Neutral Citation Number: [2017] EWCA Civ 950

Case No: A2/2017/1018

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE POPPLEWELL
HQ17X00846

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2017

Before:

SIR TERENCE ETHERTON, MR
LORD JUSTICE LONGMORE
and
LADY JUSTICE SHARP

- -

Between:

BREVAN HOWARD ASSET MANAGEMENT LLP	**Claimant/ Respondent**
- and -	
REUTERS LIMITED & ANR	**Defendants/ Appellants**

- -
- -

Guy Vassall-Adams QC and Ben Silverstone (instructed by **Wiggin LLP**) for the **Appellants**
Desmond Browne QC and Adam Speker (instructed by **Schillings International LLP**) for the **Respondent**

Hearing date: 28th June 2017

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APPROVED PUBLIC JUDGMENT

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Sir Terence Etherton, MR:

1. This is the judgment of the Court.

2. This appeal concerns an application for an injunction to restrain publication in the media of confidential business information pending trial. This is a public judgment, with redactions from a private judgment we have handed down, and which are necessary to preserve the confidential information of the respondent, to avoid defeating the purpose of the application.

3. It is an appeal from the order of Mr Justice Popplewell dated 23 March 2017, by which he ordered that the appellants, Reuters Limited ("Reuters"), the well known global media news agency, and Maiya Keidan, a financial journalist employed by Reuters, be restrained from disclosing the information in Confidential Schedule 2 to the order.

4. The information derives from documents sent on terms of confidentiality by the respondent, Brevan Howard Asset Management LLP ("BHAM"), which is the manager of a number of hedge funds, to 36 potential investors.

5. For reasons which we gave at the outset of the hearing which was held in private, we ordered that the hearing of the appeal take place in private.

6. Unless the context indicates otherwise, references in this judgment to Reuters include Ms Keidan.

The background

7. We gratefully take the following summary of the background facts from the Judge's judgment.

8. BHAM is a leading global alternative asset manager. It is one of the largest hedge fund managers in Europe and currently manages over US $15 billion in a range of funds. The group of which it is part manages hedge fund assets for over 330 institutional investors around the globe. Its principal trading activities have taken place through the Brevan Howard Master Fund Limited ("the Master Fund").

9. BHAM sent information to 36 prospective professional investors. The information was contained in a package of documents provided electronically.

10. BHAM made efforts to keep confidential the information sent to these 36 prospective investors. Each investor was telephoned before receiving any documents and informed that the documents they would receive were confidential and highly sensitive. Each recipient was then sent the documents, which were password protected with the password being unique to each recipient. The first page of the package of documents was headed "Private and Confidential" and "Not for Distribution". The package then stated on its front page:

> "Disclaimer and Important Information:
>
> This document has been provided specifically for the use of the intended recipient only and must be treated as proprietary and

> confidential. It may not be passed on nor reproduced in any form in whole or in part in any circumstances without express prior written consent from Brevan Howard. Without limitation to the foregoing any text and statistical or any portion thereof contained in this document may not be permanently stored in a computer, published, re-written for broadcast or publication or redistributed in any medium except with the express prior written permission of Brevan Howard."

11. The package comprised seven documents, five of which are the subject of the application for an injunction. The other two documents contain information which it is accepted is in the public domain. Reuters has obtained information, from confidential sources which it has declined to reveal for journalistic reasons, which appears to derive from the package of documents. It is this information which Reuters wishes to publish.

12. Reuters first indicated its intent to publish this information on 1 March 2017 and on that date it sought confirmation as to the accuracy of the information from BHAM's external communications advisors, Peregrine Communications Group. There followed correspondence during which Reuters agreed to give six hours' notice during working hours before publishing.

Human Rights Act 1998 section 12 and Article 10 of the Convention

13. Article 10 of the European Convention on Human Rights ("Article 10") and section 12 of the Human Rights Act 1998 ("the HRA") were central to the determination of the application for an interim injunction pending trial.

14. Article 10 is as follows:

> "Article 10
>
> Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

15. Section 12 of the HRA is as follows, so far as relevant:

> "Freedom of expression
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) …
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-
>
> (a) the extent to which-
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code.
>
> (5) …."

<u>The proceedings</u>

16. In anticipation of bringing these proceedings, on 10 March 2017 BHAM applied *ex parte* to Master McCloud for an order, which was granted, to seal the court file. Master McCloud also ordered that witness statements could be filed, with confidential exhibits which would be retained by the court in sealed envelopes; that statements of case could be filed with confidential schedules, to be similarly protected; and that no-one other than a party could obtain any copy of a statement of case or other document from the court file without further order of the court and without notice being given to BHAM. The Master heard that application in private.

17. On 11 March 2017 the claim form and particulars of claim were issued and served. On 13 March 2017 an application notice was issued for an interim non-disclosure order in respect of the material contained in or derived from the five documents.

18. The application came before Nicol J in the Interim Applications Court on 16 March 2017. Only an hour of time was available on that occasion. Nicol J granted an interim order restraining disclosure or use of the information in issue until the

application could be heard. That took place before Popplewell J on 22 March 2017. He heard the application in private.

The judgment

19. With impressive speed, the Judge delivered a substantial and detailed oral judgment on 23 March 2017, the day following the hearing of the application.

20. Having set out the background, he then set out the relevant principles of law. He said that the application engaged section 12 of the HRA because it sought to restrain the freedom of expression of Reuters protected by Article 10.

21. He said that imposed an enhanced merits test by comparison with that which ordinarily applies to applications for interim injunctions.

22. The Judge then referred to *The Sunday Times v United Kingdom (No. 2)* (1992) 14 EHRR 153 at [50] and to *The Observer and The Guardian v United Kingdom* (1992) 14 EHRR 153 at [6] for a summary of some key principles.

23. The Judge said that there was no dispute about the relevant ingredients of a cause of action for breach of confidence.

24. The Judge said (at para [24]) that, where Article 10 is engaged, freedom of expression may justify breach of confidence where publication is in the public interest, and whether it does so in a particular case is fact-sensitive and requires balancing the claimant's right to confidentiality with the defendants' right of freedom of expression. He referred in that connection to Lord Goff's speech in *Attorney General v Observer Ltd* [1990] 1 AC at p.282E-F and to *Associated Newspapers Limited v HRH Prince of Wales* [2006] EWCA Civ 1776, [2008] Ch 57 at [55]. He then said that, where there is a breach of confidence, the test is not simply whether the information is a matter of public interest, but rather whether, in the circumstances, it is in the public interest that the duty of confidence should be breached. He referred in that connection to paragraphs [67] and [68] of the judgment of the Court of Appeal in the *Prince of Wales* case.

25. The Judge rejected the submission of counsel for Reuters that BHAM had failed to establish that it was more likely than not to succeed at trial.

26. The Judge found that the evidence before the court suggested that the information which Reuters has and wishes to use is probably derived from the five documents sent to the potential investors, and that these documents were impressed with the quality of confidence. In that connection he said amongst other things, that the information would have the potential to be valuable to BHAM's competitors and damaging to BHAM's business if disseminated more widely.

27. The Judge said that it was probable that Ms Keidan would have been aware of the likely confidentiality of the information contained in the document she received, and in any event Reuters and Ms Keidan were on notice that the information was confidential from at least 1 March 2017.

28. The Judge said that it was no answer to an injunction that Reuters did not have the five documents themselves and that it was only the information it had which it wished to publish.

29. The Judge said that detriment is not a necessary ingredient of a cause of action in breach of confidence, and, in any event, it is clear from the content of the information that its publication would likely be damaging to BHAM for the reasons he had already given.

30. The Judge then turned to the public interest defence, which is the subject of this appeal. The Judge identified a number of matters bearing on the public interest in favour of publication, including in brief summary as follows: (1) BHAM is a very large hedge fund manager, and hedge funds and their effect on the economy are a legitimate matter of public interest and debate; (2) the success or failure of hedge funds can have a material impact on institutional investors, such as public pension funds which affect millions of people globally; (3) there have, in recent years, been reports in the mainstream financial press about the lack of transparency in the fees charged by hedge funds and about whether their results justify their fees and charges; (4) the institutional investors in the BHAM hedge funds around the globe include sovereign wealth funds, corporate and public pension plans and various foundations and endowments, which makes information about components in the performance of BHAM's funds a subject of public interest and debate as part of the debate about hedge funds and their role; (5) the investors in BHAM funds, potentially include institutional investors who invest the assets under their control ultimately for the benefit or detriment of pension plan holders, public employees and other individuals. There is a public interest in such individuals having available to them relevant information so as to be in a position to influence and hold to account the institutions whose investment decisions affect their financial welfare.

31. The Judge said that it is clear, however, from the *Prince of Wales* case that it is not sufficient to establish that there is a public interest in publication: there must be a public interest in breaching the confidence which attaches to the information, and that involves weighing the relative importance of the maintenance of confidentiality against the relative importance of the public interest in publication, which is a fact specific exercise in each case.

32. The Judge said that in the present case the maintenance of confidentiality is a weighty matter. He amplified this point as follows:

> "There is always an important public interest in observance of duties of confidence as paragraph 67 of the *Prince of Wales* case makes clear. It is especially important in the context of disclosure to potential investors of material which is relevant to their decision to invest. It is highly desirable that full and candid disclosure is given for those purposes. If a hedge fund in BHAM's position felt at risk that sensitive commercial information disclosed in confidence could be published without restraint and in breach of the careful confidentiality restrictions sought to be put in place, with the potential for considerable damage to its business and disadvantage vis-à-vis its competitors, there would be a disincentive to make full and

> candid disclosure. In a democratic society there is a strong public interest in protecting such confidentiality so as to encourage such disclosure. If a financial institution could not provide such information with adequate protection of its confidentiality, it would be forced to be less candid with investors who would be less well-informed in making their investments. The interest in protecting the confidentiality is all the stronger where, as in this case, the disclosure is by a leading market participant and the investments in issue are measured in tens of millions of dollars."

33. The Judge said:

> "In my view, this outweighs any public interest in publication of the information".

34. The Judge then went on to say that it was of significance that there is no question in this case of publication being necessary to correct a false impression created by BHAM, to reveal any illegal or immoral dealing, to expose hypocrisy or to expose some improper practice or concealment, nor even to demonstrate incompetence. He referred to *Lion Laboratories Ltd v Evans* [1985] 1 QB 526 as establishing that there is no bright line rule that it is necessary to demonstrate iniquity in order to justify a breach of confidence and that a balancing exercise falls to be performed. He said that in some cases the balance may come down in favour of permitting publication even in the absence of iniquity. The Judge then quoted two passages in the judgment of Griffiths LJ in *Lion Laboratories* at page 550 C-D and page 551 A-B. In the first of those passages Griffiths LJ said that "it is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information". In the second passage, Griffiths LJ said that "It will … be an exceptional case in which a defence of public interest which does not involve iniquity on the part of the plaintiff will justify refusing the injunction".

35. The Judge said that in the present case there has been no misleading self-promotion by BHAM which could justify a public interest in publication on the grounds that it would involve exposing hypocrisy or incompetence, still less deceit or some other form of iniquity; and publication would not be for the purposes of demonstrating any behaviour which is even arguably deserving of moral censure.

36. The Judge then referred to the IPSO Code, which he said reinforced the conclusion that the public interest in publication in the present case is at the lower end of the scale because none of the particular examples in the Code of raising or contributing to a matter of public debate apply to the facts of the present case.

37. The Judge concluded that for all the reasons he had given, on the basis of the material presently before the court, BHAM is more likely than not to establish at trial that it is entitled to restrain publication.

38. Finally, the Judge said that it is likely that BHAM will establish at trial that damages are not an adequate remedy and that this is a classic case where difficulties in quantifying damage may justify injunctive relief.

The submissions on behalf of Reuters on appeal

39. At the heart of Reuters' appeal is the criticism that the Judge wrongly adhered to pre-HRA law in believing that the paradigm case of public interest is where publication would correct a false impression or reveal wrongdoing or hypocrisy; and that, in the absence of such a factor, disclosure would only be permitted in the public interest if that was "vital" and the case was "exceptional". It is said that the Judge expressed those views in his judgment, and in particular by his quoting the passages in the judgment of Griffiths LJ at pages 550 and 551 of *Lion Laboratories*.

40. Reuters contend that, as a result of that erroneous approach, the Judge failed to conduct a proper balancing and proportionality exercise because he adopted (what the written grounds of appeal describe as) a "sliding scale of information by type or category", with the disclosure of iniquity and hypocrisy and the correction of a misimpression by the claimant at the top. In that regard, Mr Vassall-Adams QC, for Reuters, pointed to the Judge's statement that: "It is of significance that there is no question in this case of publication being necessary to correct a false impression created by BHAM, to reveal any illegal or immoral dealing, to expose hypocrisy or to expose some improper practice or concealment, nor even to demonstrate incompetence".

41. Reuters contends that those fundamental errors of principle led the Judge, when evaluating Reuters' public interest defence, to give insufficient weight to a range of important matters of public interest.

42. Mr Vassall-Adams submitted that the post-HRA approach, which the Judge should have applied, is encapsulated in the following passage in "The Law of Confidentiality: A Restatement", Stanley, 2008 (at pp 87-88):

> "The traditional approach generally sought some positive public interest in publication: the exposure of wrongdoing, or of some item of information that it was vital for the public to know. That tended to divert the inquiry from one which sought to ascertain whether confidentiality was a sufficient reason to prevent publication to one in which the court asked whether publication would serve some pressing public interest. Although the presence of such an ulterior advantage may be important to how the balance is struck under Article 10, it is not in any sense necessary. The mere fact that the defendant wishes to provide information to the public is sufficient, in itself, to engage Article 10. Freedom of expression is not merely a right secreted in the interstices of a body of rules designed to protect other aspects of the public interest."

43. The stepping stones of Mr Vassall-Adams's argument on this point may be summarised as follows. First, *Lion Laboratories* recognised a general defence of public interest to claims for breach of confidence and freed that defence from "the shackles", as he put it, of "the iniquity rule", that is to say a rule that only some form of iniquity on the part of the claimant could be disclosed in the public interest. Second, the court has to carry out a balancing exercise, weighing up the public interest in maintaining confidence against a countervailing public interest favouring disclosure. Third, in carrying out that balancing exercise, the circumstances in which the public interest in publication may override a duty of confidence are greater since

the coming into force of the HRA. In support of that last proposition, Mr Vassall-Adams placed reliance on the following passages in the judgment of the Court of Appeal in the *Prince of Wales* case:

> "50 A number of decisions of the Strasbourg court provide examples of situations where the public interest in the receipt of information protected by article 10 has prevailed over restraints on publication that were lawful under domestic law. In general the Strasbourg court views with disfavour attempts to suppress publication of information which is of genuine public interest. Where it relates to a matter of major public concern, even medical confidentiality may not prevail: *Editions Plon v France* (2004) 42 EHRR 705."

> "67 … Before the Human Rights Act 1998 came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, "necessary in a democratic society". It is a test of proportionality."

44. Fourth, there is a wide range of public information which it is in the public interest to disseminate, including economic information, and also information which corrects a false impression or image. Mr Vassall-Adams referred in that connection to *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457. In that case the claimant, an internationally famous fashion model, who had courted publicity, volunteered information to the media about her private life and stated publicly, but untruthfully, that she did not take drugs. The defendant newspaper published articles which disclosed her drug addiction and the fact that she was receiving therapy through Narcotics Anonymous, a self-help group, gave details of group meetings she attended and showed photographs of her in a street as she was leaving a group meeting. She claimed damages against the newspaper for breach of confidentiality. Mr Vassall-Adams relied on the following passages in the speech of Baroness Hale:

> "148. … There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in

> fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.
>
> 149 But it is difficult to make such claims on behalf of the publication with which we are concerned here. The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life. …
>
> 150 … such pieces are normally run with the co-operation of those involved. Private people are not identified without their consent. It is taken for granted that this is otherwise confidential information. The editor did offer Miss Campbell the opportunity of being involved with the story but this was refused. … What entitled him to reveal this private information about her without her consent?
>
> 151 The answer which she herself accepts is that she had presented herself to the public as someone who was not involved in drugs. … [T]he possession and use of illegal drugs is a criminal offence and a matter of serious public concern. The press must be free to expose the truth and put the record straight.
>
> 152 That consideration justified the publication of the fact that, contrary to her previous statements, Miss Campbell had been involved with illegal drugs. It also justified publication of the fact that she was trying to do something about it by seeking treatment. It was not necessary for those purposes to publish any further information, especially if this might jeopardise the continued success of that treatment."

45. Mr Vassall-Adams relied on the judgment of the European Court of Human Rights ("the ECrtHR") in *Couderc v France* (2015) 40 BHRC for a variety of points of principle as to the role of the media and the importance of their task to impart to the public information and ideas on matters of public interest. In that case the Grand Chamber held, in favour of the applicant publishers, that the award of damages of the French Courts against them for the publication of an interview with a woman who claimed that her son's father was the Prince of Monaco was in violation of Article 10.

46. The judgment of the Grand Chamber sets out relevant passages of Resolution 1165 (1998) on the right to privacy, adopted by the Parliamentary Assembly of the Council of Europe on 26 June 1998. That Resolution included the following description of "public figures":

> "7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those

> who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain."

47. Mr Vassall-Adams relied on the following passages in the judgment:

> "89 Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Thus, the duty of imparting information necessarily includes "duties and responsibilities", as well as limits which the press must impose on itself spontaneously (see *Mater v Turkey* No.54997/08, § 55, 16 July 2013). Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Bladet Tromsø and Stensaas v Norway [GC], No.21980/93, §§ 59 and 62, ECHR1999-III ; Pedersen and Baadsgaard v Denmark No.49017/99, § 71, ECHR2004-XI* and *Von Hannover (No.2)* cited above, § 102). Furthermore, it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case (see *Jersild v Denmark, 23 September 1994, § 31, Series A No.298* , and *Stoll v Switzerland [GC], No.69698/01, § 146, ECHR2007-V). …"*

> "96 The Court reiterates that there is little scope under art.10 § 2 of the Convention for restrictions on freedom of expression when a matter of public interest is at stake (see, inter alia, *Wingrove v the United Kingdom, 25 November 1996, § 58 ,* Reports of Judgments and Decisions 1996-V). The margin of appreciation of States is reduced where a debate on a matter of public interest is concerned (see *Éditions Plon v France No.58148/00, § 44, ECHR2004-IV)."*

> "103 In this connection, the Court specifies that the public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree (see *Sunday Times* , cited above, § 66), especially in that they affect the well-being of citizens or the life of the community (see *Barthold v Germany , 25 March 1985, § 58, Series A No.90).* This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue (see, for example, Erla Hlynsdóttir, cited above, § 64), or which involve a problem that the public would have an interest in being informed about (see *Tønsbergs Blad A.S. and Haukom ,* cited above, § 87)."

> "110 At this stage, the Court reiterates, having regard to the Government's argument that the article contained only a few lines on the issue of the child's status as a potential heir (see paragraph 68 above), that the only decisive question is whether a news report is capable of contributing to a debate of public interest, and not whether it achieves this objective in full (see *Haldimann and Others v Switzerland* No.21830/09, § 57, ECHR 2015)…."

> "113 Consequently, the Court considers that, although the impugned article admittedly contained numerous details which concerned solely private or even intimate details of the Prince's life, it was also intended to contribute to a debate on a matter of public interest (see [105]-[112] above), as submitted by the applicants both before the domestic courts and before the Court (see [30]-[33] and [52]-[53] above)."

> "114 Having regard to the domestic courts' conclusions in this regard (see [104] above), the Court considers it useful to emphasise that the press's contribution to a debate of public interest cannot be limited merely to current events or pre-existing debates. Admittedly, the press is a vector for disseminating debates on matters of public interest, but it also has the role of revealing and bringing to the public's attention information capable of eliciting such interest and of giving rise to such a debate within society. Moreover, in view of the articles published in the Daily Mail and in Bunte (see [9] and [11] above), the Court notes that the child's status as a potential heir was already a matter of public discussion."

48. Mr Vassall-Adams emphasised that the decision whether or not to grant an injunction in the circumstances of the present case is not merely an exercise in unfettered judicial discretion but the carrying out of a careful assessment of proportionality. He cited in that connection the decision of the Court of Appeal in *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] EMLR 4. In that case the court upheld the decision of the first instance judge discharging an earlier interim injunction preventing the publication by the defendants of an expert report critical of the claimants' assessment of the value for money of a proposed public-private partnership ("PPP") for the track maintenance function of the London Underground. The defendants had given an undertaking to the first instance judge not to publish any part of the report except in a redacted version which would preserve genuine commercial confidences relating to the bids for the proposed PPP arrangement. Robert Walker LJ, having described the report as "not some distasteful trivia" but "a serious report about a matter of very considerable public interest, prepared by a highly reputable organisation", rejected (at para [47]) the suggestion that the judge had exercised a "wholly unstructured discretion". Mr Vassall-Adams relied in particular on the following passages in the judgment of Sedley LJ:

> "55 Art.10 of the European Convention on Human Rights is not just about freedom of expression. It is also about the right to receive and impart information, a right which (to borrow Lord

Steyn's metaphor in *R. v Home Secretary, ex parte Simms* [2000] A.C. 115 at 126) is the lifeblood of a democracy. The Deloittes report is on one view a set of contested opinions about the bidding process; but on another it is an expert and adverse evaluation of it, the very fact of which is of public importance. Whether or not undertakings of confidentiality had been signed, both domestic law and Art.10(2) would recognise the propriety of suppressing wanton or self-interested disclosure of confidential information; but both correspondingly recognise the legitimacy of disclosure, undertakings notwithstanding, if the public interest in the free flow of information and ideas will be served by it.

56 The difficulty in the latter case, as Miss Appleby's argument has understandably stressed, is to know by what instrument this balance is to be struck. Is it to be, in Coke's phrase (4 Inst. 41), the golden and straight metwand of the law or the incertain and crooked cord of discretion? The contribution which Art.10 and the jurisprudence of the European Court of Human Rights can make towards an answer is, in my view, real.

57 It lies in the methodical concept of proportionality. Proportionality is not a word found in the text of the Convention: it is the tool—the metwand—which the Court has adopted (from 19th-century German jurisprudence) for deciding a variety of Convention issues including, for the purposes of the qualifications to Arts 8 to 11, what is and is not necessary in a democratic society. It replaces an elastic concept with which political scientists are more at home than lawyers with a structured inquiry: Does the measure meet a recognised and pressing social need? Does it negate the primary right or restrict it more than is necessary? Are the reasons given for it logical? These tests of what is acceptable by way of restriction of basic rights in a democratic society reappear, with variations of phrasing and emphasis, in the jurisprudence of (among others) the Privy Council, the Constitutional Court of South Africa, the Supreme Court of Zimbabwe and the Supreme Court of Canada in its Charter jurisdiction (see *de Freitas v Ministry of Agriculture* [1999] 1 AC 69 at 80, PC) , the courts of the Republic of Ireland (see *Quinn's Supermarket v Attorney-General* [1972] I.R. 1) and the Court of Justice of the European Communities (see Art. 3b of the Treaty on European Union; *Bosman* [1995] E.C.R. I-4921, 110).

58 It seems to me, with great respect, that this now well established approach furnishes a more certain guide for people and their lawyers than the test of the reasonable recipient's conscience. …"

49. Mr Vassall-Adams submitted that the present case is, on the evidence, an exceptionally strong case of public interest, which engages all the strands of the case law on public interest.

50. Reuters' concern in the public interest, as articulated by Mr Vassall-Adams, is also that the injunction granted by the Judge will preclude investors and potential investors, other than the 36 potential investors from knowing important facts. Further, it will prevent Reuters from enabling people to hold their pension providers to account. In that respect, it is said that the injunction undermines Reuters' role as a public watchdog.

51. A series of further points made by Mr Vassall-Adams are connected to that last point. The evidence is that Reuters is the world's largest global media news agency, with over 2500 journalists in 200 locations around the world and reaching more than 1 billion people and 750 TV broadcasters in 115 countries every day. It has over 1000 newspaper clients, including 13 of the top 15 newspapers globally, and Reuters.com has over 33 million unique monthly visitors.

52. Reuters' evidence states that it has an enviable reputation for speed, accuracy, integrity and impartiality. Mr Vassall-Adams referred us to "Reuters' Trust Principles", which, the evidence states, were put in place to safeguard Reuters' independence, integrity and the reliability of its news. Those principles include such statements as that "the integrity, independence and freedom from bias of Thomson Reuters shall at all times be fully preserved"; and "Thomson Reuters shall supply unbiased and reliable news services to newspapers, news agencies, broadcasters and other media subscribers and to businesses, governments, institutions, individuals and others with whom Thomson Reuters has or may have contracts". Reuters' Handbook of Journalism states that Reuters' journalists "always hold accuracy sacrosanct".

53. Reuters says that the injunction has the effect of suppressing in its entirely the public interest story which Reuters wishes to publish; and, because Reuters is a global news agency, it prevents an international news story worldwide, including in jurisdictions (such as the USA) where there would otherwise be no bar on publication.

54. Reuters says that the Judge was also wrong in the following respects. The Judge failed to take into account, or sufficiently into account, the limited nature of the confidential information Reuters wishes to publish, Reuters never having possessed the five documents identified by BHAM as containing the confidential information. The Judge should have concluded that the Editors' Code supported, rather than undermined, Reuters' case on the public interest in publication since it expressly provides that, where information contributes to a debate of general interest, it falls within the public interest principle. The Judge should have concluded that the difficulty that BHAM might have in establishing the amount of any damages, should an injunction be refused, did not outweigh the significant incursion on the journalistic rights of Reuters if an injunction was granted; and the Judge failed to take into account the absence of any value of the cross-undertaking in damages to Reuters in a media case where publication is time sensitive. The Judge should have borne in mind that Reuters has always acted responsibly in investigating and seeking to report on the information in issue, in particular providing BHAM with considerable detail about the intended publication, seeking comment from, and giving assurances to, BHAM that

Reuters would fairly report any such comment and undertaking to provide BHAM with notice of any publication.

55. Reuters says that the Judge was wrong to say that: "If a financial institution could not provide such information with adequate protection of its confidentiality, it would be forced to be less than candid with investors". Reuters contends that there is no evidence on behalf of BHAM that the refusal of an injunction would lead it to be less candid with investors in the future.

56. Reuters further contends that, in any event, BHAM would be under an obligation to be candid. Mr Vassall-Adams referred, in support of that proposition, to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers ("the 2011 Directive").

Discussion

57. Despite that raft of criticisms of the Judge's judgment, we are clear that the appeal should be dismissed.

58. The Judge had to carry out a balancing exercise in order to decide on the proportionality of granting the injunction. Such an exercise is one in which different judges can legitimately reach different conclusions. The appeal can only succeed if the Judge made an error of law or principle or if he reached a conclusion which was plainly wrong, that is to say it was outside the ambit of conclusions which a judge could properly reach: *Lord Browne v Associated Newspapers Ltd* [2008] QB 103 at [45]; *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645 at [26].

59. The legal principles applicable to the present case are well established. In applying them, the Judge made no error of principle or law. His conclusions that the balance came down in favour of the preservation of the confidentiality of BHAM's information and that the grant of an injunction is a proportionate exception to Reuters' right to freedom of expression under Article 10 are ones he was entitled to reach.

60. The Judge applied the principles laid down by the Court of Appeal in the *Prince of Wales* case, which was binding on the Judge and is binding on us. That case post-dated the coming into effect of the HRA and was centrally concerned with the issue whether the common law of confidence had to be revised in order to give full effect to Article 10 rights. As Lord Phillips CJ, giving the judgment of the Court of Appeal, said at paragraph [32]:

> "32 Before the Human Rights Act 1998 came into force, the English law of confidence had recognised that there were circumstances where the public interest in disclosure overrode the duty of confidence, and that these circumstances could differ depending upon whether the duty was owed to a private individual or to a public authority. The present case raises the question whether the principles permitting publication of information disclosed in breach of an obligation of confidence require to be revised in order to give full effect to article 10 rights. …"

61. As the Court of Appeal said at paragraph [65], in a privacy case, where no breach of a confidential relationship is involved, a balance has to be struck between Article 8 rights and Article 10 rights and that will usually involve weighing the nature of and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information.

62. Unlike the *Campbell* and *Couderc* cases, to which Mr Vassall-Adams referred, this is not such a case. This is a case where the information was imparted and received in confidence. The Court of Appeal addressed the principles in such a case in paragraphs [65] to [68]. It observed in paragraph [66] that the fact that information relates to information received in confidence is a factor that Article 10(2) recognises as, of itself, capable of justifying restrictions on freedom of expression.

63. Paragraph [67] of the Court of Appeal's judgment is important. Mr Vassall-Adams relied on part of what it said but it is important to read the paragraph as a whole, which is as follows:

> "There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act 1998 came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, "necessary in a democratic society". It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech." [our emphasis]

64. Reflecting those points of principle, the Court of Appeal summarised as follows the test to be applied where information has been received in confidence:

> "68 For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the

> public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."

65. Such a test plainly applies in the present case where the information was imparted to, and received by, the intended recipients in confidence, and, as the Judge found the very content of the information would have caused Ms Keidan, who was a financial journalist specialising in hedge funds, to have considered the information to be commercially sensitive and confidential.

66. There is nothing inconsistent between the approach in the *Prince of Wales* case and the jurisprudence of the ECrtHR. The Strasbourg court expressly recognised in *Markt Intern and Beerman v Germany* (1990) 12 EHRR 161 at paragraph 35 that even the publication of items which are true and describe real events may have to be prohibited in order to respect the confidentiality of certain commercial information.

67. This consistency of approach is confirmed in our domestic jurisprudence. In *Attorney-General v Times Newspapers Ltd* [1990] 1 AC 109 at 282-284, for example, Lord Goff summarised the position as follow:

> "The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.
>
> Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made "the confidant of a crime or a fraud": see *Gartside v. Outram* (1857) 26 L.J.Ch. 113 , 114, *per* Sir William Page Wood V.-C. But it is now clear that the principle extends to matters of which disclosure is required in the public interest: see *Beloff v. Pressdram Ltd. [1973] 1 All E.R. 241 ,* 260, *per* Ungoed-Thomas J., and *Lion Laboratories Ltd. v. Evans [1985] Q.B. 526 ,* 550*, per* Griffiths L.J. It does not however follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required: see *Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892 .* A classic example of a case where limited disclosure is required is a case of alleged iniquity in the Security Service. Here there are a number of avenues for proper

> complaint; these are set out in the judgment of Sir John Donaldson M.R.: see, ante, pp. 187B - 188H. Like my noble and learned friend, Lord Griffiths, I find it very difficult to envisage a case of this kind in which it will be in the public interest for allegations of such iniquity to be published in the media. In any event, a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source.
>
> ...
>
> Finally, I wish to observe that I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it. In any event I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty. The exercise of the right to freedom of expression under article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) in relation to certain prescribed matters, which include "the interests of national security" and "preventing the disclosure of information received in confidence." It is established in the jurisprudence of the European Court of Human Rights that the word "necessary" in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the courts, leads to any different conclusion."

68. The same point about the absence of any difference in principle between our domestic law and Article 10 was made by Lord Mance in *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 at [46].

69. Against this background, it can be seen that Reuters' criticism of the Judge for quoting passages from the judgment of Griffiths LJ in *Lion Laboratories* at paragraph 55 of his private judgment, and, in particular, Griffiths LJ's expression "vital in the public interest" as the touchstone for justification of publication in breach of

confidence, is misplaced. As the Judge noted, the passage containing that expression was cited, without any disapproval, in the Court of Appeal judgment in *the Prince of Wales* case (at para [54]). That expression is no more than an indication that, in carrying out the necessary balancing exercise, there must be sufficiently significant matters of public interest in favour of publication to outweigh the public interest in the observance of duties of confidence. It is entirely consistent with the statements in the Court of Appeal's judgment in the *Prince of Wales* case (at para [67]) that there is an important public interest in the observance of duties of confidence and that it is not enough to justify publication that the information in question is a matter of public interest. The importance of *Lion Laboratories* was that it made clear that such significant matters of public interest are not confined to the disclosure of iniquity.

70. Griffiths LJ's statement, also quoted by the Judge, that it will be "an exceptional case in which a defence of public interest which does not involve iniquity on the part of the plaintiff will justify refusing the injunction" did no more than make the same point; although, as was made clear in paragraph [67] of the *Prince of Wales* case, the test is now more properly expressed as one of proportionality in permitting an exception under Article 10.2 to the Article 10.1 right of freedom of expression.

71. The *LRT* case and *Northern Rock plc v The Financial Times Ltd* [2007] EWHC 2677 (QB) are examples of information subject to a confidentiality agreement where the court reached different outcomes in the balancing and proportionality exercise. In the *LRT* case the initial grant of an interlocutory injunction was set aside but it is important to note that the document which was permitted to be published was redacted so as to exclude commercially sensitive information which was the subject of confidentiality agreements.

72. In *Northern Rock* the judge granted an injunction against the publication of a Briefing Memorandum containing detailed financial statistics and projections relating to Northern Rock, which was in financial difficulties and was trying to mount a lifeboat operation. The Memorandum was sent to a number of financial institutions, which were required to agree to keep certain information confidential. The Memorandum was leaked and the Financial Times put a large section on its website. The judge, applying paragraphs [67] and [68] of the Court of Appeal's judgment in the *Prince of Wales* case, said (at para [20]), that the detailed commercial information in issue was close to the example of a Budget speech, "and a long way from the carefully redacted report that was in issue in the *LRT* case".

73. For those reasons, we reject the criticism that the Judge wrongly applied pre- HRA law and failed to apply the judgment of the Court of Appeal in the *Prince of Wales* case.

74. In any event, the Judge had already completed the balancing and proportionality exercise in his judgment before he made any reference to *Lion Laboratories*. He carried out that exercise between paragraphs [37] and [45] of his private judgment concluding in the final sentence of paragraph 46 that "The interest in protecting the confidentiality is all the stronger where, as in this case, the disclosure is by a leading market participant" and concluding in the first sentence of [47] that "this outweighs any public interest in publication of the information."

75. For similar reasons, we also reject the criticism that the Judge wrongly carried out the balancing and proportionality exercise by adopting a "sliding scale of information by type or category", with the disclosure of iniquity and hypocrisy and the correction of a misimpression by the claimant at the top. The only question which the Judge had to address, and which he did address, was whether the important public interest in the observation of obligations of confidence was outweighed by sufficiently significant matters of public interest in favour of publication. Unless his conclusion on that issue was one which no judge could properly reach, or he was swayed by matters he wrongly took into account or by failing to take into account matters he should have considered, his decision cannot be disturbed on appeal.

76. We reject the submission that the Judge wrongly failed to take into account the various matters pressed by Mr Vassall-Adams in argument or wrongly took into account matters which he ought to have ignored or discounted.

77. We do not accept the submission that the Judge ought not to have agreed with BHAM that disclosure in the present case would result in BHAM or other financial institutions being less candid with investors. Again, this seems to us to be an obvious proposition. Whether or not, as Reuters argues, any such institution is under a legal obligation to make disclosures will depend upon the precise circumstances and the law and regulatory provisions applicable. The point made by the Judge is, in any event, a wider point applicable when there may be no clear legal obligation on a financial institution to make disclosure of a particular matter but, in the interests of good investor relations, it would be desirable for the financial institution to make disclosure.

78. We are inclined to agree with Mr Desmond Browne QC, for BHAM, that Reuters may be overstating the position if its case is that, absent the ability to publish the information, it is left without any public story. Whether or not that scepticism is correct, and conscious as we are that it is for Reuters to apply its own expertise in deciding what is worth publishing and what is or is not, nevertheless the Judge was not acting outside the bounds of proper judicial competence in concluding, as it must be inferred he did, that the fact there would be no published story was insufficient on its own or with other matters to outweigh the public interest in the preservation of confidence in the present case.

79. We do not consider that the fact that Reuters is a global publisher affects the balancing exercise one way or the other. We were not referred to any evidence as to the legal right of publication of this confidential material under the laws of foreign countries.

80. We do not consider that the Judge made any error in the way he took into account IPSO's Editors' Code.

81. We do not consider that the Judge ought to have been swayed by the difficulty of calculating any damages payable to Reuters under the cross undertaking in damages. Having come to the conclusion that it was more likely than not that BHAM would establish at trial that it is entitled to restrain publication, and that a restraint on publication in order to protect the disclosure of the confidential information is a proportionate and necessary restriction on Reuters' Article 10 right of freedom of expression, and that damages would not be an adequate remedy for BHAM, there was

no way that the Judge could have properly exercised his equitable jurisdiction other than by granting an interim injunction.

82. Finally, we do not see why the fact that Reuters has behaved responsibly should have influenced the Judge in some positive and measurable way in carrying out the balancing and proportionality exercise.

Conclusion

83. For all those reasons, we dismiss this appeal.