CIVIL APPEAL NO.13 OF 2007

Between:

THE COMMISSIONER OF POLICE

1st Appellant

THE ATTORNEY GENERAL

2nd Appellant

- and -

BERMUDA BROADCASTING CO. LTD.

1st Respondent

BERMUDA PRESS HOLDING LTD

2nd Respondent

DEFONTES TELEVISION CENTERE LTD

3rd Respondent

BERMUDA SUN LTD

4th Respondent

Before: **Zacca, P**
Nazareth, JA
Ward, JA

Date of Hearing: 19th & 20th June 2007
Date of Reasons: 25th June 2007

JUDGMENT

Ward J.A.

By a writ of Summons dated 7th June 2007 the Appellants applied inter alia for an injunction restraining the Respondents from downloading, printing, copying, broadcasting in the electronic and/or print media, circulating, disseminating, distributing or otherwise publishing any information contained in records referred to as the "Sensitive Files". On 13th June 2007 the Writ was amended to make it plain that the action was for breach of confidence. The "action is brought by the Police and the Attorney General to enforce the confidentiality of the police investigation on the grounds of the general principle that the disclosure of the documents 'strike at the heart of community confidence in the Bermuda Police Service'." It is not an action on behalf of public figures whose names were mentioned in a newspaper report of 1st June 2007 published by the second Respondent.

The “Sensitive Files” were confidential police documents in relation to an investigation into the Bermuda Housing Corporation and various persons who had dealings with it including Ministers of Government.

The Bermuda Housing Corporation is an authority having the constitutional powers and duties provided for in the Bermuda Housing Act 1980. In the exercise of its function it shall be subject to any general or particular directions given to it by the Minister. In addition pursuant to Section15 of the Act some of the funds of the corporation come from grants from the Government out of moneys appropriated by the Legislature for the purposes of the Corporation. As such, what happens to those moneys is a matter of public concern.

On 18th June 2007 the learned Chief Justice refused the application for an interim injunction. The Appellants have appealed.

There are nine Grounds of Appeal as follows:

(1) The Learned Trial Judge erred in law in the exercise of his discretion by failing to take into account that the First and Second Respondents used and/or disclosed the information in the Sensitive Files in an unauthorized manner well knowing that the said files were impressed with the quality of confidence;

(2) The Learned Trial Judge erred in law in the exercise of his discretion by failing to take into account that if the First and Second Respondents used and/or disclosed the information in the Sensitive Files in an unauthorized manner, and therefore in breach of confidence, this was a significant element to be weighed in the balance in determining whether it was in the public interest to refuse to grant the injunctions sought;

(3) The Learned Trial Judge erred in law when he exercised his discretion to refuse to grant the injunctions sought by firstly considering that the allegations against the persons named in the Sensitive Files were “not gratuitous, in that there [was] some evidence to support them, as set out in the material so far reported,” and failing to take into consideration the fact that the allegations against the named individuals in the Sensitive Files were unproven, were determined by the proper authorities not to amount to a breach of the criminal laws of these Islands, the named individuals had no opportunity to respond to the allegations, and that publication of the information in the Sensitive Files seeks to circumvent the Director of Public

(4) The Learned Trial Judge erred in fact by determining (in paragraph 7 of his judgment) that there was no evidence that the Sensitive Files were stolen from the First and Second Appellants as opposed to merely being copied notwithstanding the fact that in paragraphs 8 and 9 of the First Appellant's affidavit he deposes to the theft of the Sensitive Files;

(5) The Learned Trial Judge erred in law by failing to take into account the fact that the Defendants seek to publish the information in the Sensitive Files consequent upon the Sensitive Files being stolen from the First Appellant;

(6) The Learned Trial Judge erred in law by failing to take into account that in the absence of the grant of appropriate injunctions damage to the public interest in the integrity and confidentiality of police investigations is not satisfied or compensated by the sanction of appropriate disciplinary action or even criminal proceedings against the disclosing party, who may or may not be a police officer;

(7) The Learned Trial Judge erred in law by failing to take into account that in seeking to invoke their Constitutional right to freedom of expression as enshrined in section 9 of the Constitution, the Respondents held the burden of establishing their right to publish the information in the face of the protection of confidence afforded to the First Appellant in section 9(2)(a)(ii) of the Constitution, and that in balancing the competing public interests the Respondents failed to discharge such burden;

(8) The Learned Trial Judge erred in law by wrongly deciding that the First Plaintiff's investigative files did not form part of a class of documents capable of protection from disclosure in the public interest;

(9) The Learned Trial Judge erred in law by deciding that if publication of the confidential material was in the public interest, it was lawfully allowed to be disclosed to the public at large, rather than to some other institution capable of protection from disclosure in the public interest.

An injunction is a discretionary remedy. Mr. Duncan, for the Appellants, has argued that the Learned Chief Justice improperly exercised his discretion. He developed his argument by stating that because of the

circumstances in which the Respondents came into possession of the "Sensitive Files", a duty of confidence was imposed upon them not to disclose the information contained therein. Further, he argued that the Respondents disclosed the information in the "Sensitive Files" in an unauthorized manner and therefore in breach of confidence. In addition, as the information was acquired unlawfully, its unauthorized use should be restrained. He submitted that the learned Chief Justice did not give sufficient weight to the fact that the Director of Public Prosecutions had advised that there was no breach of the criminal law disclosed in the "Sensitive Files". He continued that publication of the "Sensitive Files" would circumvent the fiat of the DPP.

He contended that the onus was on the Respondents to show that the information characterized as iniquitous was true and that the learned Chief Justice should first have seen the "Sensitive Files" himself before ruling that it was in the public interest that the files could be published. He argued that as a means of dissuading others from using unauthorized material, the publication of confidential material, obtained in breach of confidence, should not be sanctioned. He submitted that it had not been shown why the unpublished material should be published in the public interest.

The first and third Respondents operate radio and television stations. The second and fourth Respondents publish newspapers.

In his judgment the learned Chief Justice found that on 23rd May 2007 the first Respondent broadcast a report which implied that they had sight of the "Sensitive Files". On 1st June 2007 the second Respondent "carried further and extensive revelations based upon documents from the same investigation."

The "Sensitive Files", for which injunctive relief was sought, were not produced in evidence and therefore the learned Chief Justice could not peruse them. Counsel for the Appellants has argued that the Chief Justice should have, although it is unclear how he could have done so in the light of the Respondent's denials as to the possession of the documents. In those circumstances the learned Chief Justice quite rightly concluded that the unused material "would contain similar material to that already published." The headline of the newspaper article complained of read:

> "Police probe of abuses went as high as Cabinet."

The learned Chief Justice found that the information came from confidential files compiled in the course of the police investigation whether those files were stolen, copied or otherwise unlawfully obtained. He added that "the documents and the information they contained, concerned alleged fiscal improprieties by prominent public figures." It is unnecessary for the purpose of this judgment to decide whether the confidence was owed to the Crown or to the Commissioner of Police.

The issue was whether the confidential nature of the documents, coupled with the manner in which they were taken and their subsequent unauthorized use, created a bar to the publication of the material. These were documents compiled by the police in the course of an investigation. The learned Chief Justice found that the Appellants had made out a strong case that the documents were confidential police documents containing information gathered by the police in the course of the exercise of their statutory functions, and opinions on that information by senior police officers and others, and that the information was both confidential to the police service and was known by the Respondents to be so confidential at all material times. We cannot condemn too strongly the unauthorized taking of the information. Nevertheless we have to proceed to consider "the balance of justice."

The learned Chief Justice identified the issue for resolution as a conflict between the cause of action for breach of confidence and the guarantee under the Bermuda Constitution of the right of freedom of expression and freedom of the press. Section 9 of the Constitution reads:

> **"Protection of freedom of expression**
> 9 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
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> (a) that is reasonably required—
>
> (i) in the interests of defence, public safety, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television

or other means of communication or regulating public exhibitions or public entertainments; or

(b) that imposes restrictions upon public officers or teachers

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(3) For the purposes of paragraph (b) of subsection (2) of this section in so far as that paragraph relates to public officers, "law" in that subsection includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government."

With those conflicting considerations the learned Chief Justice was called upon to perform a balancing exercise between two competing public interests – on the one hand the right to confidence and the need to protect the integrity and confidentiality of police investigations, on the other hand the freedom of the press. With the freedom of the press the learned Chief Justice coupled "the proper interest of the public in being fully informed about the dealing and character of those who submit themselves for election to high public office." He reminded himself of the dictum in *Lion Laboratories Ltd. v Evans [1985] 1 QB 526 at p.536* that "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 Director of Public Prosecutions rendered an opinion that no criminal offence was discerned by him to have been committed by the persons investigated but added that the question of civil liability should be examined. We do not accept the submission that because of the opinion of the DPP ipso facto the injunction should have been granted.

After performing the balancing exercise the learned Chief Justice concluded that the balance of justice lay in favour of the Respondents. We have been asked to overturn the exercise of discretion.

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

> "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 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."

We accept the law to be that in reviewing the exercise of a judge's discretion, a Court of Appeal should intervene only where the conclusion of the judge would involve an injustice, or where the judge has erred in principle by giving weight to something which he ought not to have taken

into account or by failing to give weight to something which he ought to have taken into account.

Ward v James (1966) 1QB 273 at p.293

Evans v Bartlam [1937] AC 473

As stated in Bellenden v Satterthwaite [1948] 1 All ER 343 it was only where the exercise of a discretion exceeded the generous ambit within which reasonable disagreement was possible, and was, in fact, plainly wrong, that an appellate court was entitled to interfere.

We are fortified in this opinion after having considered Hadmor Productions v Hamilton [1983] A.C. 191 at p.220 per Lord Diplock with reference to the limited function of an appellate court on hearing an appeal against a refusal to grant an interlocutory injunction:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his

acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

We are unable to say that the learned Chief Justice wrongly exercised his discretion and we dismiss the appeal with costs.

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Zacca, P

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Nazareth JA

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Ward, JA

Mr Duncan for the Appellants
Mr Horseman for the 1st Respondent
Mr Froomkin for the 2nd Respondent
Mr Adamson for the 4th Respondent