Privy Council Appeal No 48 of 2007

(1) Commissioner of Police
(2) Attorney General *Appellants*

v.

(1) Bermuda Broadcasting Co. Ltd
(2) Bermuda Press Holdings Ltd
(3) Defontes Press Holdings Co. Ltd
(4) Bermuda Sun Ltd
(5) Defontes Broadcasting Television Ltd *Respondents*

FROM

THE COURT OF APPEAL OF BERMUDA

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REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 29th October 2007, Delivered the 23rd January 2008

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Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Scott of Foscote**]*

1. The litigation that has led to this interlocutory appeal to the Board has its origins in the unauthorised removal from the custody of the Bermuda Police Service ("the BPS") of a number of documents relating to an extensive investigation that the BPS, over the period 2002 to 2004, had carried out into the affairs of the Bermuda Housing Corporation ("the

BHC"), a statutory body with powers and duties provided for by the Bermuda Housing Act 1980. The police investigation had been prompted by allegations of corruption and impropriety in the conduct of the BHC's affairs. The documentary material generated by this investigation included police officers' notes and records of interviews, policy decisions and investigative strategies. The police files record, among other things, the opinions of police officers on the material being gathered and the allegations made by and against individuals. Several of the individuals against whom or about whom allegations had been made were prominent figures in Bermudian political life. Some were or had been government ministers. In about July 2004 the then acting Director of Public Prosecutions, Mr Kulandra Ratneser, concluded that the investigation had not disclosed anything sufficient to warrant a criminal prosecution being brought against any of those concerned save, it appears, one junior BHC officer. The investigation was then brought to an end and the police files, containing the documentary material that had been collected, were placed in a storage facility.

2. However at some time between March 2007 and 23 May 2007 the police files were unlawfully removed. The identity of the perpetrator or perpetrators has not been discovered. The BPS were unaware that the files had been removed until 23 May 2007 when ZBM, a television channel operated by the first respondent, broadcast an interview of Mr Ratneser by Mr Gary Moreno, the ZBM presenter, in the course of which documents, or copies of documents, from the BHC investigation police files were put to Mr Ratneser. On the following day, 24 May 2007, ZBM broadcast a further programme in which its reporter, Mr Peter Cattell, referred to having had sight of the documents in the missing files (or of copies of the documents). These broadcasts were followed on 1 June 2007 by the publication in the Mid-Ocean News, a Bermudian newspaper published by the second respondent, of articles which referred to, quoted from, and, in one case, produced a facsimile of, documents contained in the missing files. The third, fourth and fifth respondents subsequently broadcast and published material derived from the material that had been broadcast or published by the first and second respondents.

3. The reaction of the BPS to all this was, first, to institute an investigation into, as they saw it, the theft of police documents and, secondly, on 7 June 2007 to join the Attorney General in commencing proceedings against those responsible for the broadcasts and the publications. The Writ of Summons was subsequently amended and, in its amended form, seeks, among other things, an injunction to restrain each of the defendants from broadcasting or publishing any information derived from the BHC investigation documents. An order is also sought for the delivery- up by each of the defendants of any investigation

documents in the possession of that defendant. However no order is sought for the disclosure of the identity of the person or persons from whom the investigation documents (or the copies of the documents) referred to in the broadcasts or newspaper publications (as the case may be) were obtained.

4. On the same day as the Writ was issued the plaintiffs, appellants now before the Board, obtained ex parte relief preventing the publication of any "new material" based on the missing investigation documents until an inter partes application for an interlocutory order to that effect could be heard. The inter partes application was heard by Ground CJ on 13 June 2007. The burden of the opposition to the grant of the interlocutory injunction was borne by the second respondent. The other respondents undertook to be bound by whatever order the court made and then withdrew. On 18th June, in a written judgement, the Chief Justice dismissed the application. He agreed with the appellants that they had made out "a strong case that the documents are confidential police documents" and that there was:

> "…a serious issue to be tried that continuing publication of the information would breach the rights of the confidentiality which the police service has in it." (para. 25)

But he held also that the issue as to whether the injunction should be granted

> "…turns upon a balancing of the competing interests of the police in confidentiality and of the press and public in freedom of expression" (para. 26)

5. In striking the balance between these competing interests the Chief Justice took into account, on the one hand, "the interest of the police service in the proper exercise of its functions" and, on the other hand, "…the proper interest of the public in being fully informed about the dealings and character of those who submit themselves for election to high public office" (para. 28). He recognised "the need to protect the integrity and confidentiality of police investigations" and recognised that disgruntled police officers who were not satisfied with the outcome of an investigation should not be able or encouraged to turn the investigation materials over to the press (para. 30). But the Chief Justice noted that there was nothing to suggest that the press in general, or the second respondent in particular, had been guilty of or had participated in the removal of the investigation documents from the custody of the BPS. The first and second respondents had, he suggested, simply been the recipients of a "leak" by some as yet unknown police insider (para. 31). The Chief

Justice also put into the balance the interests of the individuals named in the leaked documents and about whom adverse allegations had been made. But he took the view that "different considerations apply to those who have sought election to public office than apply to private individuals" (para. 32). In paragraph 33 of his judgment, the Chief Justice expressed his opinion about the weight of the factors on the other side, the press side, of the balance. Their Lordships think that the paragraph merits citation in full:

> "33, On the other side of the balance there is the media's constitutional right to inform the public about serious allegations concerning important public figures. As the cases cited illustrate that is a weighty and important consideration: The allegations are not gratuitous, in that there is some evidence to support them, as set out in the material so far reported. Nor do the allegations concern the private personal life of those concerned. They touch upon their conduct in office. In those circumstances I think that the public interest is genuinely engaged, and this is not a case of the public being officiously interested in matters which do not concern them. I think, therefore, that the balance comes down firmly against restraining the media's freedom [of] expression. I consider that that is the case even at this interlocutory stage, it being hard to envisage what a full trial could add to the considerations already before the court."

6. The appellants appealed but the Court of Appeal (Zacca P, Nazareth JA and Ward JA) dismissed the appeal. Here, too, only the second respondent appeared at the hearing. The judgment of the Court of Appeal, given by Ward JA on 25 June 2007, agreed that the Chief Justice had had to carry out a balancing exercise between the right of the BPS that their confidential documents should remain confidential and, on the other hand, the constitutional right of the press to freedom of expression. Ward JA cited the passage from Lord Diplock's speech in *Hadmor Productions v Hamilton* [1983] 1 AC 191, 220 identifying and limiting the proper function of an appellate court on an appeal against the refusal of an interlocutory injunction and said simply that he and his brethren were unable to say that the Chief Justice had wrongly exercised his discretion. The Court of Appeal gave the appellants leave to appeal to the Privy Council but held that the Court had no jurisdiction to extend, pending the hearing of that appeal, the holding injunction that had been granted on 7 June. However an immediate application to the Privy Council for, in effect, the continuance of the 7 June injunction until the resolution of the pending appeal was granted on 26 June.

7. In the appeal to the Board the appellants have renewed their claim to an interlocutory injunction to restrain the publication of any information derived from the investigation documents "except that portion of the said information already circulated to the general public by the respondents between 23 May 2007 and 7 June 2007" (see para. (a) of the injunction granted by the Privy Council on 26 June 2007). In addition, the Board has been asked to say whether the Court of Appeal was right to hold that they lacked jurisdiction to grant an interlocutory injunction pending the hearing of the appeal to the Privy Council. At the conclusion of the hearing of the appeal their Lordships announced that on the main issue (the question whether an interlocutory injunction should be granted) the Board would for reasons to be given later humbly advise Her Majesty that the appeal should be dismissed. This judgment gives those reasons and also the Board's conclusion on the jurisdiction issue. Before the Board, as before the Chief Justice and the Court of Appeal, only the second respondent opposed the appeal.

The Main Issue

8. It is desirable that their Lordships should give a little more detail about the contents of the publications that led to this litigation. The details can be most conveniently taken from the articles in the Mid-Ocean News of 1 June 2007. The front page has a highlighted headline "Police probe of abuses went as high as Cabinet" with photographs of former housing Minister Nelson Bascome and Premier Ernest Brown. The article said that "Premier Ernest Brown was one of the subjects of a two-year police investigation into allegations of corruption at the Bermuda Housing Corporation" and named four other ministers who, it was said, were also investigated together with "a host of other government MPs". The article then said that in the opinion of the then Police Commissioner "many of those named in the probe could be accused of nothing but bad ethics" and that in the opinion of Mr Ratneser "some of those under investigation only escaped prosecution because of the island's antiquated corruption laws". The article referred to the successful prosecution for fraud of a junior BHC officer but said that "otherwise authorities have until now been able to keep a tight lid on the extent of police findings and no charges have ever been brought against any MPs". The article said that the Mid-Ocean News, after reviewing the leaked investigation documents, "can reveal that several senior Government MPs were at the centre of the inquiry" and that the "damaging dossier" uncovered "what were thought to be under-the-table deals and backhanders". The article included details about an alleged commercial relationship between Ministers and a prominent Bermudian construction company and alleged that Dr Brown, the then Premier, had "cajoled" the then chief executive of the BHC into buying at "an inflated price" a property belonging to Dr Brown. Various other allegations of improprieties in dealings between

Ministers, former Ministers or MPs with the BHC were made. The clear inference was that each of these allegations was based on information that had been obtained from the leaked documents.

9. There is also no doubt at all that the allegations to which reference has been made in the above paragraph, and other comparable allegations contained in the publications, are in their nature defamatory of those against whom they are made. Some may also represent breaches of confidentiality or of rights of privacy to which the individuals concerned are entitled. But the individuals, the targets of the allegations, are not parties to this litigation. They may or may not have causes of action they can successfully bring against the respondents. It is the Commissioner of Police and the Attorney General who are the applicants for relief in this litigation. It is right that the interests of those against whom the allegations are made should be placed in the balance, and the Chief Justice did so, but the critical issue is whether the public interest that can be asserted by the BPS in preserving the confidentiality of their investigative material should trump the public interest in the freedom of the press to place before the public of Bermuda material of the sort disclosed in the broadcasts and publications that led to this litigation. This was perceived by the Chief Justice to be the critical issue and their Lordships are in respectful agreement.

10. A number of sub-issues have been raised that need to be cleared away. It has been argued by Mr Guthrie QC, counsel for the appellants, that the Chief Justice had paid insufficient attention to the clear evidence filed on behalf of the appellants that the missing files and documents had been stolen, or at the least unlawfully removed, from the BPS. But since there was no evidence, direct or inferential, that the respondents had participated in that removal, the circumstances of the removal are not, in their Lordships' opinion, relevant. This is not a case of the respondents seeking to profit from their own wrong (c/f *Attorney General v Guardian Newspapers* (No. 2) [1990] 1 AC 109). It was argued also that because the injunction sought was an interlocutory injunction pending a full trial the Chief Justice had been wrong to have attempted to strike the critical balance as between the competing public interests and ought to have preserved the status quo, on a balance of convenience basis, until trial. But the Chief Justice had taken the view, realistically in their Lordships' opinion, that further evidence adduced at trial could not be expected to alter the weight of the competing interests. The law, he said, was clear and the relevant facts plain (see para. 26 of his judgment). Mr Guthrie pointed out that the appellants were not seeking to restrain the further publication of material that had already been disclosed in the 23 May to 7 June publications. It was the publication of any new material, as yet undisclosed, that derived from the BPS documents that the injunction

sought was aimed at. Mr Guthrie submitted that the Chief Justice had not been in a position to strike the critical balance without examining the new material on which further publications might be based. The respondent could have put in evidence any such new material but had not done so. The Chief Justice had noted (in para.14 of his judgment) that the evidence before him did not disclose what any new material might contain but went on to say that he thought "…it fair to infer that it would contain similar material to that already published". Their Lordships would draw the same inference. The only use of the confidential police material that has so far been made by the respondents related to allegations of corruption and impropriety in connection with the BHC that involved individuals prominent in Bermudian political and commercial life. There is no reason whatever to suppose that any respondents have any wish to make public any new material of a different character. It is said, for example, that the confidential documents include bank statements relating to individuals. It would plainly be wrong for details of these bank statements to be disclosed otherwise than for the purpose of demonstrating or supporting allegations of improprieties. But no indication has been given by any of the respondents of any intention to use any such confidential material for any other purpose. Injunctions can, of course be sought to restrain threatened disclosures that would, if made, be wrongful but in order to justify the grant of any such injunction, whether final or interlocutory, the applicant must show some reason to suppose that, absent the injunction, there is a danger that the disclosure will be made. Their Lordships, like the Chief Justice, can see nothing in this case to justify the fear that disclosures of confidential police material of a different nature from that already disclosed or for a purpose other then that of supporting allegations of improprieties similar to those contained in the 23 May to 7 June publications will be made.

11. Accordingly, in their Lordships' opinion, the Chief Justice was entitled to test the appellants' application for an interlocutory injunction by asking himself whether the appellants were likely, if the case went to trial, to obtain a permanent injunction, and to answer that question by reference to the facts and matters in evidence before him. He was, in their Lordships' opinion, entitled and bound to strike the balance between the competing public interests.

12. The Chief Justice, in striking that balance took into account on each side of the balance the various considerations that were proper to be taken into account. He gave weight to the operational difficulties that may be faced by the police if confidential records of police investigations are disclosed but against that he set "the freedom of the press and the proper interest of the public in being informed about the dealings and character of those who submit themselves for election to high public office" and

concluded that the balance came down on that side. Mr Guthrie has protested that the allegations of corruption relating to the BHC had been fully investigated by the police and that the investigation had shown that no criminal prosecution of any of those prominent individuals named in the publications was warranted. That, of course, is so, but the test of whether or not a criminal prosecution should be brought is not the same as the test of whether the disclosure to the public of confidential information relating to improprieties falling short of criminality in which prominent public figures are involved is justified. The 1 June article in the Mid-Ocean News attributed to the Police Commissioner at the time of the BHC investigation the opinion that many of the individuals investigated "could be accused of nothing but bad ethics" and to the then Director of Public Prosecutions the opinion that many had escaped prosecution because of Bermuda's antiquated corruption laws. It is, in their Lordships' opinion, impossible to read the articles in the Mid-Ocean News without concluding that the public of a democracy, where legislators and Ministers must submit themselves regularly to free and fair elections, are proper recipients of information of the sort disclosed in these articles. It was not suggested by Mr Guthrie, and so far as their Lordships are aware has never been suggested, that the contents of these articles was other than a fair reflection of the contents of the documents on which the articles were based.

13. Moreover, if the Chief Justice was right in attempting to strike the balance between the public interest in maintaining the confidentiality of the police's BHC investigation files and the public interest in the freedom of the Bermudian media to inform the Bermudian public of the matters disclosed by the 23 May to 7 June publications, or of similar matters arising from the documents in those files, and their Lordships have no doubt that he was, the local courts with their intimate knowledge of the state of public affairs in Bermuda are far better placed than their Lordships to strike that balance. Their Lordships would not presume to substitute their judgment for that of the local courts unless it were apparent that some error of law or the overlooking or misunderstanding of relevant facts had taken place. Here there is none. In their Lordships' respectful opinion the Chief Justice conducted the balancing exercise impeccably and the Court of Appeal were right to dismiss the appeal. It follows that, on the main issue, their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.

The Jurisdiction Issue

14. The Court of Appeal, like the Court of Appeal of England and Wales, is a statutory creation and has the jurisdiction expressly or impliedly conferred on it by statute or by rules made under statutory authority. It does not have any inherent jurisdiction. The Court of Appeal

Act 1964 establishes the Court of Appeal for Bermuda. Section 8 (1) says that the Court

> "…shall have all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original and appellate jurisdiction"

Section 9 empowers the President of the Court to make rules "for carrying this Act into effect" and section 13 allows the Court, upon hearing a civil appeal

> "…[to] allow the appeal in whole or in part or [to] dismiss the appeal in whole or in part or [to] remit the case to the Supreme Court to be retried in whole or in part and [to] make such order as the Court may consider just"

And, finally, the Rules of the Court of Appeal, made under section 9 and in force since 1965, include Rule 2/25 which empowers the Court:

> "…to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require…"

and Rule 2/28 which says that:

> "The Court shall not review any judgment once given and delivered by it save and except in accordance with the practice of the Court of Appeal in England".

15. Their Lordships have no doubt that these provisions in force in Bermuda would have provided the Court of Appeal with the requisite jurisdiction to have continued the holding injunction pending the resolution of a further appeal to the Privy Council. First, although their Lordships have not been referred to the statutory basis on which the Chief Justice had continued the original holding injunction granted on 7 June 2007 over the hearing of the appeal to the Court of Appeal, it has not been suggested that he lacked jurisdiction to do so. And if a judge sitting in the Supreme Court can grant an injunction pending the hearing of an appeal to the Court of Appeal, it appears to their Lordships that the Court of Appeal are empowered by section 8 (1) to exercise the like power pending the hearing of a further appeal to the Privy Council. Second, the language of section 13, "…may make such other order as the Court may consider just", seems to their Lordships well wide enough to enable an injunction to be granted pending an appeal to the Privy Council. Thirdly, the power under Rule 2/25 "…to make such further or other order as the

case may require…" would, in their Lordships' opinion, confer, independently of any power conferred by section 8 or section 13, power to grant an injunction pending an appeal to the Privy Council. And, finally, in case it might be argued that, having announced that an appeal would be allowed or, as the case might be, dismissed, the Court of Appeal had become functus, Rule 2/28 would permit the Court to review its judgment for the purpose of considering whether to grant an injunction pending a further appeal. That is what the Court of Appeal in England can do and that, therefore, is what the Court of Appeal for Bermuda can do.

16. Their Lordships do not consider that their ruling on this issue warrants any change in the order that the appellants should pay the costs of the hearing before the Board.