Businessman named despite media ban – raising a question of privilege

In a remarkable case of reliance on parliamentary privilege, a prominent businessman has been publicly named by Lord Hain as the executive behind an injunction granted by the Court of Appeal against the Telegraph newspaper[1]. Speaking under parliamentary privilege in the House of Lords, Lord Hain claimed that it was in the public interest to reveal his identity. By side-stepping the carefully constructed anonymity of the court proceedings, the disclosure has sparked great controversy about whether invoking parliamentary privilege has, in effect, circumvented the rule of law – especially on the facts of this case, which ironically turn on allegations of abuse of a privileged position by the executive.

Background

The claimants were two related companies and a senior executive. Five employees had previously made internal complaints of discreditable conduct by the executive. Four of them brought proceedings in the Employment Tribunal. In all five cases, the complaints were settled at an early stage by settlement agreements under which substantial payments were made.

The complainants had each taken independent legal advice. In each of the settlement agreements, both parties agreed to maintain the confidentiality of the subject matter of the complaints themselves and various associated matters. Importantly, the settlement agreements safeguarded the complainants' rights to make legitimate disclosures, including reporting any criminal offences.

In July 2018, a Daily Telegraph journalist contacted the claimants to obtain comments on a proposed story about the complainants' allegations, including the settlement agreements and non-disclosure clauses.

Court proceedings

The claimants immediately commenced legal proceedings. They applied for an interim injunction to prevent the Telegraph from publishing confidential information disclosed in breach of confidence. That application was heard in private by Mr Justice Haddon-Cave. In August 2018, the judge refused the application. To preserve the position pending any possible appeal, his full judgment was produced in a "closed" format for the parties, and the "open" judgment[2] omitted the details of the confidential information and the identities of the parties.

An appeal was heard in September 2018, and judgment was given on 23 October 2018. The Court of Appeal allowed the appeal and granted an interim injunction preserving the confidentiality of the information pending a full trial, which, as the court directed, should be expedited. Again, both "closed" and "open" judgments were given.

The law

There was no dispute about the relevant principles of law.

- Article 8(1) of the ECHR (right to privacy) provides that: "Everyone has the right to respect for his private and family life, his home and his correspondence." Article 10 (freedom of expression) provides that everyone has "the right to freedom of expression", which includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

[1] *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329.

[2] *ABC v Telegraph Media Group Ltd* [2018] EWHC 2177 (QB).

- Article 10(2), however, states that: “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 … for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence ...”

- Section 12 of the Human Rights Act 1998 applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the right to freedom of expression. Subsections (3) and (4) then provide as follows:

  “(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 …”

  [*emphasis added*]

The Court of Appeal referred to *Cream Holdings Ltd v Banerjee*,[3] in which the House of Lords gave authoritative guidance on the meaning of the word "likely" in section 12(3). For the Court of Appeal, the *Cream Holdings* decision meant that, although the general approach should be that applicants must satisfy the court that they will probably succeed at the trial (and the court should be “exceedingly slow” to depart from this approach), there will be cases where it is necessary for the court to do so, and where “a lesser degree of likelihood will suffice as a prerequisite”. For example, a lower degree of likelihood may be sufficient where the adverse consequences of disclosure would be extremely serious, and where the interests of justice would be best served by a restraint on publication until a disputed issue of fact can be resolved at trial.

The Court of Appeal noted that the leading modern authority on how the balance should be struck where the media wish to publish information alleged to have been obtained in breach of confidence, and reliance is placed on the public interest to justify such publication, is *HRH the Prince of Wales v Associated Newspapers Ltd*.[4] In that case, Associated was prevented from publishing the Prince’s travel journals, which had been disclosed by a former member of his private office. The Court of Appeal in that case referred to *Attorney-General v Observer Ltd* (the “Spycatcher” case),[5] in which three limiting principles were identified, including 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 … 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.”

[3] [2004] UKHL 44.

[4] [2006] EWCA Civ 1776.

[5] [1990] 1 AC 109.

In the *Prince of Wales* case, the Court of Appeal went on to address the position where a disclosure relates to information received in confidence, commenting that it would be surprising if this consideration were ignored, and adding that "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".

In the present case, the Court of Appeal noted the importance of the public interest in the observing duties of confidence, and identified the relevant principle as being "whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached". That question must be answered by a consideration of "all the relevant circumstances", while "having regard to the nature of the information". The court noted that the test is ultimately one of proportionality.

Where there is an express contractual obligation of confidence that may have been broken (as in the present case), it is "arguable" that the express duty carries more weight "than a duty of confidentiality that is not buttressed by express agreement", but the extent to which is does so "will depend upon the facts of the individual case".[6]

The Court of Appeal noted that, with regard to the public interest (if any) in the disclosure of confidential information, it clearly extends to the disclosure of conduct which, if established at trial, would involve the commission of a criminal offence or some other recognised form of wrongdoing. The public interest must, however, allow for informed debate on the standards of conduct that are required in public or commercial life.

For the Court of Appeal, one type of situation likely to have a significant influence on the balancing exercise is where the obligation in question is contained in a settlement agreement. As long as the agreement is freely entered into and with the benefit of independent legal advice, and with due allowance for disclosure of any wrongdoing to the police or other appropriate body, the public policy reasons in favour of upholding the obligation are likely to tell with particular force. They referred to *Mionis v Democratic Press SA*,[7] in which it was held that a settlement agreement formed an important part of the analysis that section 12(4) of the Human Rights Act required the court to undertake, and that, since the agreement in that case had been made with the benefit of expert legal advice on both sides, it would require a strong case for the court to conclude that the bargain was disproportionate and to refuse to enforce it.

Application to the facts

The primary question to consider was whether the claimants' case was likely to succeed at a full trial. The judge at first instance had decided that it would not, for several reasons: (a) he found the information reasonably credible; (b) there could be little or no reasonable expectation of confidentiality; (c) a considerable amount of the information was already in the public domain; (d) it had not been shown that the information had been obtained in breach of the non-disclosure clauses; and (e) publication would be in the public interest.

In its open judgment, the Court of Appeal declined to give full details of its reasoning (as provided in its closed judgment), but provided a summary explanation.

<u>Breach of confidence</u>

The Court of Appeal concluded that it was likely that substantial and important parts of the information were passed to the Telegraph in breach of a duty of confidence, and that it was aware of the breach.

[6] See *Campbell v Frisbee* [2003] ICR 141.

[7] [2017] EWCA Civ 1194.

Information reasonably credible

The appeal judges considered that: (a) some of the allegations had been addressed and rejected in detail by the claimants; (b) the most serious allegations had been denied, and the settlement of the Employment Tribunal claims meant that the opportunity to have the truth determined had been lost; and (c) the confidentiality restrictions made it difficult for the claimants to rebut the allegations.

Reasonable expectation of privacy or confidentiality

They held that the judge's finding did not meet the point that the complainants had entered into particular obligations of confidence in this case. The real issue was whether breaches of that confidentiality were justified as a matter of public interest.

Information in the public domain

The Court of Appeal noted that, in its closed judgment, it explained its reasons for concluding that the information in the public domain did not include the most serious elements of the allegations.

Public interest in publication

The judge had concluded that, in all the circumstances, publication by the Telegraph of the information in question was clearly capable of significantly contributing to a debate in a democratic society and, in particular, making a contribution to a current debate of general public interest on misconduct in the workplace. He referred to the recent Report of the House of Commons Women and Equalities Select Committee entitled "Sexual harassment in the workplace" (HC725), which contains a discussion of the legitimacy of the use of non-disclosure agreements (**NDAs**).

The Court of Appeal endorsed the judge's comments on the important public concern about misbehaviour in the workplace, as well as the legitimacy of NDAs. They criticised the judge, however, for failing to note the important role played by NDAs in the consensual settlement of disputes, particularly in the employment field. This was addressed in the Committee Report in their acknowledgement that "there is a place for NDAs in settlement agreements", given that "there may be times when a victim makes the judgement that signing an NDA is genuinely in their own best interests, perhaps because it provides a route to resolution that they feel would entail less trauma than going to court, or because they value the guarantee of privacy".

Significantly, the Court of Appeal found there was no evidence that any of the settlement agreements were procured by bullying, harassment or undue pressure by the claimants. Each settlement agreement recorded that the employee was independently advised by a named legal adviser and authorised disclosure to third parties in a range of cases, including to regulatory and statutory bodies. The appeal judges also noted that employees may themselves wish to maintain confidentiality in relation to the settlement of the dispute with the employer, and that two of the complainants actually supported the claimants' application, a factor not taken into account by the judge.

The Court of Appeal noted that there had been no oral submissions by either side's counsel on the public interest in upholding NDAs before the judge, and stressed the merits generally of NDAs in the settlement of disputed claims (as had been set out in the *Mionis* case), i.e. to put an end to litigation and to provide employees with substantial payments.

Court of Appeal's assessment

The Court of Appeal considered that the High Court's analysis was undermined by the judge's failure: (a) to draw the inferences that substantial and important parts of the information were passed to the Telegraph in breach of a duty of confidentiality, and that it was aware of the breach; (b) to weigh in the

balance all the various factors countering the likelihood of a finding of serious misconduct; (c) to find that a considerable amount of the information that the Telegraph wished to publish was not already in the public domain; and (d) to weigh in the balance the various public policy considerations relevant to upholding NDAs. In addition, the judge's exercise of discretion was vitiated by a failure to consider the relevance of the fact that, if an interim injunction were refused, publication by the Telegraph might result in immediate, irreversible and substantial harm to the claimants.

So the Court of Appeal considered that the proper order to make was for an interim injunction and an order for a speedy trial, for the following reasons:

- There was a real prospect that publication by the Telegraph would cause immediate, substantial and possibly irreversible harm to the claimants. The court should not ignore the seriousness of the possible adverse consequences of disclosure before, for example, a disputed issue of fact is resolved at the trial.

- The starting-point was whether or not the claimants would be likely to establish at trial that the information the Telegraph wished to publish was obtained in breach of duty of confidentiality. That was disputed and could not be resolved until trial. The appeal judges found it likely that the claimants would establish at trial that a substantial part of the information was obtained through breach of duty of confidentiality, and that the Telegraph acquired the information with knowledge both of the non-disclosure clauses and the breach of confidence. Further, it was likely that the claimants would establish at trial that the confidentiality attaching to a substantial part of the information had not been lost through release into the public domain. Besides, the most serious allegations were denied by the claimants, and their occurrence could not be resolved until trial.

- Finally, the settlement agreements caused the claimants to lose the opportunity to contest those allegations, and they were also hamstrung by the non-disclosure clauses themselves.

In the circumstances, the Court of Appeal found the critical issue to be the likelihood of the Telegraph's establishing at trial a public-interest defence to the claim for breach of confidentiality. The court considered it unlikely that the claimants' enforcement of their right to confidentiality would be defeated at trial by a defence of public interest: there was no evidence that any of the settlement agreements were procured by bullying, harassment or undue pressure by the claimants. Also, each employee received independent legal advice before entering into the settlement agreement, and each settlement agreement authorised disclosure to regulatory and statutory bodies.

The Court of Appeal reiterated the public benefit in the enforcement of contracts, freely entered into by the parties, settling their disputes, not least in the employment field. If such a non-disclosure agreement was entered into with legal advice, the court will be slow to refuse to enforce it as disproportionate in an Article 10 case. Non-disclosure agreements made as part of a settlement of a dispute will often be for the benefit of all parties to it.

The Court of Appeal held that the policy considerations and their application in the present case were best considered comprehensively following a trial, and that there was a sufficient likelihood that the claimants would defeat a public-interest defence at trial. So the Court of Appeal allowed the appeal, reinstated the interim injunction, and ordered a speedy trial.

Comment

The reasoning behind the Court of Appeal's decision was clear and compelling. But the disclosure that followed the judgment was highly controversial.

The naming of the executive in question by Lord Hain in the House of Lords has led to an intense debate about whether members of either House should be permitted to use parliamentary privilege in such a manner. Is it a good idea for members of our legislature to ignore a court order made by the judiciary (in this case involving the Master of the Rolls, one of the country's most senior judges) because they disagree with laws made in Parliament? Many commentators have argued that to do so undermines the rule of law.

This point came into sharper focus in this instance, as it appeared that Lord Hain had not even read the Court of Appeal's judgment (a mere 15 pages of text). If he had done so, he would have properly understood the court's reasoning. He would have also saved himself the embarrassment of realising that the law firm for which he consults, Gordon Dadds LLP, was acting for the Telegraph, which is clear from the front page of the judgment.

Whatever opinions there may be on the use of NDAs generally, and on the executive in question, Lord Hain's actions have prevented justice from being done: an interim injunction had been granted to protect the judicial process until a full trial (and an expedited one at that). It is unclear whether he understood the implications of his act.

Ironically, Lord Hain claimed that he was acting to challenge power, wealth and abuse, while he, as an unelected politician, used the power of parliamentary privilege to circumvent the rule of law. His argument that identifying the executive was "clearly in the public interest" assumed that he, rather than three Court of Appeal judges who had read a substantial amount of confidential evidence, was better placed to determine whether that was the case. And it appears he did so without even reading the judgment. That in itself can hardly be in the public interest.

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