

BURNS PHILP (FIJI) LTD.

v.

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1. **ASSOCIATED MEDIA LTD.**
2. **YASHWANT GAUNDER**
3. **SHAIENDRA SINGH**
4. **TAMARISI DIGITAKI**

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[HIGH COURT, 1998 (Fatiaki J) 3 July]

Civil Jurisdiction

Defamation- grant of injunction to restrain further publication- principles governing.

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The Plaintiff company sought to restrain further publication of allegations that it was about to be taken over. The High Court refused the application. It explained that such injunctions will be refused save in the clearest cases and where irreparable harm would otherwise result. When the Defendant intended to justify publication on the grounds of truth or fair comment an injunction will ordinarily be refused.

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Cases cited:

Coulson v. Coulson (1887) 3 T.L.R. 846

Frazer v. Evans [1969] Q.B. 349

Khashoggi v. IPC Magazines Ltd. [1986] 1 W.L.R. 1412

London Artists Ltd. v. Littler [1969] 2 Q.B. 375

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Interlocutory application in the High Court.

G.P. Lala for the Plaintiff

A.H.C.T. Gates for the Defendants

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Fatiaki J:

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This is an opposed application for an interlocutory injunction sought by the plaintiff company against the defendants that they "... be restrained ... from further publishing any matter concerning a proposed sale of any of its assets to Courts (a furnishing company) or any other person or corporation pending the trial of this action ...". In its Writ filed with the application the plaintiff company claims an injunction and damages for defamation arising out of the contents of an article published by the defendants in the June edition of "The Review" magazine a monthly publication of the first defendant company.

The offending article is entitled "Sale of the Decade" and concerns the proposed sale of the plaintiff company to Courts for an estimated sum of seven million dollars. In its Statement of Claim no less than seven passages are extracted from the article, all of which, the plaintiff company claims, were published falsely and maliciously.

I do not propose to set out the so-called objectionable passages in this instance and would only observe that in three instances [paras. 6(a), (c) & (d)] the article uses words such as "reputed", "likely to see" and "around the same time"; another two passages [paras. 6(d) & (f)] appear to have been taken out of context in so far as they relate to an overseas principal of the plaintiff company; and the remaining three extracts [paras. 6(b), (e) & (g)] do not appear to refer to the plaintiff company either at all or in a defamatory manner.

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The second defendant, the publisher of "The Review" magazine, in opposing the grant of the injunction deposes in his affidavit that :

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"... statements in relation to the sale, redundancies, profitability and the future of the business were made by way of comment. It is denied they were untrue or that they were made maliciously or dishonestly"

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and further :

"... that all the defendants have defences to the Statement of Claim of justification and fair comment open to them"

and lastly :

"... the article complained of consisted of matters of public interest upon which comment was made which was fair and which was not made dishonestly or maliciously ..."

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Quite plainly the defendants in this case propose to raise in their defence to the plaintiff's claim, the well-known defences of fair comment and justification.

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In respect of both of these defences the Defamation Act (Cap. 34) provides in Sections 15 and 16, that neither defence shall fail by reason only that the truth of every charge or of every allegation of fact is not proved, if the words not proved to be true by way of justification do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges, or, if the expression of opinion is fair comment, having regard to such of the facts alleged or referred to in the words complained of as are proved.

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That this Court has the necessary jurisdiction to restrain the publication or continued publication of a libel has been settled since Coulson v. Coulson (1887) 3 T.L.R. 846 where Lord Esher M.R. whilst affirming the jurisdiction, nevertheless, described it, as '... a most delicate jurisdiction ...' and '... only to be exercised in the clearest case' where irreparable harm would be done to the plaintiff.

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Indeed so delicate is the jurisdiction that a well-established rule of law has developed where the court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established

for many years since Bonnard v. Perryman, per Lord Denning M.R. in Frazer v. Evans [1969] Q.B. 349 at 360.

A The ambit of this rule of law is illustrated by the case of Khashoggi v. IPC Magazines Ltd. [1986] 1 W.L.R. 1412 where the Court of Appeal (E & W) in setting aside the injunction granted in that case at first instance where the defendant had pleaded justification:-

B “HELD: ... the (rule of law) extended to the situation where the defendant intended to justify the common sting of several allegations, including the allegation complained of, even though it might not be able to prove the particular facts contained in that allegation:”

C Needless to say in exercising its discretion whether or not to grant such an injunction as that sought by the plaintiff company, this Court is obliged to balance the defendants’ constitutional right to freedom of expression against the plaintiff’s right to protect its reputation from the publication of defamatory material.

D In this latter regard it is noteworthy that counsel for the plaintiff company was not so much concerned at the alleged libel committed against the plaintiff company by the offending article as he was, with maintaining absolute confidentiality and secrecy in the highly sensitive negotiations being undertaken with a view to the eventual takeover or purchase of the plaintiff company.

E In the light of the foregoing, the onus on an applicant for an injunction to restrain publication of an allegedly defamatory article is an onerous one to discharge moreso, at an interlocutory stage. “The Court must be satisfied that in all probability the alleged libel is untrue” (per Lord Esher op. cit.).

F *A fortiori* where the injunction is sought after publication, when it might be said that the damage has already been done, and, where there is no evidence or grounds upon which the Court can infer that the defendants threaten or intend to continue publication of the article.

G I am also mindful of the breadth of the injunction sought in the plaintiff company’s motion which, if granted, would effectively render the subject-matter of the article (not the allegedly defamatory words used in it) completely out-of-bounds to the defendants. Such an injunction would be a severe and, in my view, an unwarranted curtailment of the defendants’ constitutional freedom of expression which includes the “freedom to receive and impart ideas and information without interference”.

The sale of one of the oldest and largest publicly-listed trading companies in Fiji is undoubtedly a matter of legitimate public interest and concern. Not only to its many employees and shareholders but also its creditors and customers who may still have outstanding hire purchase accounts with it. It is therefore legitimate subject-matter for the news media to write about and

comment upon.

As was said by Lord Denning M.R. in London Artists Ltd. v. Littler [1969] 2 Q.B. 375 at p.391 :

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“There is no definition in the books as to what is a matter of public interest ... I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.”

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Needless to say the readership of “The Review” magazine which retails at \$5 per copy is unlikely to be the same as that which reads the daily newspapers and is likely therefore to be a more discerning and discriminating one.

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In the light of the foregoing and after having carefully considered the affidavit evidence provided by the parties and the respective submissions of their counsel, I am not satisfied that this would be an appropriate case to depart from the established rule of law.

The application is accordingly refused with costs.

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(Application dismissed.)