider issues of public interest that should be considered. This relates to the substantial borrowings by all officials and some other members. It is submitted that prudent lending guidelines have not been observed, particularly in relation to repayments of loans. The apparent ease with which officials obtain large loans for themselves and grant them to some other members amounts to a betrayal of trust on the part of the officials which ought to be exposed in the public interest.

Certainly there are some matters which give rise to a feeling of disquiet that has not been allayed by the plaintiff. For instance:

- The very substantial loans to every board and committee member. Such loans would have required specific approval pursuant to Section 30 of the Credit Unions Act and adequate security could be expected as a matter of prudence.

- An instance of a loan being made to an official which would appear to be prohibited by Rule 10 of the By laws as he has resigned from the Public Service.

- Instances of loans where it appears that inadequate repayments are being made.

- Statements in reports and brochures. For example the statement of the Credit Committee in the 1995 Annual Report that "applications for large loans for houses, cars etc. were not entertained".

- The absence of any information regarding the plaintiffs lending policies and security requirements particularly those determined by the Board pursuant to Section 26 of the Credit Unions Act and Rules 39 and 62 of the By-Laws.

These various matters reflect adversely on the plaintiff and its officers. However, the onus is on the defendants to show an arguable defence of public interest and this can only be determined on the basis of the evidence presently before the Court. In their totality, these divers matters arouse suspicion, but give only tenuous support for the allegations of misconduct and betrayal of trust made by the defendants.

Even if the evidence was sufficient to support the wider public interest claim made by the defendants, it would still be necessary for the Court to consider that public interest in publication against the public interest in confidentiality being maintained. In Lion Laboratories Ltd. v Evans & ors [1985] 1 QB 526 Lord Justice Stephenson expressed this (at page 536-7):

> "The problem before the judge and before this court is how best to resolve, before trial, a conflict of two competing public interests. The first public interest is 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.
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> There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has 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".

Lord Denning MR succintly expressed this issue in Woodward & Ors v Hutchins & ors [1977] 1 WLR 760 at page 764 as:

> "In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth."

By way of illustration the balance in Lion Laboratories Ltd. v Evans & ors (supra) came down in favour of publication of confidential information which raised serious doubts about the reliability of an instrument being widely used by the police to obtain convictions under the breath/alcohol legislation. However in Distillers Co. (Biochemicals) Ltd. v Times Newspapers Ltd. [1975] 1 Q.B. 613

an interlocutory injunction was granted to restrain publication of confidential information regarding the effects of the use of the drug thalidomide which was acknowledged to be a matter of public interest.

There is a strong public interest in the maintenance of confidentiality of private information. A powerful case is needed to justify publication in the public interest. In Lion Laboratories Ltd. v Evans & ors (supra) such a case was found to be made out for publication but the principle was stated by Lord Justice Griffiths at page 551:

> "When there is an admitted breach of confidence and breach of copyright, there will usually be a powerful case for maintaining the status quo by the grant of an interlocutory injunction to restrain publication until trial of the action. It will, I judge, be an exceptional case in which a defence of public interest which does not involve iniquity on the part of the plaintiff will justify refusing the injunction."

In the same case Lord Justice Stephenson (at page 539) cited with approval a passage from the speech of Lord Fraser in British Steel Corporation v Granada Television Ltd. [1981] AC 1096 which included:

> "No doubt there is a public interest in maintaining the free flow of information to the press and therefore against obstructing informers. But there is also I think a very strong public interest in preserving confidentiality within any organisation, in order that it can operate efficiently, and also be free from suspicion that it is harbouring disloyal employees."

In my view the strong public interest in maintaining confidentiality is especially pertinent to financial and banking records. Citizens expect, and should be entitled, to conduct their personal financial affairs with a bank or institution of their choice, confident that those affairs shall remain confidential. It would require a very powerful counter balancing public interest to justify publication of those personal financial dealings, particularly if the transactions are not shown to be tainted with iniquity. It would require an exceptional circumstance to justify publication of financial business that a customer has transacted in a proper manner.

In the present case there must be a strong public interest in maintaining the confidentiality of members financial dealings with their own credit union. Publication should be restrained unless the balancing exercise shows a very strong countervailing interest of the public in being informed. On the evidence presently before court this has not been done. This is not a case like, for instance, Femis-Bank (Anguilla). Ltd. & Ors. v Lazar & anor. [1991] 2 All ER 865 where the court refused an injunction to restrain the defendants from disclosing wrong

doing in the plaintiff bank to various banking, fiscal and prosecutory authorities. In this case the defendants do not seek to inform the appropriate authorities of alleged wrongdoing but are intent on publishing to the general public details of loans made by the plaintiff to its members.

Allegations have been made that the officers of the plaintiff have granted themselves substantial loans contrary to the By-Laws and details of their loans have been published. Such iniquity, if shown, might raise sufficient public interest for publication of that information. Questionable self-serving actions of officers of financial institutions might warrant public scrutiny. However, as earlier stated, only tenuous evidence has been presented in support of the allegations. In respect of loans made to other members, there is no evidence to suggest that those members have, themselves, been guilty of misconduct which justifies publication of their names and details of their confidential transactions. Such information concerning some of them who hold important positions in the community may be "interesting" to the public. But as Lord Wilberforce said in British Steel Corporation v Granada Television Ltd. (supra) at page 1168 "there is a wide difference between what is interesting to the public and what it is in the public interest to make known".

To the extent that there may be in this case, competing public interest considerations of confidentiality and publication the balance falls clearly on the side of confidentiality. On the evidence presently before the court, the defendants have not shown sufficient grounds to outweigh the strong public interest in preserving confidentiality.

In summary, the findings of the court are:

1. The information regarding details of loans made by the plaintiff to its members and contained in the computer printouts attached as Exhibit F to the affidavit of Samisoni Kakaivalu is confidential information. In the public interest such confidentiality should be maintained.

2. The defendants have not shown a serious defence of public interest for publication of the information on the ground that the plaintiff has been granting loans contrary to its By-Laws. This was the specific justification given in the published articles.

3. The other matters submitted by the defendants as raising wider grounds of public interest arouse suspicion but give only tenuous support for the allegations of betrayal of trust and misconduct on the part of officers of the plaintiff.

4. The public interest of confidentiality clearly outweighs any public interest in publication that has been raised on the evidence before the Court.

Accordingly the interim injunction restraining further publication should be continued until the determination of the substantive action or further order of the Court.

Counsel for the defendants takes issue with the form of the present interim order. I agree that it is too broad. It must specifically relate to the information that is the subject of this action. There is nothing to suggest that the defendants are about to publish further or other confidential information of the plaintiff and its members.

I therefore make the following orders:

1. The interim injunction in this action granted against the defendants on the 10th May 1996 is dissolved.

2. An interlocutory injunction restraining the first, second and third named defendants themselves or by their servants or agents or otherwise, from disclosing or publishing in any manner whatsoever any confidential information of the plaintiff comprising the name of any member of the plaintiff credit union and/or any details of the contributions, shareholdings, share purchases, loans, loan balances, loan repayments and interest payments of any member until the final determination of this action or further order of the Court.

3. The plaintiff is entitled to costs on this application which shall be costs in the cause.

(Application granted.)