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Case No: HQ17X00846

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 March 2017

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

BREVAN HOWARD ASSET MANAGEMENT LLP **Applicant**

-and-

1. REUTERS LIMITED
2. MAIYA KEIDAN
3. PERSON OR PERSONS UNKNOWN (who has/ have leaked confidential investment documents belonging to the Claimant)

Respondent

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- -

DESMOND BROWNE QC & ADAM SPEKER (instructed by **Schillings International LLP**) for the **Applicant**

GUY VASSALL-ADAMS QC & LORNA SKINNER (instructed by **Wiggin LLP**) for the **First and Second Respondents**

Hearing dates: 22 & 23 March 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE POPPLEWELL

The Hon. Mr Justice Popplewell :

Introduction

1. This is a redacted and abbreviated version of a judgment which I gave in private on 23 March 2017. I approved a press statement the same day identifying the application and the result, pending the provision of assistance from the parties in preparing a judgment for delivery in public. The alterations from the private judgment have been made to preserve the confidential information of the Claimant and are necessary so as to avoid defeating the purpose of the application.

2. This is an application by the Claimant ("BHAM") for an interim non-disclosure order. The First Defendant ("Reuters") is the well-known international news agency. The Second Defendant, Ms Keidan, is a financial journalist working for Reuters. The Third Defendant is identified as "Person or Persons Unknown" alleged to have leaked the confidential documents, or the information derived therefrom, the use of which BHAM seeks to restrain by this application.

3. BHAM is the manager of a number of hedge funds. The information which BHAM wishes to restrain the Defendants from disclosing or publishing is that contained in or derived from five documents in a package of documents provided to potential investors..

4. BHAM is a member of the Brevan Howard Group which was founded in 2002 and is a leading global alternative asset manager. BHAM is one of the largest hedge fund managers in Europe, at one time managing over US$ 40 billion of investor monies and currently managing over US$ 15 billion in a range of funds. The group manages hedge fund assets for over 330 institutional investors around the globe. It employs over 300 people based in 8 offices in London, New York, Geneva, Jersey, Hong Kong, Tel Aviv, Washington and Singapore. The firm's principal trading activities have taken place through the Brevan Howard Master Fund ("the Master Fund").

5. BHAM sent out information to 36 potential professional investors. The information was contained in a package of documents provided electronically.

6. BHAM made efforts to keep the information sent out to these 36 investors confidential. 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" and 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, under any circumstances without express prior written consent from Brevan Howard. Without

> limitation to the foregoing, any text and statistical data or any portion thereof contained in this document may not be permanently stored in a computer, published, rewritten for broadcast or publication or redistributed in any medium, except with the express prior written permission of Brevan Howard."

7. The package comprised seven documents, five of which are the subject of the present application. The other two, it is accepted by BHAM, contain information which is in the public domain. Reuters has obtained information, from confidential sources which it declines to reveal for journalistic reasons, which appears to derive from the package of documents. It is this information which Reuters wishes to publish. In the evidence submitted on its behalf, Reuters states that it has not received the documents themselves. However on the evidence presently available, it is probable that the information Reuters has received is derived from those documents, most probably originating directly or indirectly from one or more of the 36 potential investors to whom they were sent in the circumstances which I have described.

8. Reuters first threatened to publish this information on 1 March 2017 and sought confirmation as to its accuracy from BHAM's external communications company Peregrine Communications Group. There followed correspondence during which Reuters agreed to give 6 hours notice, during working hours, before publishing.

9. In anticipation of bringing 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 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.

10. On 10 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.

11. The application came on, at the insistence of Reuters and Ms Keidan, before Nicol J in the Interim Applications Court on Thursday 16 March 2017. By that stage the agreed estimate for the hearing of the application was a day, and as was known to the parties, only an hour was available. Most of the time was taken up with argument over whether the hearing should take place in private. Nicol J granted an interim order restraining disclosure or use of the information until the hearing before the court yesterday and today.

12. Having heard argument in private, I determined that the hearing should take place in private, subject to review and to the possibility of a subsequent order that some or all of it might be treated as having been in public. I gave my reasons for that decision in a private judgment.

The Principles

13. It is common ground that this application engages s.12 of The Human Rights Act 1998 because it seeks to restrain the Defendants' freedom of expression protected by Article 10 of The European Convention on Human Rights.

14. Article 10 provides

> "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 provides

> "(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.
>
> …
>
> (3) No such relief is to be granted so as to prevent 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."

16. The test laid down in s.12 (3) of the Act, of whether the applicant is "likely" to establish that publication should not be allowed, is a flexible test, but the general approach should be that the Court will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the Court that he will probably succeed at trial in obtaining a permanent non-disclosure order, that is to say will more likely than not obtain such an order: see ***Cream Holdings v Bannerjee*** [2005] 1 AC 253 at paragraph [22]. There are no special circumstances which make it inappropriate to apply that threshold to the current application.

17. This is an enhanced merits test by comparison with that which ordinarily applies to applications for interim injunctions. The enhanced merits test reflects the importance attached to the role of an independent press in a democratic society and the European Court of Human Rights jurisprudence on the approach to prior restraint of publication by the press.

18. In ***Sunday Times v United Kingdom (No 2)*** (1992) 14 EHRR 229, the ECtHR summarised the key Article 10 principles as follows (at paragraph 50):

> "(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.
>
> (b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. 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".
>
> (c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).
>
> (d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review

> under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".”

19. In ***The Observer and the Guardian v United Kingdom*** (1992) 14 EHRR 153, the ECtHR said at paragraph 60:

> “… The dangers inherent in prior restraint are such that they call for the most careful scrutiny on the part of the Court. This is especially so so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”

20. BHAM’s cause of action is for breach of confidence. There is no dispute about the relevant ingredients which were conveniently summarised by Tugendhat J in ***Terry v Persons Unknown*** [2010] EMLR 16 at paragraph 49 as follows:

> “A breach of confidence occurs where (i) information has the necessary quality of confidence, (ii) it has been imparted in circumstances importing an obligation of confidence to the claimant and (iii) unauthorised use or disclosure is threatened. A duty of confidence arises when information comes to the knowledge of a person in circumstances where he has notice, or is held to have agreed, that the information is confidential.”

21. Where Article 10 of the European Convention on Human Rights is engaged, the freedom of expression which is thereby protected may justify breach of confidence where publication is in the public interest. Whether it does so in a particular case is fact sensitive and requires balancing the claimant’s right to confidentiality with the defendant’s right of freedom of expression: see per Lord Goff in ***Attorney-General v Observer Ltd*** [1990] 1 AC 109 (‘the ***Spycatcher*** case’) at p. 282E-F; ***Associated Newspapers Limited v HRH Prince of Wales*** [2002] Ch. 57 at paragraph [55].

22. 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: see ***Prince of*** **Wales** case at paragraph [68]. In that case the Court of Appeal also said this:

> “67. There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships which carry with them a duty of confidence, ought to be able to be confident that they can disclose, without wider risk of 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 which 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."

Submissions

23. On behalf of Reuters and Ms Keidan, Mr Vassal-Adams QC submitted that BHAM had failed to establish that it was more likely than not to succeed at trial on five essential ingredients which had to be established, namely that:

    (1) The information imparted by BHAM had the necessary quality of confidence;

    (2) It was received by Reuters in circumstances which gave rise to a duty of confidence;

    (3) What was threatened by Reuters was unauthorised use of the confidential information which would cause a detriment to BHAM;

    (4) That the public interest defence would fail; and

    (5) That damages would not be an adequate remedy.

24. I shall take each in turn.

(1) Quality of confidence

25. The evidence currently before the Court suggests that the information which Reuters have, and wish to use, is probably derived from the five documents. The evidence of Mr Underwood, BHAM's general counsel, suggests that the Reuters information can only have been compiled by someone who had the documents provided to the potential investors in electronic form. This evidence has not been challenged or controverted by any evidence from Reuters. No other source has been identified from which the figures could have come.

26. It is also probable, on the current evidence, that the documents provided to potential investors were impressed with the quality of confidence. The confidentiality of the information supplied to the potential investors is apparent from both its nature and the circumstances in which it was conveyed to and received by them. It was sensitive commercial information not previously held in that form but created for the purposes of making candid and responsible disclosure to a limited number of potential investors; it would have the potential to be valuable to BHAM's competitors and damaging to BHAM's business if disseminated more widely. Although not a trade secret in the true sense, it is confidential business information which can properly be the subject matter of confidentiality.

27. The information was released to a limited class of recipients in circumstances designed to preserve its confidentiality. It was preceded by a statement that it was to be kept confidential; it was password protected; and was accompanied by the description that it was private and confidential and covered by the terms of the first document which I have quoted. By using the individual passwords, the potential investors may be taken to have been accepting the confidential terms on which it was being proffered.

28. For these reasons BHAM is more likely than not to establish that the information which Reuters wish to publish is impressed with the quality of confidentiality.

(2) Circumstances of receipt

29. The evidence is that Reuters received a document from its source or sources, but that this was not was not one of the five identified documents provided to the potential investors by BHAM; rather it was what was described by Reuters in its evidence as a "third party" document which the source assured the Reuters personnel had not been obtained in breach of confidence.

30. It is probable in my view that Ms Keidan would have been aware of the likely confidentiality of the information contained in such document. She would have known that such information had not previously been published and was not in the public domain. Its content would have suggested to her that the information emanated from BHAM itself as the only entity likely to be in possession of the information. Its very content would likely have caused her, as a financial journalist specialising in hedge funds, to have considered that content to be commercially sensitive and confidential. There is no witness statement from her suggesting otherwise.

31. In any event from at least 1 March 2017 Reuters and Ms Keidan were on notice that the information was confidential as a result of the correspondence with BHAM and its solicitors. That would be sufficient of itself to render Reuters and Ms Keidan subject to a duty of confidence: see ***Vestergaard Frandsen A/S v Bestnet Europe Ltd*** [2013] 1 WLR 1556 at paragraphs [23] to [25].

(3) Threatened use and detriment

32. As to intended use, the point seemed to be that Reuters did not have the documents themselves; and that it is the information which it did have which it

wishes to publish. That is no answer to an application to restrain use and publication of the information if it is confidential and derives from the documents, which is more likely than not.

33. As to detriment, it is not a necessary ingredient of a cause of action in breach of confidence: see the ***Spycatcher*** case per Lord Keith at p. 256. Nevertheless, it is clear from the content of the information that its publication would likely be damaging to BHAM for the reasons I have explained.

34. I am satisfied therefore that BHAM is more likely than not to establish that the information which it seeks to protect is confidential and that disclosure by Reuters would be an actionable breach of confidence.

(4) The Public Interest defence

35. The starting point is BHAM is a very large hedge fund manager and that hedge funds and their effect on the economy are a legitimate matter of public interest and debate. Hedge funds are an important feature of the global economy. The investments made by hedge funds can at times move stock, bond and other market prices. People look to large and well known hedge fund managers such as BHAM to identify trends. They are important to other financial institutions, such as banks, because the profitability of such financial institutions can rely on the business which hedge funds give to them.

36. The success or failure of hedge funds can have a material impact on the institutional investors such as public pension funds, which affect millions of people globally. In 2004, Timothy Geithner, the then President and CEO of the Federal Reserve Bank of New York, focussed in his key note address at the National Conference on the Securities Industry on hedge funds and their implications for the financial systems. He stated:

> "The term hedge funds is used to describe a diverse group of financial institutions, which together play an increasingly important role in our financial systems … Hedge funds play a valuable arbitrage role in reducing or eliminating mispricing in financial markets. They are an important source of liquidity, both in periods of calm and stress. They add depth and breadth to our capital markets. By taking risks that would otherwise have remained on the balance sheets of other financial institutions, they provide an important source of risk transfer and diversification."

37. He went on to identify amongst the systemic risks which hedge funds present:

> "… the possibility that the failure of a major hedge fund or group of funds could significantly damage the viability of a major financial institution, both through direct exposure to the fund and losses resulting from the impact on other market risk to which the institution is exposed."

38. 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.

39. BHAM describes itself on its website as "one of the world's leading global macro absolute return managers". The reference to "global macro" is intended to convey that the investment strategy of the fund is to base its holdings on an assessment of the current and predicted economic and political circumstances of countries around the world.

40. 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. Amongst those investors are the New Jersey State Investment Council, Shropshire County Pension Fund, Pennsylvanian Public School Employees' Retirement Scheme and West Virginia Investment Management Board. BHAM has sometimes been held up in the press as an exemplar of hedge fund activity from whose attitudes or results more general conclusions can be drawn.

41. A further factor which increases the weight of the public interest in publication of the information lies in the identity of the investors in BHAM funds**.** They include institutional investors who invest the assets under their control ultimately for the benefit of pension plan holders, public employees and other individuals. The confidential information which is the subject matter of this application has been disclosed to the professional institutional investors who are to make the investment decisions. Nevertheless, those for whose benefit or detriment such investments are potentially to be made, including the public employees, pension plan holders and other individuals, are not to be provided with the information, notwithstanding its obvious relevance to the investments. There is no obligation on BHAM to make such information available to them, and indeed from a regulatory point of view, BHAM is precluded from marketing to retail investors. However that does not detract from the public interest in those 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.

42. It is clear from the ***Prince of Wales*** case, however, 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. 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.

43. In applying the balance the nature of the relationship which gives rise to the duty of confidentiality may be important: see the ***Prince of Wales*** case at [69]. In this case the maintenance of confidentiality is a weighty factor. There is always an important public interest in observance of duties of confidence, as paragraph [67] of the ***Prince of Wales*** case quoted earlier 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 against its competitors, there would be a disincentive to make full and candid disclosure to investors. In a democratic society, there is a strong public interest in protecting such confidentiality so as to encourage such behaviour. 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.

44. In my view this outweighs any public interest in publication of the information. 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. Prior to ***Lion Laboratories Ltd v Evans*** [1985] 1 QB 526, it had been thought that it was necessary to demonstrate iniquity in order to justify a breach of confidence. That case establishes that there is no such bright line rule and a balancing exercise falls to be performed: see for example per Stephenson LJ at p. 539A. In some cases the balance may come down in favour of permitting publication even in the absence of iniquity, as it did in that case. Nevertheless, Griffiths LJ said at p550C-D

> "I believe that the so-called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed. No doubt it is in such circumstances that the defence will usually arise, but 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."

The expression "vital in the public interest" was cited with approval at paragraph 54 of the ***Prince of Wales*** case.

45. Griffiths LJ went on to say at page 551A-B in ***Lion Laboratories*** :

> "When there is an admitted breach of confidence and breach of copyright, there will usually be a powerful case for maintaining the status quo by the grant of an interlocutory injunction to restrain publication until trial of the action. It will, I judge, 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. But I am bound to say that I think this is such a case."

46. Material which might undermine BHAM's public reputation is a matter of public interest but it lacks the weightier public interest which publication might carry if it were necessary to expose some behaviour on the part of BHAM which involved iniquity. In this 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. Publication would not be for the purposes of demonstrating any behaviour which is even arguably behaviour deserving of moral censure.

47. It is of significance that the IPSO Code, to which regard is required to be had by section 12(4) of the Human Rights Act 1998, provides a list of matters which are to be regarded as in the public interest by way of bullet points. They are introduced by the words "The public interest includes, but is not confined to:" and do not therefore purport to be an exhaustive list. Nevertheless the eight bullet points, which are drawn in wide terms must have been intended to capture the most important categories. Only two are potentially relevant:

    (1) "There is a public interest in freedom of expression itself"

        This identifies the Article 10 public interest but provides no assistance in the current context.

    (2) "Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct, or incompetence concerning the public"

    Whilst it can be said that publication would contribute to a matter of public debate in general terms, none of the specific, albeit non-exhaustive examples enumerated in this bullet point apply.

48. This reinforces the conclusion that the public interest in publication in this case is at the lower end of the scale.

49. For all these reasons I conclude, on the basis of the material presently before the Court, that BHAM is more likely than not to establish at trial that it is entitled to restrain publication. BHAM has established on the present evidence that a restraint on publication in order to protect the disclosure of this confidential information is probably a proportionate and a necessary restriction on the defendant's Article 10 right of freedom of expression; and that the public interest in publication probably does not reach the threshold which requires publication in breach of confidence to be permitted.

(5) Damages not an adequate remedy

50. It is likely that BHAM will establish that damages are not an adequate remedy. The difficulties in establishing the amount of such damages caused by the breach of confidence are obvious. This is a classic case where difficulties in quantifying damages may justify injunctive relief.

Conclusion

51. Accordingly the application will be granted