

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 497/99

BETWEEN:

SAMUEL COMMISSIONG

Plaintiff

and

**THE NEWS LTD
SHELLEY CLARKE**

Defendants

Appearances:

Mr Hansraj Matadial and Mr Grahame Bollers for the Plaintiff
Mr Stephen Huggins and Ms Paula David for the Defendant

1999: October 28, November 4, 11,17

DECISION

- [1] **MITCHELL, J.:** The Plaintiff in this case is a prominent barrister and solicitor of the Eastern Caribbean Supreme Court practicing in Saint Vincent and the Grenadines. The 1st Defendant is a newspaper publishing company bringing out the weekly newspaper 'The News.' The 2nd Defendant is its managing director and editor. This is a ruling on two summonses taken together. The first is brought by the Plaintiff to renew an *ex parte* interlocutory injunction granted on 15th October 1999 prohibiting the continued publication of an alleged libel. The other one is brought by the Defendants to discharge the injunction.

THE FACTS

[2] The affidavits filed in these applications revealed that sometime in late July 1999 the Plaintiff was instructed by a Swedish lawyer (hereinafter "the Swedish colleague") to collect a debt alleged by Gourmet Foods (St Vincent) Ltd (hereinafter "Gourmet Foods") to be owed to it by Friendship Bay Hotel Ltd (hereinafter "Friendship Bay.") The writ in that matter was issued on 10th August 1999 and numbered suit no 401 of 1999. Friendship Bay entered an appearance to the writ on 13th August 1999. It would appear from one of the newspaper articles complained of that the amount of the claim in suit 401 of 1999 was EC\$43,700.00, and that Friendship Bay counterclaimed in that action against Gourmet Foods for some US\$68,000.00. Meanwhile, on 13th August 1999, some 3 days after the issue of the writ, and on the day Friendship Bay entered an appearance to the writ, the Plaintiff wrote to the Swedish colleague a letter as follows:

Dear Colleague,

Re: Pending Claim against Friendship Bay Hotel

The case against Friendship Bay Hotel is proceeding normally. We have enclosed a copy of the default judgment for your records. The Lawyer who works for Friendship Bay Hotel said that LAB has instructed him to apply to the court for stay of execution pending his efforts to make a claim against Gourmet Foods Ltd. You did inform me of this possibility. This has not happened yet but we heard that it is coming. If it does we shall have to get fresh instructions from you. The Goods taken in execution are kept in storage as a matter of law for two weeks before sale. The rationale is that the debtor must have the opportunity to recover his

goods by paying the monies. If he cannot, the goods will be sold by public auction.

(sd) SE Commissiong

- [3] This letter on the face of it does not make any sense in relation to the legal proceedings to which it applied. That case had only begun days before, and it had hardly begun to proceed, far less to be proceeding normally. The writ had been served on Friendship Bay that very day, and Friendship Bay had only that day entered an appearance. Certainly, Gourmet Foods could have obtained no default judgment as described by the Plaintiff at that stage.
- [4] Accompanying this letter from the Plaintiff to the Swedish colleague was a copy of a 'Default Judgment.' It bore on its top right hand corner a facsimile of the filing stamp of the Registry of the Supreme Court (date illegible). It would appear from the copy eventually produced to the court that that stamp had been copied from some other court document and transposed onto this document. The 'Default Judgment' was dated the impossible date of 25th July 1999 (a Sunday) some two weeks before the writ was actually issued. The place for the High Court suit number was left blank and was not filled in with the suit number, 401 of 1999. This would have been a simple matter for the Plaintiff to do if there had been any intention on the part of the Plaintiff deliberately to mislead anyone with this document. The 'Default Judgment' appeared to be signed by the acting Registrar of the High Court, when we now know that she never in fact signed such a document. It would appear that either her signature had been transposed by photocopying from some other document or it had been traced on the document. A facsimile of the Registrar's office stamp appearing to validate her signature appeared underneath the

facsimile of her signature. The document was not stamped "sample" or "not valid" or some other such notice to indicate that it was not a genuine court document. The only person the Plaintiff sent the two documents to and whom the documents could be expected mislead was the client of the Plaintiff. It did not appear from any of the documents before the court that either Gourmet Foods or the Swedish colleague has any quarrel with or has been in any way misled by either of the two documents. The Plaintiff did not appear to have intended anyone else to see the documents sent to the Swedish colleague, or for any action of any kind to be taken by anyone on the documents. There was certainly no evidence of his intending to have deceived anyone over these documents.

- [5] Whatever the explanation for this covering letter and the 'Default Judgment,' they subsequently got into the hands of Messrs Hughes & Cummings the solicitors for Friendship Bay, the alleged debtor. They made enquiries of the Registrar as to how such a mistake in granting a default judgment in a suit that had hardly begun could have been made. The Registrar examined the files and realized that she had never signed such a document as the one shown to her and which purported to bear her signature. She enquired of the Plaintiff as to what he had done. He explained to her that he had only intended to send his Swedish colleague a precedent of what such an order would look like when prepared. The Registrar informed Messrs Hughes & Cummings accordingly. The Registrar was concerned that actions of such a nature could have serious and far-reaching consequences in the operation of the Registry business. On 26th August 1996 she wrote a memorandum to the Attorney General acquainting him of the incident.

- [6] The story, together with copies of the Plaintiff's letter to his Swedish colleague and the 'Default Judgment,' got into the hands of the press. On 8th October 1999 an article appeared on the front page of the Defendant's weekly newspaper 'The News' under the headline "Lawyer Forges Court Order?" In commenting on the incident, the article used such phrases as "a dark cloud of uncertainty and doubt hovered over the 'noble profession,'" and asked the rhetorical question, did one of the leading lawyers in fact "forge a Judgment of the High Court?" The article claimed, "The phantom order is now creating some controversy and unease." The article noted, "The News has not yet heard of any disciplinary action, if any, that will be taken against the lawyer for the action."
- [7] The Defendants now obtained a copy of the Registrar's memorandum of 26th August to the Attorney General. On 15th October, under the by-line of Duggie 'Nose' Joseph at page 3, there was a follow-up article in 'The News.' The story was illustrated with photographs of the Plaintiff and the Registrar under the headline "Registrar Denies Signing Judgment." Most of the article was a straight forward report of the incident, but it concluded with a last paragraph, "One source here has expressed concerns, similar to some expressed by a Trinidadian newspaper relating to the legal controversy there, questioning 'if anyone has the testicular fortitude' to take any action." Yet a third article on the same page dealt with the incident under the headline, "That Mysterious Order!" It commented on and highlighted the discrepancies in the "Default Judgment."
- [8] On 15th October counsel for the Plaintiff applied to the court *ex parte* for an injunction to restrain the Defendants from publishing anything defamatory of the Plaintiff. The application was supported

by a Certificate of Counsel of Extreme Urgency, and an affidavit of the Plaintiff explaining that the Defendants had threatened to publish his name as the forger of a court order, and that if they were not restrained their actions could cause irreparable harm to his professional and personal reputation, and further setting out reasons why it was extremely urgent that an injunction be granted *ex parte*.

- [9] On 15th October this court heard counsel on the Plaintiff's *ex parte* application, and granted the Plaintiff the injunction he applied for on condition that he gave an undertaking as to damages, and issued a writ within 7 days. The order as applied for and granted was in these words:

That the Defendants be restrained and an injunction is hereby granted restraining them, whether by themselves, or by their servants or agents or any of them or otherwise howsoever from publishing, republishing, circulating and/or distributing the defamatory allegation contained in two articles published by the said Defendants in two issues of The News newspaper on 8th October 1999 and the 15th October 1999, of and concerning the Plaintiff or any other defamatory matter, until after the hearing of a summons to continue this injunction returnable on the 5th day of November 1999 or until further order.

- [10] The Plaintiff later the same day 15th October 1999 caused to be issued a generally endorsed writ claiming \$1,000,000.00 general damages for libel, gave the undertaking in writing, and served the writ and the injunction and supporting documents on the Defendants. On 19th October the Plaintiff issued a summons to

continue the injunction, and on 22nd October the Defendants issued a summons for the injunction to be discharged. These are the two summonses with which we are concerned. Neither the statement of claim nor the defence has as yet been delivered or filed.

- [11] Meanwhile, on 22nd October 1999, after the service on them of the injunction and the writ, the Defendants published further articles on page 1 of 'The News' illustrated by photographs of the Plaintiff, his counsel Mr Matadial, and the 2nd Defendant. The first article appeared under the by-line of Duggie 'Nose' Joseph and with the headline "\$1 Million for News Stories." After describing and commenting on the lawsuit, in particular the unusualness of a claim for \$1,000,000.00 in general damages, the article concluded,

When The News first broke the story about the 'Offshore Banking Deal,' which involved then Attorney General Parnel Campbell, he served writs on a number of persons involved with The News. Then came the 'National Commercial Bank issue' and another former Attorney General, Carlyle Dougan, sued. Both individuals later resigned their positions following The News publication.

- [12] A second article on page 1 was printed under the headline "Legal Chattering." It analysed and criticized the affidavit of the Plaintiff in support of his application for the injunction. Yet a third article appeared on page 3 under the headline "Nothing Wrong?" It commented on various aspects of the evidence in the affidavit of the Plaintiff served on the Defendants.

[13] A number of further affidavits were sworn after the issue of the writ and which were used at the hearing of these applications. First, Mr Huggins on 22nd October in his affidavit exhibited the covering letter of the Plaintiff of 13th August. This was the first time that the court was seeing this letter. On the same day, Ilca Browne, a legal clerk in the law firm of Messrs Hughes & Cummings, the solicitors for Friendship Bay, the Defendant in Suit 497 of 1999, exhibited the same letter and a copy of the 'Default Judgment.' This was the first time that the court was seeing the 'Default Judgment.' On the same day the 2nd Defendant swore and filed his affidavit opposing the application to continue the injunction. He asserted that the articles of which the Plaintiff complained were not defamatory, and in any event they were fair comment on a matter of public interest made without malice and based at the very least on a sufficient substratum of fact. Further, he deposed, the Defendants had a good defence in that the articles were true, fair and accurate reports of fact and reasonable and justifiable reporting amounting in law to the defence of justification. He also claimed that qualified privilege extended to this reporting and that section 10 of the Constitution of Saint Vincent and the Grenadines guaranteed freedom of the press. He exhibited to his affidavit the 'Default Judgment,' the Registrar's memorandum to the Attorney General of 26th August 1999, and a letter to the Registrar from the Plaintiff of 1st September 1999 explaining his actions. In this letter of explanation, the Plaintiff protested that the 'Default Judgment' had been treated with a degree of seriousness that it could not and did not deserve. He claimed that the documents had been sent to a colleague in Sweden with the clear understanding that they were sample documents that lacked legal validity. He claimed that he had regularly sent such sample documents to foreign colleagues who were keen to know how our system worked. He claimed that

he normally sent two samples, one taken straight from the court forms and the other as it would look properly prepared, entered and perfected. On 25th October the 2nd Defendant swore and filed a further affidavit in which he asserted that the Plaintiff had not at the *ex parte* hearing disclosed his covering letter of 13th August, which would have influenced the court if it had seen the letter.

- [14] On 10th November 1999, just before the third and final day of the adjourned hearing of the submissions on these applications, the Plaintiff swore and filed a further affidavit. A copy of it was served on counsel for the Defendants just before he entered the judge's chambers on the final day of hearing submissions on the applications. In this affidavit the Plaintiff explained to the court for the first time how he came to write the covering letter and prepare the 'Default Judgment' in question. His explanation of the covering letter was that it was an honest routine error that could happen in any busy office: that he used in his office a series of routine sample letters in debt collection cases and modified the sample as circumstances dictated; that the letter of 13th August was a second stage letter to inform the client what he might do when a default judgment was entered against him. In this case, he deposed, a judgment had not yet been entered, so that the letter of 13th August was premature; that a first stage letter should have been sent describing the process leading to a default judgment. The other error to which he now admitted was that the form of 'Default Judgment' he had prepared was not endorsed "not valid." He deposed that his covering letter of 13th August to the Swedish colleague contained no false hope nor dishonest intent; that he did not understand how any right thinking person could assume that his covering letter and the 'Default Judgment' were anything other than informative. He concluded his affidavit by claiming that the

Defendants had earlier failed to satisfy a judgment of \$20,000.00 in an unrelated case, Suit 322 of 1993, and that they would not be able to satisfy any judgment awarded in his favour against them. He also deposed that his Solicitors had advised him that the publication of 22nd October further defamed his character, and that the Defendants were in contempt of court by carrying out further publications calculated to prejudice a fair trial of the matter.

[15] During the course of the argument, counsel for the Plaintiff submitted that the injunction should be continued for two reasons. First, regardless of the fact that the injunction had been granted and served on the Defendants they had further libeled the Plaintiff by comparing him with Messrs Campbell and Dougan who they alleged had been forced to resign as a result of articles that the Defendants had published about them; and that these gentlemen had attempted a face saving exercise by suing the Defendants. Counsel for the Plaintiff submitted that the suggestion in the articles of 22nd October was that the Plaintiff was a forger and that all he was attempting to do now was to go through the same face saving exercise by suing the Defendants. Counsel submitted that this further libel of 22nd October was published after the injunction had been granted and served on the 15th of October. The principle invoked by the Plaintiff was that where a party to a suit is in breach of an injunction that party cannot be heard to make an application to the court: **Hadkinson v. Hadkinson (1952) 2 All ER 567**

[16] The second reason for continuing the injunction, submitted counsel for the Plaintiff, was that the Defendants were in contempt of court in publishing in 'The News' the articles of 22nd October. The publications as they would be understood by the ordinary man would prejudice the fair trial of the matter which was now pending

before the court. The Defendants had acted improperly in publishing the articles in their newspaper of 22nd October criticizing the contents of the Plaintiff's affidavit.

[17] Counsel for the Defendants submitted that the injunction should be discharged for a variety of reasons. First, the Defendants had published assertions of fact that were substantially accurate. In his argument, counsel went through the facts recited in the articles. He claimed that the Plaintiff had not challenged the accuracy of any of those recitals of facts. Counsel further submitted that in so far as the articles contained expressions of opinion, these were fair comment on a matter of public importance and made without malice. His further submission was that in an action for defamation an interlocutory injunction would not normally be granted where the defendant pleaded justification and fair comment: **Forde and another v. Sealy [1979] 35 WIR 53.**

[18] The second reason given by counsel for the Defendants why the injunction should be discharged was that the Plaintiff had in his *ex parte* application failed to make full and fair disclosure of all material facts, particularly as regards the 'Default Judgment' and the covering letter. He submitted that since the application was made *ex parte*, the Plaintiff had the burden of stating fairly the points which the Defendants were making against him: **Coosals Quarry Ltd v. Teamwork Trinidad Ltd [1985] 37 WIR 417.**

[19] Thirdly, the Plaintiff ought not to have made his application *ex parte* because the circumstances were not such as required immediate action. An *ex parte* injunction ought not to be granted against a party without first giving him an opportunity to be heard unless the

circumstances are such as require immediate action: **Adanac Industries Ltd v. Black [1962-1963] 5 WIR 233.**

[20] The fourth reason why the injunction should be discharged, submitted counsel for the Defendants, was that the language of the injunction gave no clear rule of conduct; the injunction was imprecise, ambiguous and uncertain: that the only way for the Defendants to comply with the terms of the injunction was to publish absolutely nothing of or concerning the Plaintiff; and this could not have been the intention of the court. The 1864 case of **Low v. Inness 46 ER 933** was called in aid.

[21] Counsel for the Plaintiff submitted in reply to counsel for the Defendants' first submission above that the Defendants had never appreciated what the Plaintiff was complaining about. The Defendants had been making statements that the Plaintiff was a forger, that disciplinary action should be brought against him by the bar association, and that there existed in St Vincent concerns similar to those in Trinidad that no one 'has the testicular fortitude to take any action.' This conveyed to the ordinary man precisely what was stated in the headline of the issue of the newspaper of 8th October: "Lawyer forges Court Order." The question mark at the end of the headline was an attempt to disguise that this allegation that the Plaintiff was guilty of forgery was a statement of fact: **Gatley on Libel and Slander, 8th Ed, paragraph 103.**

[22] Counsel for the Plaintiff had no quarrel with counsel for the Defendants' submissions on the law on interlocutory injunctions when the defence of justification was set up. However, counsel for the Plaintiff urged the court to consider the evidence of the Plaintiff in his affidavit to the effect that the Defendants were persons of

straw and would be unable to pay any damages that might be awarded against them: that on the granting of an interlocutory injunction, it was a material consideration to be taken into account that the Defendants would be unable to pay damages: **American Cyanamid Co v. Ethicon Ltd [1975] AC 396.**

[23] Counsel for the Plaintiff further submitted that the Defendants' third and fourth submissions had absolutely no merit. There had been produced to the court at the time of the *ex parte* application evidence of the urgency of preventing the further defaming of the Plaintiff; and the words of the injunction were perfectly clear and unambiguous. Counsel for the Plaintiff urged the court to continue the injunction with the addition of the words "or from publishing anything which may prejudice the fair hearing of this action."

[24] The above paragraphs summarise the submissions made by or on behalf of the Plaintiff and the Defendants. It will in due course be for a court to decide whether or not the Defendants have defamed the Plaintiff and what damages, if any, he is entitled to. For the present, it is only necessary to decide whether as a matter of law the injunction granted *ex parte* on 15th October 1999 should be continued. In coming to its decision the court has been greatly aided by the care taken by both counsel in researching the law on the various issues raised, and in making their submissions and presenting the court with copies of their research. I now deal with the major issues as they appear to me.

THE GENERAL PRINCIPLE

[25] The general principle on the granting of interlocutory injunctions in cases of defamation is set out at paragraph 1571 of **Gatley** [*supra*]:

Injunction granted only in clearest cases. Where the defendant continues to publish the false or defamatory words and immediate and irreparable injury to person or property is likely to result, the court has jurisdiction to grant an interlocutory injunction restraining the defendant from further publishing the words until the hearing of the action or until further order. But, the jurisdiction is 'of a delicate nature,' and will only be exercised with great caution, especially in cases of slander. It will not in general be exercised unless there is 'strong prima facie evidence that the statement complained of is untrue,' for 'until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed.' Moreover, as the question of libel or no libel is eminently a matter to be determined by the verdict of a jury, and the court, in order to grant an interlocutory injunction, must necessarily come to a decision upon that question in advance, it will exercise its jurisdiction only 'in the clearest of cases, where any jury would say that the matter complained of was libelous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.' 'In the case of an atrocious libel wholly unjustified and inflicting the most serious injury on the plaintiff' it would be quite proper for the court to exercise its jurisdiction. But, if it be at all doubtful whether the matter complained of is libelous, an interlocutory injunction will not be granted. The reason is 'the importance in the public interest that the truth should out.'

[26] Even though the court might be satisfied that the words complained of are *prima facie* libelous and untrue, it will refuse to grant an

interlocutory injunction in specific cases. One of these cases relevant to these proceedings is where the defendant pleads the defence of justification. To quote **Gatley** [supra] at paragraph 1574:

Justification. Where the defendant swears that he will be able to justify the words – unless the court is satisfied that he will not be able to do so. ‘The validity of a justification, if pleaded, is eminently a matter to be determined by a verdict of a jury.’ ‘When once a defendant says that he is going to justify the words complained of, there is an end of the case so far as an interim injunction is concerned,’ although in a proper case it may be that the court will intervene on the ground of a breach of confidence.

[27] The proper procedure on an application for an *ex parte* interlocutory injunction is set out at paragraph 1580 of **Gatley** [supra]. The application should be made as soon as the plaintiff has issued his writ. The affidavit should not be sworn until after the writ is issued. The Trinidadian case in the Court of Appeal of **Adanac Industries** [supra] is instructive. One of the reasons given by Wooding CJ for discharging the injunction in that case was that the affidavit should not have been acted upon unless it had been re-sworn after the issue of the writ or an undertaking had been given that it would be re-sworn and re-filed. An affidavit can only be sworn in matters of this kind after the writ of summons has been duly issued, because as required by O.41, r.1 of the **1970 Rules of the Supreme Court** every affidavit must be entitled in the cause or matter in which it is sworn, and it cannot be so entitled unless and until there is a cause or matter. In this case presently before us, the affidavit of the Plaintiff was sworn before the issue of the writ of

summons, and was not re-sworn and re-filed prior to the hearing of the application for continuance. In any event, the Defendants did not take the procedural point, and there was an abundance of other affidavits, including the further affidavit of the Plaintiff of 10th November, late though it was, upon which to proceed to consider whether or not the injunction should be continued.

[28] In the Barbados case of **Forde and Another** [supra], Williams acting CJ as he then was dealt extensively with the principles governing the court on an application for an interlocutory injunction in cases of libel where the defendant pleaded justification and fair comment. He quoted at length from the various authorities on the subject, and I can do no better than to follow his lead. He accepted the judgment of Lord Coleridge CJ in the case of **Bonnard v. Perryman** [1891] 2 Ch 269 as the relevant authority. In that case the UK Court of Appeal overruled the High Court, which had granted an interlocutory injunction in an action for defamation, on the ground that in all but exceptional cases the court must abstain from interference until the trial and determination of the plea of justification.

[29] Williams CJ also quoted approvingly from the judgment of Lord Denning MR in **Fraser v. Evans** [1969] 1 QB 349 at page 360:

In so far as the article will be defamatory of Mr Fraser, it is clear that he cannot get an injunction. 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**. The reason sometimes given is that the

defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for the judge. But a better reason is the importance in the public interest that the truth should out.

And later,

It all comes back to this. There are some things which are of such public concern that the newspapers, the press, and indeed, everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away.

[30] Williams CJ in the same judgment also quoted approvingly from **Duncan & Neill on Defamation**, 1978 Ed. at paragraph 19.02 at page 146 as follows:

In many cases where defamatory matter has been published the most important immediate step from the point of view of the plaintiff is to prevent any further publication. The court has jurisdiction to grant an injunction to prevent any further publication where the plaintiff can establish – (a) a prima facie case of libel or slander; (b) that the defendant threatens or intends to make a further publication; (c) that if a further publication is made the plaintiff will suffer an injury which cannot be fully compensated in damages. Even if these conditions are satisfied, however, the general rule is that an interlocutory injunction will not be granted if there is any doubt as to whether the words are defamatory, or if the defendant swears that he will be able to justify the words

complained of, or if the defendant swears that he intends to rely on any other recognised defence, such as qualified privilege or fair comment.

[31] And, Williams CJ concluded:

In my view this approach is a sound one. Freedom of speech must continue to be cherished as it always has been. And a rule born out of the extreme importance which the great common law judges of the past attached to freedom of speech should not now be casually thrown aside. Moreover, as indicated in the cases cited earlier, where justification and fair comment are raised, the decision whether or not there is a slander, has to await the trial, whether the trial be by a jury or a judge.

THE CONSTITUTIONAL POINT

[32] Section 10 of the Constitution provides:

(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) 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 –

...

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of the persons concerned in legal proceedings,

...

[33] By virtue of the above provision freedom of expression in *St Vincent* is no longer only a common law right. It is a right protected by the Constitution. The Constitution recognizes the existence of the right of the person who wishes to communicate ideas and information. It also recognizes the right of persons to protect their reputations through the law on defamation. The Constitution does not extend or abridge either of those countervailing rights to the advantage or disadvantage of the other. The words of the section reflect the existing common law position. The court must continue to keep the balance between those two rights. The law and the authorities on the tort of defamation that predate the Constitution continue to be valid in determining the correct balance between the right of persons wishing to communicate ideas and information as against the right of others to protect their good name.

FULL AND FAIR DISCLOSURE

[34] The law on the duty of counsel in the case of an *ex parte* application for an injunction is summarized in **Bean on Injunctions** at page 117 following the principles articulated in the case of **Brinks-MAT v. Elcombe [1988] 3 All ER 188** thus:

- (1) The plaintiff must make a full and fair disclosure of all material facts;
- (2) proper enquiries must be made before making the application, and the duty of disclosure applies not only to facts known to the plaintiff but to those which he would have known if he had made the proper enquiries;
- (3) the extent of the enquiries which are necessary must depend on the nature of the case, the probable effect of the order on the defendant, the degree of legitimate urgency and the time available for making enquiries;
- (4) the court will be astute to ensure the plaintiff is deprived of any advantage he may have derived by his breach of duty;
- (5) whether the undisclosed fact is sufficiently material to justify immediate discharge of the order without examination of the merits depends on its importance; the fact that non-disclosure was innocent, in the sense that the fact was not known to the plaintiff or not perceived to be relevant, is an important consideration, but not decisive, because of the need to make proper enquiries;
- (6) there is discretion to continue the order or to grant a new one on terms, notwithstanding proof of material non-disclosure. The discretion is to be 'exercised sparingly' (per Balcombe LJ at 194.)

[35] In this case, at the time of the *ex parte* application neither the covering letter to the Swedish colleague nor the 'Default Judgment' was before the court. Counsel for the Plaintiff did not draw it to the attention of the court that the 'Default Judgment' bore a facsimile of the Registry stamp; bore a facsimile of the Registrar's stamp; bore a facsimile of the Registrar's signature; was not stamped "not valid" or "sample" or "draft" or any other words denoting its lack of validity. Nor did counsel disclose that the covering letter, far from describing the document as a sample or draft, simply and clearly described it as a copy of the default judgment. The Plaintiff has now explained that by oversight a form letter was erroneously used by his office in this communication to the Swedish lawyer, but neither the documents nor the explanation were disclosed to the court at the time of the *ex parte* application. Given the facts that have now emerged, the appearance of these documents was important to have been disclosed to the court at the time of the application by the Plaintiff for the *ex parte* injunction. It is difficult to imagine in what circumstances anyone, but especially a prominent barrister and solicitor such as the Plaintiff undoubtedly is, would prepare or cause to be prepared a document of such a nature as the 'Default Judgment.' No matter how innocently done, it could never be correct for anyone to create a sample court order by copying from other court documents the stamps of the court and of the Registrar and fabricating the Registrar's signature. That is not the way that a sample document is prepared to send to a foreign legal colleague. Even stamping or marking such a document with the words "sample" or "not valid" would not have made the exercise engaged in by the Plaintiff or under his direction, and now the matter of comment by the Defendants, permissible. The only redeeming aspect is that there does not appear to have been the slightest

intention on the part of the Plaintiff to deceive anyone by this action of his.

IMPRECISE LANGUAGE

[36] The language of the injunction sought and granted is couched as the Defendants submit in the widest terms. The order restrained the Defendants from "... publishing ... the defamatory allegation contained in two articles published by the said Defendants ...". There was no particularization of what parts of the articles the Plaintiff considered defamatory, or what allegation or innuendo if any was not to be repeated. The result was that the Defendants were not told by the order what words or allegations exactly it was that they were enjoined from repeating. The law is set out in the old case of **Low v. Inness** [supra] as follows:

The first duty of the court in granting an injunction of this kind is to lay down a clear and definite rule. If the language of the order in which the injunction is contained be itself ambiguous, uncertain, indefinite, giving no clear rule of conduct, the injunction becomes a snare to the defendant, who violates it, if at all, at the peril of imprisonment. The court therefore should, in granting an injunction, see that the language of its order is such as to render quite plain what it permits and what it prohibits.

PREJUDICING THE TRIAL

[37] There is the further question raised by counsel for the Plaintiff that, in a small community such as St Vincent is, if the Defendants are allowed to continue to publish allegations that the Plaintiff forged an

order of the court and other libelous remarks and comments it will be impossible for an unprejudiced jury to be selected, falls to be dealt with. No authority or text was advanced to assist in determining how this issue is to be determined. I have not been able to find any authority, and none was suggested to me, that this concern could override the general principle in **Bonnard v. Perriman**. If I may say so, counsel advanced the argument almost as an afterthought. It will be for counsel for the Plaintiff in assisting with the eventual selection of the jury to ensure that a fair and unprejudiced jury is selected. It is not for the court at this stage to be so sensitive to the need to safeguard the innocence of potential jurors that it should make an order stifling the right of freedom of speech on a matter of public concern where the Defendants have sworn that the defences of justification and fair comment will be raised. It is only fair to add that the Defendants on the other hand will no doubt have been advised that they must exercise care in continuing to report on the issues raised by the events that have given rise to this news story so that they are not reckless with the character of the Plaintiff by drawing conclusions and casting aspersions that are not justifiable by the provable facts. The courts in libel trials take into account subsequent and continuing libelous publications by the Defendant when the court is quantifying any damages a Defendant may be ordered to pay in the event that he is found to have libeled the Plaintiff.

CONTEMPT OF COURT

- [38] The publication of 22nd October in 'The News' objected to under this heading was principally concerned with the writ that had been issued and the documents that had been served on the Defendants. It cannot be claimed by the Plaintiff that the *ex parte*

injunction could have been intended by the court to prohibit any further mention by the Defendants of the events surrounding the incident and the ensuing litigation. The alleged libels of the earlier publications do not appear to have been repeated. Other than the allusion to Messrs Campbell and Dougan, counsel for the Plaintiff did not urge that there were any allegedly new libelous allegations made against the Plaintiff in this publication. There is no reason for this court to believe that Messrs Campbell and Dougan were other than honourable men who resigned high offices when their actions were called into question in the press without any wrongdoing on their parts ever having been established. Counsel for the Plaintiff did not strenuously urge this submission, and I make no finding on it.

INABILITY OF THE DEFENDANTS TO PAY DAMAGES

- [39] There was no evidence proffered by the Plaintiff, other than the alleged failure to pay an amount of \$20,000.00 ordered in another case, that an award of damages against the Defendants would not be an adequate remedy for the Plaintiff. No reason was shown why the damages allegedly previously ordered against the Defendants in that other unrelated case had not yet been paid: the plaintiff in that other suit may have failed for his own reasons to execute the judgment; the decision may be under appeal; the plaintiff might be awaiting the taxation of costs before attempting to collect; or any number of other reasons. In any event, the legal authorities produced to the court show the reluctance of the courts to apply the **American Cyanamid** principles to defamation cases. I do not accept the submission of counsel for the Plaintiff either that the inability of the Defendants to pay damages to the Plaintiff if such should be awarded has been made out, or that even if the

inability were proved the **American Cyanamid** principles apply. Williams acting CJ in the case of **Forde and Another** [supra] following **Hubbard v. Pitt** [1976] 1 QB 142 was clear on the point that the **American Cyanamid** principles did not affect the principle in **Bonnard v. Perryman**. He also quoted approvingly from **Duncan & Neil** [supra] at page 148 to the following effect:

It is to be noted that in the **American Cyanamid** case no reference was made to the rules governing the grant of interlocutory injunction in actions for defamation.

Accordingly, though the guidelines laid down by the House of Lords appear to be of general application, it is submitted that the previous practice will still be followed, either on the basis that, provided the cause of action is for defamation alone, the rule in **Bonnard v. Perryman** remains untouched, or because the rule would come into play in assessing the balance of convenience and would constrain the court to withhold an interlocutory injunction.

CONCLUSION

[40] Bearing in mind the law set out above on the issue of the correct approach of a court to the granting or refusing of an interlocutory injunction in cases where justification or fair comment are claimed by a defendant in an action for defamation, I find that this is not a case where the *ex parte* interlocutory injunction should be continued. The principles in **Bonnard v. Perriman** prevail over the right of the Plaintiff to have his reputation protected by injunctive relief prior to the trial of his case for libel when the defences of justification or fair comment are claimed. The non-disclosure by

counsel for the Plaintiff of the physical appearance of the 'Default Judgment' and the wording of the covering letter adversely affects the Plaintiff's claim to have the injunction continued. The language of the injunction was indefinite and gave no clear rule of conduct, and should not be continued. The fact that the Plaintiff has raised the issue of possible inability of the Defendants to pay any damages that may be ordered does not bring the **American Cyanamid** principles into play. The injunction granted on 15th October 1999, and extended subsequently until further order, is discharged. The Defendants are entitled to the costs of this application to be taxed if not agreed.

A handwritten signature in black ink, appearing to read 'Ian Mitchell', with a long horizontal flourish extending to the right.

Ian Donaldson Mitchell, QC
High Court Judge