IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2007: No. 196

BETWEEN:

EWART F. BROWN

Plaintiff

-and-

BERMUDA PRESS (HOLDINGS) LTD.

First Defendant

THE ROYAL GAZETTE LIMITED

Second Defendant

TIM HODGSON

Third Defendant

WILLIAM ZUILL

Fourth Defendant

CHRISTIAN DUNLEAVY

Fifth Defendant

RULING

Date: November 6, 2007

Mr. Charles Richardson, Juris Law Chambers, for the Plaintiff
Mr. Saul Froomkin, Mello Jones & Martin, for the Defendant

Background

1. The Plaintiff is the Premier of Bermuda who, it is a notorious fact, called a General Election on Friday, November 2, 2007, only a few days before the present application was (pursuant to a Consent Order dated October 25, 2007) scheduled to be heard. In these circumstances, it is necessary to have regard to the history of the present action, and related proceedings which have some significance to the present application.

2. The Plaintiff issued a Generally Indorsed Writ of Summons against the Defendants on July 20, 2007, principally seeking damages for libel in relation to articles relating to an alleged Bermuda Police Service investigation into the affairs of the Bermuda Housing Corporation. Paragraph (4) of the prayer sought a

permanent and interim injunction restraining the Defendants from publishing further material relating to this injunction. On August 1, 2007, an appearance was entered on behalf of all Defendants.

3. On August 17, 2007, a Statement of Claim was filed, and on August 23, 2007, an Amended Statement of Claim was also filed by the Plaintiff. On September 20, 2007, the Defendants requested Further and Better Particulars of the Statement of Claim which have not yet (seemingly) been supplied.

4. On October 19, 2007, an Ex Parte on Notice application for an interim injunction was filed by the Plaintiff supported by the First Affidavit of his counsel, Mr. Charles Richardson. This application was issued by the Court on October 22, 2007, returnable for October 25, 2007. According to paragraph 24 of the First Richardson Affidavit, the Plaintiff sought an order "*restraining these Defendants from publishing or otherwise disseminating any of the contents of the alleged police dossier insofar as they relate to him and except that portion or those portions of the said information already circulated to the general public…from the 1st June, 2007.*"

5. The Plaintiff's interim injunction application explicitly related to the same material ("the BHC dossier") which had at this point been the subject of an unsuccessful interim injunction application: *Attorney-General and Commissioner for Police –v-Bermuda Broadcasting Company Ltd. et al* [2007] Bda LR 40 (Chief Justice); *Attorney-General and Commissioner for Police –v-Bermuda Broadcasting Company Ltd. et al*, Court of Appeal for Bermuda Civil Appeal 2007: 13, Judgment dated June 25, 2007. However, the view was expressed in counsel's affidavit that these judgments (made in support of breach of confidentiality as opposed to defamation claims) explicitly suggested that different principles might apply in the defamation context.

6. On October 23, 2007, the Defendants applied to adjourn the October 25, 2007 interim injunction application on the grounds that both counsel with the conduct of the matter would be en route to London for the October 29, 2007 Privy Council appeal of the Commissioner for Police and Attorney-General against the refusals of their interlocutory injunction applications in relation to the BHC dossier. Mr. Attridge conceded that he was only holding for Mr. Richardson, who was himself en route to London in connection with the same Privy Council hearing. I adjourned the matter for mention on November 2, 2007, with a view to the matter being heard on either November 2, 2007 or November 6, 2007 whichever was most convenient to counsel on both sides. The matter was eventually fixed by consent for November 6, 2007. In the course of the hearing I expressed my preliminary doubts about whether a legal basis existed for seeking to restrain publication of allegedly defamatory material in the public interest context.

7. It is now also a notorious fact that on October 29, 2007, the Privy Council dismissed the appeal of the Commissioner of Police and the Attorney-General. This result was hardly surprising, because in their July 11, 2007 reasons for granting on June 26, 2006 an interim injunction pending appeal, their Lordships observed ([2007] UKPC 46, page 4):

> "*Their Lordships made clear to Mr Guthrie, and think it right to repeat here, that if there had been full inter partes argument it might have taken a good deal to persuade them that the Chief Justice erred in the exercise of his discretion, and that the Court of Appeal was wrong to dismiss the appeal.*"

8. On November 5, 2007 at 3.00pm, the Fourth Defendant filed his First Affidavit deposing to the fact that once Further and Better Particulars of the Statement of Claim are supplied, he expects on advice to file a defence "*based upon qualified privilege and fair comment, inter alia.*" At around 3.20 pm that same day, the Plaintiff filed his First Affidavit together with the Second Affidavit of Charles Richardson and Further and Better Particulars of the Statement of Claim. A

covering letter notified the Court of the fact that the Plaintiff intended to seek an adjournment of his interim injunction application to afford himself an opportunity to obtain from the Commissioner of Police and consider the "*entire BHC police dossier*". The Second Richardson Affidavit further (a) suggests that this Court would benefit from the Privy Council's reasons (yet to be delivered) before adjudicating the plaintiff's interim injunction application; (b) suggests that it is obvious that the 1st-3rd Defendants have breached their undertakings to this Court by publishing a Mid Ocean News article on November 3, 2007 and (c) seeks leave to re-amend the Amended Statement of Claim. The Second Richardson Affidavit also exhibited a draft Re-Amended Statement of Claim, and sought leave to re-amend, although no Summons seeking leave was filed.

9. At this morning's hearing, three applications were moved by Mr. Richardson, (a) the application for leave to re-amend, (b) an adjournment application, and (c) the scheduled application for an interim injunction.

10. Mr. Froomkin sensibly waived the right to complain about technical irregularities in relation to the first application, which I granted together with an application to amend the Generally Indorsed Writ to add a breach of confidentiality claim. I set out below my reasons for refusing the adjournment application and my decision with respect to the merits of the interim injunctive relief application.

Reasons for refusing the adjournment application

11. The Plaintiff, the Premier of Bermuda, who on Friday called a General Election for December 18, 2007, six weeks from today, sought an adjournment of what was purportedly an urgent ex parte interim injunction application for at least eight weeks, and an interim injunction restraining the Defendants from publishing further material from the BHC dossier until then. Having regard to the fact that the present application could have been made at the commencement of the present action in July, 2007 (by which time it was evident that the Privy Council was unlikely to restrain publication of the BHC dossier in late October) I refused this application.

12. Granting the application, in my judgment, would have created the strong impression that the judicial arm of Government had been co-opted by the executive branch of Government to effectively censor the press. There was no or no adequate explanation for the delay in making the application for injunctive relief, the BHC dossier could have been sought from the Commissioner of Police sooner, and the pending reasons of the Judicial Committee of the Privy Council in the Commissioner of Police case would not materially impact on the disposition of the Plaintiff's substantive application. More importantly still, the case for interim injunctive relief seemed extremely weak. It was difficult to see, bearing in mind that three courts had held that publication of further material from the BHC dossier was in the public interest (without prejudice to any damages claims), how an adjournment would assist the Plaintiff to obtain the interim relief he was seeking.

Distinctive principles governing the grant of interlocutory injunctions in defamation cases

13. '*Gatley on Libel and Slander*'[1] defined the principles governing interim injunctions in defamation cases as follows:

> "*The jurisdiction to grant interlocutory injunctions to restrain publication of defamatory statements is 'of a delicate nature', which 'ought only to be exercised in the clearest cases'. That was stated by Lord Esher M.R. in Coulson –v- Coulson*[2]*, and it encapsulates the*

[1] 10th edition (Sweet and Maxwell: London, 2004).
[2] [1887] 3 T.L.R. 846.

general approach of the Court. Thus, the Court will only grant an interlocutory injunction where,

1. *(1)the statement is unarguably defamatory;*
2. *(2)there are no grounds for concluding the statement may be true;*
3. *(3) there is no other defence which might succeed;*
4. *(4) there is evidence of an intention to repeat or publish the defamatory statement*."[3]

14. Brooke LJ in *Greene-v- Associated Newspapers Ltd.*[2005] QB 972 (C.A.) summarised the common law position as follows:

> "*57. This survey of the case law shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial. This is partly due to the importance the court attaches to freedom of speech. It is partly because a judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it. This is another way of putting the point made by Sir John Donaldson MR in Khashoggi v IPC Magazines Ltd [1986] 1 WLR 1412, to the effect that a court cannot know whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth lies. And if the defence fails, the defendants will have to pay damages (which in an appropriate case may include aggravated and/or exemplary damages as well).*"

15. The above authorities were placed before the Court by the Defendants' counsel, and the Plaintiff's counsel very sensibly conceded that the applicable legal principles were not favourable to the present application. Mr. Richardson accepted that the governing principles for the grant of an injunction restraining the publication of allegedly defamatory material were to be found in the nineteenth century English Court of Appeal decision of *Bonnard-v-Perryman* [1891] 2 Ch 269. This case is consistent with the principles upon which Mr. Froomkin relied.

16. There appears to be only one Bermudian judicial decision directly relating to an application by the plaintiff in a defamation action to restrain publication of defamatory material by a newspaper. In *Hector-v- The Royal Gazette Ltd. and Gavin Shorto,* Civil Jurisdiction 1980: No. 56 (Ruling dated April 3, 1980), Chief Justice James Astwood (as he then was) ruled as follows:

> "*Both Mr. Hall and Mr. Smith have made very extensive submissions to me concerning the libel aspects of this matter…the application is to restrain publication of something which may or may not be libellous, depending on what view of the facts a jury might or might not take when there is a publication of the letter or its contents by the Defendants…I have not been convinced that exceptional circumstances exist whereby I should go against the constitutional provision of freedom of expression and restrain the Defendants any longer from publishing the letter if they so wish. But I have to state that they do so at their peril.*"[4]

[3] Paragraph 25.2.
[4] Pages 2-3.

17. This decision was not appealed, and has represented the Bermuda law position on prior restraint in defamation cases for over 27 years. This 1980 decision pithily captures the essential elements of the English common law position reflected in both pre and post-1980 cases. Those elements may be re-formulated as follows: (a) it is for the jury at trial to determine whether or not the plaintiff has a valid claim for defamation or whether the defendant has a valid defence, (b) because of the constitutional importance of freedom of expression, a defendant will only in exceptional cases be restrained from publishing an allegedly defamatory statement, and (c) if the defendant elects to publish, he assumes the risk of being eventually held liable in damages if the plaintiff succeeds at trial. These damages will be the plaintiff's remedy for any injury to his legal rights.

Principles governing the grant of interim injunctive relief in relation to breach of confidentiality claims

18. The Plaintiff has brought into play the parallel legal rules governing the interaction between freedom of the press and breach of confidentiality claims by his plea (added today, by way of re-amendment) contained in paragraphs 29 to 35 of the Statement of Claim. He complains that the BHC dossier contains confidential documents relating to his private banking and business affairs. It is true that in what may for convenience be described as the parallel confidentiality proceedings, the Courts have not considered the interaction between the private confidentiality rights of the subjects of the investigation, such as the Plaintiff, and freedom of the press. It seems doubtful to me that the individual privacy rights of the Plaintiff could be entitled, in general terms, to greater weight than the broader public interest asserted by the Commissioner of Police in the contents of the BHC dossier. But what is most important is that three Courts have already decided that the press has a right to publish and the public an interest in receiving further information about the BHC dossier. These findings, in my judgment, are binding on me in the context of the present application.

19. In *Commissioner of Police and Attorney-General-v- Bermuda Broadcasting Co. Ltd. et al*[2007] Bda LR 40, Judgment dated June 18, 2007, Richard Ground Chief Justice refused the Plaintiffs' application for an interim injunction. The Chief Justice clearly applied the normal principles applicable to interlocutory injunctions, having regard to (a) whether there was a serious issue to be tried on breach of confidentiality (he held that there was-paragraph 25); (b) whether damages would be an adequate remedy for any further publication of the confidential material (he held that they would not be an adequate remedy-paragraph 27); and (c) whether there was a serious issue to be tried as to the right to a permanent injunction at trial (he held that there was not-paragraph 26). He reached this conclusion on the grounds that in the context of an attempt to restrain a breach of confidence by the press, the Court (in deciding where the balance of convenience lay) had to balance the plaintiff's private rights of confidentiality with the media's constitutional freedom of expression rights:

> "*19. The result of these conflicting considerations is that a Judge considering an injunction in a breach of confidence case has to perform a balancing exercise. This is particularly so where the confidential material may disclose impropriety:*
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> *'The courts have, however, always refused to uphold the right to confidence when to do so would be to cover up wrongdoing. In Gartside v. Outram (1857) 26 L.J. Ch 113, it was said that there could be no confidence in iniquity. This approach has been developed in the modern authorities to include cases in which it is in the public interest that the confidential information should be disclosed: see Initial Service Ltd. v. Putterill [1968] 1 Q.B. 396, Beloff v. Pressdram Ltd. [1973] 1 A.E.R. 241 and Lion Laboratories Ltd. v. Evans [1985] Q.B. 526. This involves the judge in balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against*

some other public interest that will be served by the publication of the confidential material. Even if the balance comes down in favour of publication, it does not follow that publication should be to the world through the media. In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry. If it turns out that the suspicions are without foundation, the confidence can then still be protected: see Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892. On the other hand the circumstances may be such that the balance will come down in favour of allowing publication by the media, see Lion Laboratories Ltd. v. Evans [1985] Q.B. 526. Judges are used to carrying out this type of balancing exercise and I doubt if it is wise to try and formulate rules to guide the use of this discretion that will have to be exercised in widely differing and as yet unforeseen circumstances. I have no doubt, however, that in the case of a private claim to confidence, if the three elements of quality of confidence, obligation of confidence and detriment or potential detriment are established, the burden will lie upon the defendant to establish that some other overriding public interest should displace the plaintiff's right to have his confidential information protected.'
Attorney-General v Guardian Newspapers (No. 2) [1990] 1 AC 109 HL at 268 per Lord Griffiths."

20. It is noteworthy that the authorities considered by the Chief Justice included cases where private confidentiality was being weighed against freedom of the press, and the approach seems to have been essentially the same as in cases where public confidentiality was asserted as a ground for restraining publication. In the public confidentiality context, as the Chief Justice himself noted[5], consideration should be given to the private interests of individuals as well, particularly where they had no opportunity to be heard. But the governing principle is that interests of confidentiality and privacy must be weighed against the interests of the public and the "right to know". This decision was affirmed by the Court of Appeal for Bermuda and by the Judicial Committee of the Privy Council. In *Attorney-General and Commissioner for Police –v-Bermuda Broadcasting Company Ltd. et al*, Court of Appeal for Bermuda Civil Appeal 2007: 13, Judgment dated June 25, 2007, Sir Austin Ward JA gave the judgment of the Court. He held (at pages 6-7):

> "*We have considered whether information yet unpublished would fall within the category of matters of public interest as opposed to being matters of interest to the public because of the personages involved. In HRH Prince of Wales v Associated Newspapers Ltd. [2007] 2 All ER 139 at p.152 quoting from Von Hannover v Germany (2005) 40 E H R R 1 the Court observed*
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> > *"The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case does not exercise*

[5] Judgment, paragraphs 32-33.

official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest" it does not do so in the latter case."

In the instant case because of the investment which the public has made in the Bermuda Housing Corporation, the public has a right to know the results of the investigation. We adopt the formulation of the relevant principles with respect to the role of the press in a democratic society to be found in Fressoz v France (1999) 5 BHRC 654 at 666 (para. 45) and quoted at page 151 para. 49 of Prince of Wales v Associated Newspapers.

"…..(i) Freedom of expression constitutes one of the essential foundations of a democratic society. Subject to art 10(2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"… (ii) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and right of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest… In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation…(iii) As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established."

21. Having regard to these principles, it is necessary to clarify that this Court's ability to assess whether or not particular documents relating to the Plaintiff which happen to be in the BHC dossier but which are clearly wholly irrelevant to the Police inquiry is not wholly circumscribed by the various decisions in the parallel proceedings. Nor do these decisions decide the issue to be determined at trial, namely whether or not a breach of confidence has occurred. These judgments merely illustrate the application of the judicial discretion to grant pre-trial relief by way of restraining the press from publishing information it already has, and how (where matters of public interest are involved) the courts will normally favour the public rights of freedom of expression over private confidentiality claims. But these judgments do make it impossible for this Court to find, in the context of the present application, that the contents of the BHC dossier generally

are not as a class matters which the media have a legitimate interest in publishing and the public a legitimate interest in knowing.

22. The decisions in the *Commissioner of Police* cases are, in my judgment, helpful decisions which deal with the topic of breach of confidentiality for the first time as questions of Bermuda law. The forthcoming judgment from the Privy Council will not simply be of considerable benefit to Bermuda, but the wider Commonwealth as well.

Findings: application to restrain publication of further material from BHC dossier (defamation claim)

23. The application to restrain further publication of material derived from the BHC dossier on the grounds that it is defamatory is refused. Assuming that the allegations against the Plaintiff are wholly untrue and cannot be justified by the Defendants, it is clear that they have a potentially valid defence of, *inter alia*, public interest qualified privilege. This defence will not necessarily succeed if they have not acted responsibly[6], but the merits of this defence can only be assessed at trial, after publication has occurred. It is impossible at this stage for the Court to determine that it is obvious that the public interest defence will fail. Nor is there any basis for the Court ordering the Defendants to give the opportunity to comment before they publish any story. The Defendants owe a duty to their employers/shareholders to act responsibly, because they risk the imposition of potentially huge damage awards against them if they do not. The law of defamation fundamentally affords a person whose reputation is likely to be damaged with a right to receive compensation for damage established at trial.

24. As Lord Bingham observed in *Jameel-v-Wall Street Journal* [2007] 1 AC 359 at 376:

> " ***32*** *Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one of public interest, that Lord Nicholls proposed, at p 202, a test of responsible journalism, a test repeated in Bonnick v Morris [2003] 1 AC 300, 309. The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency, at p 238, "No public interest is served by publishing or communicating misinformation." But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication."*

25. As I indicated in the course of the hearing, there may be cases where established principles must give way to new precedents. But the present application, brought (albeit in his private capacity), by a Premier who has just called a General Election is a manifestly inappropriate case in which to break free of all established precedent and grant revolutionary forms of press-stifling injunctive relief. Such a course would raise legitimate questions about the independence of the courts.

Findings: application to restrain publication of further material from BHC dossier (breach of confidentiality claim)

26. The Plaintiff has failed to establish that he would suffer any irreparable harm from the disclosure of private documents whose confidentiality outweighs any countervailing public interest in favour of publication. It is difficult to envisage what documents would very clearly have no connection whatsoever with the

[6] *Reynolds* [2001] 2 AC 127

investigation which resulted in the compilation of the BHC dossier, and the Plaintiff's own Affidavit concedes that he is unclear precisely what the dossier contains. It is clear that the public interest in learning more about the BHC dossier has been held to outweigh the important public confidentiality rights of the Commissioner of Police. In these circumstances, I am bound to refuse the application to restrain publication of documents which are as yet un-particularized and which (as regards the Plaintiff) may not even be in the BHC dossier at all.

27. Without wishing to encourage any further applications in this matter, it is entirely possible that the Plaintiff may be able to properly make a fresh application for injunctive relief based on (a) facts not presently in his possession, and/or (b) guidance given by the Judicial Committee of the Privy Council in the eagerly awaited reasons for their October 29, 2007 judgment in the parallel proceedings.

Conclusion

28. For the above reasons, the Plaintiff's application for an interim injunction restraining publication of further material relating to the BHC dossier is refused. I will hear counsel as to costs, but my provisional view is that the costs of the present application ought to be reserved. Rejection of the injunction application in no way opens the door to a judicially-sanctioned media feeding frenzy with the Plaintiff's reputation as the centre-piece of the "feast". The media's freedom must, to be protected from potential liability in damages after a trial, be exercised responsibly.

Dated this 6th day of November 2007

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Kawaley J.