Neutral Citation Number: [2018] EWCA Civ 2329

Case No: A2/2018/1947

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
[2018] EWHC 2177 (QB)
Haddon-Cave J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2018

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE UNDERHILL VP
and
LORD JUSTICE HENDERSON

- -

Between :

ABC & OTHERS	**Appellants**
- and -	
TELEGRAPH MEDIA GROUP LIMITED	**Respondent**

- -
- -

James Price QC and **Chloe Strong** (instructed by **Schillings International LLP**) for the **Appellants**
Desmond Browne QC and **Jonathan Price** (instructed by **Gordon Dadds LLP**) for the **Respondent**

Hearing date: 25 September 2018

- -

OPEN JUDGMENT

Sir Terence Etherton MR, Lord Justice Underhill VP and Lord Justice Henderson:

1. In these proceedings the Claimants, who are the Appellants before us, seek an injunction to prevent the Defendant, which is the Respondent, from publishing what they say is confidential information about them which was disclosed in breach of confidence. On 18 July 2018 they applied for an injunction preventing disclosure on an interim basis. That application was heard by Haddon-Cave J (as he then was) on 23 July. The hearing took place *in camera* because if it had been heard in open court the information whose confidentiality the Claimants were seeking to protect would have been lost irrespective of the outcome of the application. On 13 August he handed down his decision refusing the application. In order to preserve the position pending any possible appeal his full judgment was produced in a "closed" format which cannot be released to anyone except the parties and their advisers; and the open judgment, which is on the public record in the usual way, omits not only the details of the information which the Claimants are seeking to protect but details of their identities and any background information which might lead to their identification. That judgment has the neutral citation number [2018] EWHC 2177 (QB) and more details about procedural history are given there.

2. We heard an appeal from Haddon-Cave J's decision on 25 September. By our judgment handed down today we have allowed the appeal and granted an interim injunction preserving the confidentiality of the information pending a full trial, which we have directed should be expedited. It has accordingly been necessary for us, like Haddon-Cave J, to give our decision in a way which preserves the confidentiality of the information pending the hearing. The parties have been given a closed judgment which sets out the background and gives our reasons in full. In this open judgment we refer to the background only in very general terms; but we appreciate that the issues – involving, as they do, the freedom of the press – are important and we have tried to explain our reasoning as fully as we can consistently with not jeopardising the confidentiality to which we must assume, at this stage, that the Claimants are entitled.

The Background in Outline

3. The Claimants are two companies in the same group and a senior executive of that group. Five employees of group companies ("the complainants") have made allegations of discreditable conduct by that executive. Three of them did so through the companies' confidential internal grievance procedures. Two of those employees, when their grievance was not upheld, brought (separate) proceedings in the Employment Tribunal ("the ET"), as did another who had not employed the grievance procedure.

4. In all five cases the complaints were compromised by settlement agreements under which substantial payments were made to the complainants ("the Settlement Agreements"). The complainants in each case had independent legal advice in entering into the Settlement Agreement in their case. There were terms in each of the Agreements under which both sides undertook to keep confidential the subject matter of the complaints themselves and various associated matters, including the amounts paid by way of settlement. The Agreements safeguarded the complainants' rights to make legitimate disclosures (including reporting any criminal offences) if they chose. We will refer to this aspect of the Settlement Agreements as non-disclosure agreements ("NDAs"). In the case of the complainants who had brought ET proceedings the

settlements were made at an early stage and before any details of the claims had gone on the public record.

5. On 16 July a Daily Telegraph journalist contacted the Claimants with a view to obtaining their comments on a story which it was proposing to publish about the complainants' allegations and also about how they had been handled up to and including the Settlement Agreements and the inclusion of NDAs in those agreements. It was accordingly clear that he was aware of the existence of the NDAs. It seemed to the Claimants that the information in question had been disclosed to the newspaper by one or more of the complainants or by other employees who were aware of the information and of the NDAs, and they immediately commenced the present proceedings.

6. At an early stage in the proceedings Nicklin J directed that attempts be made to ascertain the attitudes of the five complainants to whether information about their complaints should be published, even if they were not named. One complainant said that they were happy for their complaint, and the settlement, to be disclosed, provided they were not named. Two said that they supported the Claimants' application for an injunction. One said they did not support the application.

The Relevant Law

7. There is no dispute about the principles of law which must guide us in resolving this appeal.

8. The claimants seek an interim injunction to restrain the publication of information which they allege has been obtained by the Telegraph in breach of confidence. Section 12 of the Human Rights Act 1998 ("HRA") and Article 10 of the European Convention on Human Rights ("the Convention") are therefore directly engaged. It will also be necessary to have regard to the Article 8 rights of the individuals who may feature in the intended publication.

9. Article 10 of the Convention is headed "Freedom of expression", and provides that "[e]veryone 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". This right is, of course, one of the foundations of a free press, and its importance in a democratic society can hardly be overstated. Nevertheless, it is not an unqualified right. So far as material, Article 10(2) 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…"

10. Article 8(1) provides that:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

11. Section 12 of the HRA 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: see subsection (1). 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;
>
> (b) any relevant privacy code."

12. In *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, the House of Lords gave authoritative guidance on the meaning of the word "likely" in section 12(3) of the HRA. The leading judgment was given by Lord Nicholls of Birkenhead, with whom the other members of the court agreed. Lord Nicholls pointed out (at [15]) that the "principal purpose" of section 12(3) "was to buttress the protection afforded to freedom of speech at the interlocutory stage", and that:

> "It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a "serious question to be tried" or a "real prospect" of success at the trial."

13. Lord Nicholls then rejected the submission for the media in that case that "likely" in section 12(3) has the meaning of "more likely than not" or "probably". He said (at [16]):

> "This would be a higher threshold than that prescribed by the *American Cyanamid* case. That would be consistent with the underlying parliamentary intention of emphasising the importance of freedom of expression. But in common with the views expressed in the Court of Appeal in the present case, I do not think "likely" can bear this meaning in section 12(3). Section 12(3) applies the "likely" criterion to all cases of interim prior restraint. It is of general application. So Parliament was painting with a broad brush and setting a general standard. A threshold of "more likely than not" in every case would not be workable in practice. It would not be workable in practice because in certain common form situations it would produce results Parliament

> cannot have intended. It would preclude the court from granting an interim injunction in some circumstances where it is plain injunctive relief should be granted as a temporary measure."

14. Lord Nicholls then gave the example of the frequent need to grant a short-term injunction to hold the position until the court is able to give proper consideration to an urgent application for interim relief. He pointed out (at [18]) that "[c]onfidentiality, once breached, is lost for ever", and that it would be absurd if the court were powerless to preserve confidentiality pending the full hearing of an application, or pending the hearing of an interlocutory appeal against the judge's order. He then said:

> "19. The matter goes further than these procedural difficulties. Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person… Despite the potential seriousness of the adverse consequences of disclosure, the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a "probability of success" test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the disputed issue of fact can be resolved at the trial.
>
> 20. These considerations indicate that "likely" in section 12(3) cannot have been intended to mean "more likely than not" in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases, application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that "likely" should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of "real prospect" but permits the court to dispense with this higher standard where particular circumstances make this necessary."

15. After referring to other statutory contexts where a flexible interpretation of the word "likely" had been adopted, Lord Nicholls continued (at [22]):

> "In my view section 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the

> trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

16. It can be seen, therefore, 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 nevertheless be cases where it is necessary for the court to do so, and where "a lesser degree of likelihood will suffice as a prerequisite". Further, it is apparent from Lord Nicholls' comments at the end of [19] that one type of case where a lower degree of likelihood may suffice is where the adverse consequences of disclosure would be extremely serious, and where the interests of justice will be best served by a restraint on publication until a disputed issue of fact can be resolved at trial.

17. It is also relevant to note the brief concurring opinion of Lord Scott of Foscote, where (at [29]) he expressed his "complete agreement with the guidance" given by Lord Nicholls at [22], while expressly recognising that the guidance would apply even in cases, like *Cream Holdings* itself, where "the disclosure which is sought to be prevented is, if the information in question is true, disclosure of iniquity by any standards."

18. The leading modern authority on how the balance should be struck in cases where the media wish to publish information which is alleged to have been obtained in breach of confidence, and reliance is placed on the public interest to justify such publication, is the decision of this court in *HRH the Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57. This is the well-known case in which summary judgment was granted by Blackburne J, and upheld by this court, to prevent the publication of handwritten travel journals kept by HRH The Prince of Wales recording his views and impressions of overseas visits. These journals had been photocopied by a member of his private office and circulated to certain individuals in an envelope marked "private and confidential". A former member of the private office, whose contract of employment contained express confidentiality and non-disclosure obligations relating to information concerning The Prince of Wales acquired by her during her employment, supplied copies of some of the journals to the defendant newspaper publisher.

19. In the judgment of the court (delivered by Lord Phillips of Worth Matravers CJ, sitting with Sir Anthony Clarke MR and May LJ), the court traced the development of English law in cases where disclosure of information in breach of confidence is met by a public interest defence. As the court explained (at [54]), before the HRA came into force, the defence was initially limited to the so-called "iniquity rule", that confidentiality could not be relied upon to conceal wrongdoing, but this test had been widened in *Lion Laboratories Ltd v Evans* [1985] QB 526, and extended to circumstances where it might be "vital in the public interest" to publish confidential information. The court then referred to *Attorney-General v Observer Ltd* [1990] 1 AC 109 (the Spycatcher case), in which Lord Goff of Chieveley (at 282) identified three limiting principles to the protection that the law affords to confidence, of which the third was material:

> "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 of 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."

20. The court then discussed developments in the English case law since the enactment of the HRA, including the decision of this court in *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] EMLR 4. The court went on (at [66]) to address the position where the disclosure relates to information received in confidence, and agreed that "it would be surprising if this consideration was ignored". As the court observed:

> "It is a factor that article 10(2) recognises is, of itself, capable of justifying restrictions on freedom of expression."

21. The court then stated the law to be applied in such cases, as follows:

> "67. 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.
>
> 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.
>
> 69. In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality. In *Campbell v Frisbee* [2003] ICR 141, para 22, this court drew attention to this conflict of view, and commented:
>
> > "We consider that it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the restriction of the right of freedom of expression, than a duty of confidentiality that is not buttressed by express agreement…"
>
> We adhere to this view. But the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case."

22. The passage which we have quoted emphasises the importance of the public interest in the observance of duties of confidence, and identifies 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 test is ultimately one of proportionality. Where (as in the Settlement Agreements in the present case) there is an express contractual obligation of confidence which may have been broken, 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."

23. With regard to the public interest (if any) in the disclosure of private or confidential information, this 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. However, the boundaries of the relevant public interest cannot always be confined within such a narrow formulation. In particular, the public interest must allow for informed debate on the standards of conduct that are required in public or commercial life, and for changing perceptions of the kind of behaviour by people in positions of power that may be regarded as acceptable. In this context, we would respectfully endorse the obiter comments made by Tugendhat J in *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB), [2011] EMLR 27, where he said at [133]:

> "… in my judgment it is in the public interest that there should be public discussion of the circumstances in which it is proper for a chief executive (or other person holding public office or exercising official functions) should be able to carry on a sexual relationship with an employee in the same organisation. It is in the public interest that newspapers should be able to report upon cases which raise a question as to what should or should not be a standard in public life. The law, and standards in public life, must develop to meet changing needs. The public interest cannot be confined to exposing matters which are improper only by existing standards and laws, and not by standards as they ought to be, or which people can reasonably contend that they ought to be."

24. As we have already explained, the weight which should be attached to an obligation of confidence may be enhanced if the obligation is contained in an express contractual agreement. One type of situation where this consideration is likely to have a significant influence on the balancing exercise which the court has to perform is where the obligation in question is contained in an agreement to compromise, or avoid the need for, litigation, whether actual or threatened. Provided that the agreement is freely entered into, without improper pressure or any other vitiating factor, and with the benefit (where appropriate) of independent legal advice, and (again, where appropriate) with due allowance for disclosure of any wrongdoing to the police or appropriate regulatory or statutory body, the public policy reasons in favour of upholding the obligation are likely to tell with particular force, and may well outweigh the article 10 rights of the party who wishes to publish the confidential information.

25. This was the position in *Mionis v Democratic Press SA* [2017] EWCA Civ 1194, [2018] QB 662, where the media defendants had entered into a confidential settlement agreement with the claimant, a businessman who had brought libel proceedings in respect of a series of articles in a Greek newspaper which concerned his alleged involvement in tax evasion. The agreement prohibited the defendants from making any reference at all to the claimant and his immediate family, in print or online, in any jurisdiction, subject to certain specified exceptions. Following the publication of further articles in alleged breach of this provision, the claimant applied for an injunction to enforce it and for an inquiry into damages caused by the alleged breach. The judge refused to grant any relief, on the basis that the relevant clause was too vague and uncertain to be enforced by an injunction. On the claimant's appeal to this court, the

defendants conceded that the clause was valid and enforceable, and that they were in breach of its terms, but argued that its enforcement would amount to a disproportionate interference with their right to freedom of expression under Article 10, to which section 12(4) of the HRA required the court to have particular regard.

26. Allowing the claimant's appeal, this court held that the settlement agreement formed an important part of the analysis which section 12(4) of the HRA required the court to undertake, and that since the agreement 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 other than on ordinary contractual or equitable principles. On the facts, the relevant restrictions in the agreement did not constitute a disproportionate interference with the defendants' Article 10 rights, so the claimant was entitled to the injunction and inquiry as to damages which he sought.

27. The leading judgment in the *Mionis* case was delivered by Sharp LJ, with whom Gloster and Lindblom LJJ agreed. After holding that section 12 of the HRA applied, even though the relevant restriction on the defendants' Article 10 rights appeared in a contract between private parties, Sharp LJ said at [67]:

> "However, the fact that the parties have entered into an agreement voluntarily restricting their article 10 rights can be, and in my judgment in this case is, an important part of the analysis which section 12 then requires the court to undertake. Whilst each case must be considered on its facts, where the relevant contract is one in settlement of litigation, with the benefit of expert legal advice on both sides, particularly where article 10 issues are in play in that litigation, it seems to me that it would require a strong case for the court to conclude that such a bargain was disproportionate and to refuse to enforce it other than on ordinary contractual or equitable principles."

28. Having discussed the case law, and referred to the obvious advantages to both sides to the litigation in reaching a settlement (which not only serves the private interests of the litigants, but also the administration of justice and the public interest more generally, by freeing court resources for other cases: see [89]), Sharp LJ continued:

> "90. The parties in this case decided, with the benefit of expert legal advice on each side, to enter into a contract that compromised their legal proceedings…
>
> 91. Parties are of course generally free to determine for themselves what primary obligations they accept; and legal certainty requires that they do so in the knowledge that if something happens for which the contract has made express provision, then other things being equal, the contract will be enforced (*pacta sunt servanda*). This is a rule of public policy of considerable importance. Furthermore, the principled reasons for upholding a bargain freely entered into, obviously apply to one that finally disposes of litigation with particular force."

29. In the final main section of her judgment, headed "Conclusions in this case", Sharp LJ said it was "axiomatic" that "the right to freedom of expression is a Convention right of fundamental importance". Further, the court must have particular regard to it, by virtue of section 12(4) of the HRA. She continued, at [102]:

> "Accordingly, close attention must be paid to those rights, and in particular to the extent that the defendants' participation in a free press permits and requires them to exercise those rights.
>
> 103. However, article 10.2 permits restrictions on those rights for the protection of the reputation *and rights of others*, which includes, in this case, the private rights of the parties under an otherwise validly constituted contract of settlement. This is something to which the law attaches considerable importance and save in well-defined circumstances, such contracts would normally be enforced. The issue thus resolves itself into one of proportionality, and in particular, whether the restrictions in clause 3.2 are a disproportionate interference with the defendants' article 10 rights.
>
> 104. The wording of section 12 requires a consideration of article 10, because the court is being asked to grant an injunction that affects freedom of expression. However, in my view, the analysis after a settlement agreement has been freely entered into and the parties have waived their respective rights, is not the same as that which arises at the interim stage say, in a contested privacy or defamation action. That is to ignore the importance in the public interest of parties to litigation, including this kind of litigation, being encouraged to settle their disputes with confidence that, if need be, the court will be likely to enforce the terms of a settlement freely entered into on either side."

Application of the Law to the Facts

30. As appears from paras. 11-17 above, the primary question is whether the Claimants' case is "likely" to succeed at a full trial, in the sense explained in *Cream v Banerjee*. Haddon-Cave J decided that that was not the case and that, as he put it at para. 30 of his open judgment, "in all the circumstances, the public interest in publication outweighs any confidentiality attaching to the information". He summarised his reasons for that view at para. 31 as follows:

> "(1) First, the information is reasonably credible.
>
> (2) Second, there can be little or no reasonable expectation of confidentiality or privacy in respect of the information.
>
> (3) Third, a considerable amount of the information is already in the public domain.
>
> (4) Fourth, it has not been demonstrated that the information has been obtained in breach of the NDAs.

(5) Fifth, in my view, publication of the information would be in the public interest."

31. In our closed judgment we explain why we have reached the contrary conclusion to Haddon-Cave J about whether the public interest in publication outweighs the confidentiality attaching to the information pending a speedy trial. We there consider Haddon-Cave J's five reasons in turn, though in a different order. In this open judgment we cannot give full details of our reasoning, but we hope in the following summary to explain the factors which have led us to our conclusion as fully as the requirements of confidentiality will permit.

The Judge's Reasons

32. We start with the Judge's fourth reason, namely that it had not been demonstrated that the information which the Telegraph wishes to publish had been obtained in breach of the NDAs. That is an appropriate starting-point since the Claimants' cause of action is for inducement of breach of contract and breach of confidentiality. The Judge's conclusion on this point is an inference of fact from the evidential material before the court. This court is in as good a position as the Judge to decide whether it is correct to draw such an inference and to hold that he was wrong to do so: see Mance LJ in *Todd v Adams & Chope* [2002] 2 Lloyds Rep. 293, approved by the Court of Appeal in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at [17], and by the House of Lords in *Datec Electronic Holdings Ltd v UPS* [2007] 1 WLR 1325 at [46]. It is to be distinguished from the type of multi-factorial evaluative assessment that was under consideration in *Bawa-Garba v The General Medical Council* [2018] EWCA Civ 1879. We review in the closed judgment the evidence before the Judge. Contrary to his view, we conclude that it is likely that substantial and important parts of the information which the Telegraph wishes to publish were passed to it in breach of a duty of confidence to the Claimants and that it was aware of the breach, or the likelihood of breach, of confidence.

33. We consider next the Judge's first point, that the information intended to be published by the Telegraph is reasonably credible. In our closed judgment we review the points that he made in support of that view and accept that they have force. But we also identify factors going the other way that need to be weighed in the balance at this, interlocutory, stage, and bearing in mind the limited material before the court. It is not possible to give particulars, but they include (a) that some of the allegations had been addressed and rejected in detail by the Claimant companies; (b) that the most serious allegations made by the complainants had been denied and that the settlement of the ET claims meant that the opportunity to have their truth determined by an independent tribunal had been lost; and (c) that the NDAs created a difficulty for the Claimants in rebutting the Telegraph's allegations given that they are equally bound by them.

34. The Judge's second point was that there could be no reasonable expectation of privacy or confidentiality in some of the particular misconduct alleged. We accept that as a general proposition, but it does not meet the point that the complainants had entered into particular obligations of confidence in this case, including in the NDAs. The real issue is whether, in the light of all the relevant facts, breach of that confidentiality is justified as a matter of public interest.

35. The third reason given by the Judge for his conclusion that the Claimants are unlikely to succeed at trial in obtaining an injunction against the Telegraph is that a considerable amount of the information which it wishes to publish is already in the public domain. In our closed judgment we explain our reasons for concluding that such of the information as is in the public domain does not include the most serious elements in the complainants' allegations.

36. The Judge's final reason concerns the public interest in publication. We can deal with this more fully, though we cannot at this stage give details of the misconduct alleged.

37. The Judge 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 said that, in his view, publication of the information would be in the public interest, notwithstanding the confidentiality which the Claimants assert attaches to it.

38. In reaching that conclusion, the Judge emphasised the importance both under the common law and Strasbourg jurisprudence of political debate in a democratic society, especially when exercised by the media, and the essential role played by the press in a democratic society. He cited in that context *Gaweda v. Poland App no 26229/95* (ECtHR, 14 March 2002), *Hannover v. Germany (No 1)* (2005) 40 EHRR 1, *Axel Springer AG v. Germany (No.2)* (2012) 55 EHRR 6, and *Hannover v. Germany (No 2)* (2012) 55 EHRR 15.

39. The Judge referred to recent controversies about misconduct in the workplace and the recent Report of the House of Commons Women and Equalities Select Committee entitled *Sexual harassment in the workplace (HC725)* ("the WESC Report"), which contains among other things a discussion of the legitimacy of the use of NDAs. He also referred to, and quoted from, the Independent Press Standards Organisation's definition of what matters are in the public interest.

40. We entirely endorse the Judge's statements as to the importance of freedom of political debate, the right of freedom of expression, the essential role played by the press in a democratic society, including contributing to debate on a matter of general interest, and the important public concern about misbehaviour in the workplace as well as the legitimacy of non-disclosure agreements and other legal devices for "gagging" disclosure by victims.

41. The Judge has, however, left entirely out of account the important and legitimate role played by non-disclosure agreements in the consensual settlement of disputes, both generally but in particular in the employment field. The WESC Report itself acknowledged this role. It said the following in its opening Summary:

> "Non-disclosure agreements (NDAs) are used unfairly by some employers and also some members of the legal profession to silence victims of sexual harassment. While NDAs have a place in settling complaints of sexual harassment in the workplace, there is insufficient oversight and regulation of their use. It is unacceptable that some NDAs are used to prevent or dissuade victims from reporting sexual harassment to the police,

> regulators or other appropriate bodies or individuals. Those who use NDAs unethically in this way must face strong and appropriate sanctions.
>
> We are calling on the Government to: … (d) clean up the use of non-disclosure agreements (NDAs), including by requiring the use of standard, plain English confidentiality clauses, which set out the meaning, limit and effect the clause, and making it an offence to misuse such clauses; and extending whistleblowing protections so that disclosures to the police and regulators such as the Equality and Human Rights Commission are protected."

42. Paragraph 109 of the WESC Report specifically addresses the benefit of non-disclosure agreements in settlement agreements, as follows:

> "109. Settlement agreements are described by the [Government Equalities Office] as providing 'a way to resolve workplace disputes or end a working relationship without the need to go through the cost and stress (for both parties) of an Employment Tribunal hearing'. Employment lawyers agreed that NDAs were important to enable victims of sexual harassment to get a settlement from their employer, particularly if the case could not be resolved through the employer's grievance procedure. Indeed, Gareth Brahams, the then Chair of the Employment Lawyers Association, told us that in many cases no settlement would be agreed without a non-disclosure agreement. Again, we acknowledge that there is a place for NDAs in settlement agreements; 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."

43. There is no evidence that any of the Settlement Agreements were procured by bullying, harassment or undue pressure by the Claimants. Each Settlement Agreement records that the employee was independently advised by a named legal adviser. Each Settlement Agreement contained provisions authorising disclosure to third parties in a range of cases, including to regulatory and statutory bodies. They did not in the present case, therefore, on the face of the evidence at this interlocutory stage, have any of the unethical vices criticised by the WESC Report.

44. Moreover, employees may themselves wish to maintain confidentiality in relation to the settlement of the dispute with the employer. In the present case, for example, two of the complainants have confirmed through their solicitors that they support the Claimants' application, a factor not apparently taken into account by the Judge. In the case of one of them, the express reason given was that the complainant would like to protect their privacy.

45. Regrettably, in this context, although the *Mionis* case was mentioned in the Telegraph's skeleton argument below, no reference was made in the oral submissions of either side's counsel to the case itself or to the explanation in that case of the public interest in

upholding non-disclosure agreements. Mr Browne has pointed out that the facts of the present case and those in the *Mionis* case are very different. What are important, however, are the observations of the Court of Appeal about the merits generally of non-disclosure agreements in the settlement of disputed claims.

46. The effect of each of the Settlement Agreements was to put an end to existing or potential litigation and enabled the employees to receive substantial payments.

Assessment

47. We consider that the analysis of the Judge, and the legitimacy of the exercise of his discretion in refusing to grant an interim injunction, were undermined by his failure (1) to draw the inferences that it is likely that substantial and important parts of the information which the Telegraph wishes to publish were passed to it in breach of a duty of confidentiality and that it was aware of the breach or the likelihood of breach of confidentiality; (2) to weigh in the balance, when assessing the credibility of the allegations at this interlocutory stage, all the various factors we have mentioned above countering the likelihood of a finding of serious misconduct; (3) to find that a considerable amount of the information which the Telegraph wishes to publish is not already in the public domain; and (4) to weigh in the balance, when considering whether a defence of public interest is likely to succeed at trial, the various public policy considerations relevant to upholding NDAs in general and the ones in issue in the present case in particular.

48. 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 is refused, publication by the Telegraph may result in immediate, irreversible and substantial harm to the Claimant companies due to adverse customer reaction. He did not refer to Lord Nicholls' speech in *Cream Holdings* as to how this might bear on the requirement in section 12(3) of the HRA that the Claimants must satisfy the court that they would be "likely" to establish at trial that publication should not be allowed.

49. It falls on us, therefore, to exercise afresh the discretion as to whether or not there shall be an interim injunction.

50. We consider that the proper order to make in the present case is for an interim injunction and an order for a speedy trial for the following reasons.

51. There is a real prospect that publication by the Telegraph will cause immediate, substantial and possibly irreversible harm to all of the Claimants. In the case of the Claimant companies, this may have implications for their employees. This is, therefore, precisely the type of case which Lord Nicholls had in mind in *Cream Holdings* when he cautioned that, when considering what is "likely" for the purposes of section 12(3) of the HRA, the court should not ignore the seriousness of the possible adverse consequences of disclosure prior to, for example, a disputed issue of fact being resolved at the trial. As he said (at [22]), on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. He gave two examples (in [22]) of cases where a lesser degree of likelihood of success at trial than probability (more likely than not) would be appropriate for the grant of an interim injunction: where the potential

adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal. The present application embraces the first of those examples.

52. Mr Browne said that those potential serious consequences for the Claimant companies are of minimal significance in the balancing exercise. He relied on the decision of Mann J in *Tillery Valley Foods v Channel Four Television* [2004] EWHC 1075 (Ch) and the principle in *Bonnard v Perryman* [1891] 2 Ch 269, that in a defamation case, in which the defendant claims justification, the court has power to grant an interim injunction but that power ought only to be exercised in the clearest cases. In the *Tillery Valley Food* case Mann J refused to grant an interim injunction restraining the broadcast of a television programme about the practices at the factory of the claimant, whose business was the development, production and distribution of chilled frozen meats to the healthcare and public sector markets. The cause of action asserted by the claimant was breach of duties of trust and confidence by an undercover investigative journalist who was employed at the factory for a period of time. Mann J held (at [11]), however, that the information to be disclosed by the defendant did not possess the necessary confidential quality, and (at [21]) that the claim was really a defamation action in disguise and so the principle in *Bonnard v Perryman* ought to be applied.

53. That is very different from the present case for the reasons we give below as to the likelihood of breach of confidentiality and the centrality of the contractual NDAs both in relation to confidentiality and in assessing the likelihood of a defence of public interest. There are many reported cases in which, in deciding whether or not to grant an injunction, the court has had to balance a claimant's right to a private life under Article 8 of the Convention with the right to freedom of expression under Article 10, of which *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2017] 3 WLR 351, is a recent example, where the information intended to be published would affect the claimant's reputation. It is to be noted that in the present case the Judge did not rely on the *Tillery Valley Foods* case or the principle in *Bonnard v Perryman* in paragraphs [42]-[86] in which he discussed his decision and the reasons for it.

54. The starting point in the present case is whether or not the Claimants would be likely to establish at trial that the information which the Telegraph wishes to publish, or at least a significant part of it, was obtained in breach of duty of confidentiality to the Claimants, including in breach of the NDAs, and as a result of inducement of breach of contract.

55. That is disputed and cannot be finally resolved until trial. We have concluded, however, on the material currently before us that it is likely that the Claimants will establish at trial that a substantial part of the information was obtained through breach of duty of confidentiality to the Claimants, either in breach of the NDAs, or by those with knowledge of the NDAs, and that the Telegraph acquired the information with knowledge both of the NDAs and the breach of confidence.

56. We have found that it is likely that the Claimants will establish at trial that the confidentiality attaching to a substantial part of the information has not been lost through being released into the public domain.

57. The most serious allegations of specific and particularised incidents are denied by the Claimants. Their occurrence is a matter of fact, which cannot be finally resolved prior to trial. There is currently before the court no corroboration of those incidents but only the allegations of the employees.

58. The result of the employees' claims having been compromised by the Settlement Agreements is that the Claimants have lost the opportunity to contest those serious particularised allegations in an independent judicial adjudication. If the Telegraph is permitted to publish all the information it wishes, the Claimants will be left to challenge the allegations through the media while, the same time, being themselves bound by, and so hamstrung by, the NDAs.

59. In these circumstances, the critical issue is the likelihood of the Telegraph establishing at trial a public interest defence to the claim for breach of confidentiality. Bearing in mind Lord Nicholls' observations about the flexibility of the "likely" criterion in section 12(3) in circumstances such as those of the present case, we consider that it is unlikely that the Claimants' enforcement of their right to confidentiality would be defeated at trial by a defence of public interest.

60. The legal test endorsed in the *Prince of Wales* case is whether in all the circumstances it is in the public interest that the duty of confidence should be breached: see paras 21 and 22 above.

61. As we have said above, there is no evidence that any of the Settlement Agreements were procured by bullying, harassment or undue pressure by the claimants. Each employee received independent legal advice before entering into the Settlement Agreement. Each Settlement Agreement contained provisions authorising disclosure to regulatory and statutory bodies. They did not fall within the criticism of the WESC Report.

62. As acknowledged in the WESC Report, and as emphasised in the *Mionis* case, there is a public benefit in the enforcement of contracts, freely entered into by the parties, settling their disputes, not least in the employment field. According to the *Mionis* case, 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 other than on ordinary contractual and equitable principles.

63. Furthermore, as the WESC Report states, non-disclosure agreements made as part of a settlement of a dispute will often be for the benefit of all parties to it. In the case of the settlement of an employment dispute, the employee may have as much concern to maintain confidentiality as the employer. The employee may not wish details of the dispute and the terms on which it was settled to be disclosed more widely for a variety of reasons, such as to maintain personal privacy or in case it might affect future employment opportunities or for financial reasons.

64. As we have said, two of the complainants support the Claimants' application; and one of them gave the express reason that they wished their privacy to be protected. It is right to say that another has stated that they are happy for their complaints and the fact of the NDA to be disclosed but on the basis that they will not be named. There must be a high risk, however, that it will be possible to identify them if the Telegraph publishes particulars relating to their allegations.

65. Mr Browne emphasised that what is in issue in the present case is not merely a contest between the right of the Claimants to maintain the confidentiality of the information and the right of the employees and their colleagues to freedom of expression under Article 10 but rather the independent right of the media to inform the public of matters of legitimate public interest. He called it the role of the media as a watchdog. He said that the public, including prospective employees of the claimants, have the right to know not just about the alleged misconduct but also the way in which senior management has (in his words) swept aside the complaints of employees. Citing Tugendhat J in the *Goodwin* case and in *BUQ v HRE* [2012] EWHC 774 (QB), Mr Browne said that the media have an important role to play in informing the public about, and promoting public debate about, the way powerful men, including corporate managers and executives, treat employees and about the standards to be expected of those in public life. The challenge to the media's watchdog role posed by non-disclosure agreements is something about which the press generally is concerned: see, for example, the editorial under the headline "Secrets and Lies" in The Times newspaper on 8 October 2018.

66. The importance of the role of the media is not in issue or in doubt. It is, however, only one side of the scales in determining where the balance of the public interest lies on the particular facts of the present case. As we have said, on the very limited information currently before the court, it is likely that the Claimants will establish at trial both that the relevant information was acquired by the Telegraph with knowledge of the NDAs and of the general obligation of confidentiality owed by the employees of the Claimant companies, and also that the information was imparted to the Telegraph in breach of either the NDAs or by employees who were aware of the NDAs and that, in either case, there was a breach of the duty of confidentiality to the Claimants.

67. Each case turns on its own particular facts. The circumstances of the present case give rise to important and difficult policy considerations. They are not relieved merely by the stated intention of the Telegraph to anonymise the employees. The policy considerations and their application in the present case are best considered comprehensively following a trial, at which evidence can be brought forward by either side on the various matters of fact which are in dispute. At this interlocutory stage, it is enough for us to conclude, as we do, that there is a sufficient likelihood of the Claimants defeating a public interest defence at trial, to justify the grant of an interim injunction. It is not necessary for us to state the precise degree of probability of the Claimants' success.

68. We appreciate that any delay in the publication of matters of public interest is undesirable. That can be met to some extent, in the present case, by ordering a speedy trial.

Conclusion

69. For the reasons outlined above, and given more fully in our closed judgment, we allow this appeal, subject only to what we say below about the wording of the injunction, and order a speedy trial.

70. We consider that the information intended to be covered by the injunction is expressed too widely at the moment. We presently consider that it should be limited to the allegations as to the individual incidents of alleged misconduct particularised in the

grievances and the Grounds of Complaint to the ET and to the negotiation and terms of the Settlement Agreements. We will, however, consider any further submissions in writing that the parties may wish to make on the terms of the injunction.