Claim No: HC 05 000292

Neutral Citation Number: [2005] EWHC 721 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 29 April 2005

Before :

The Hon Mr Justice Laddie

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Between :

(1) DELOITTE & TOUCHE LLP **(2) Another**	**Claimants**
- and -	
(1) CHRISTOPHER DICKSON **(2)WILLIAM MORRISON** **(3) THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES** **(4)VNU BUSINESS PUBLICATIONS LIMITED**	**Defendants**

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Mr Mark Howard QC and **Mr Alan Maclean** (instructed by **Freshfields Bruckhaus Deringer**) for the **Claimants**
Mr Michael Beloff QC and **Mr Jonathan Evans** (instructed by **Stephenson Harwood**) for the **First to Third Defendants**
Ms Joanne Cash (instructed by **DMA Legal LLP**) for the **Fourth Defendant**

Hearing dates: 7 – 8 March, 2005

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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.

....
Mr Justice Laddie

The Hon Mr Justice Laddie :

1. The Third Defendant in these proceedings is The Institute of Chartered Accountants in England and Wales (“ICAEW”). In 1979 it, together with the Institute of Chartered Accountants of Scotland (“ICAS”) and the Institute of Chartered Certified Accountants (“ACCA”), set up the accountancy profession’s Joint Disciplinary Scheme (“the JDS”). The ACCA withdrew from the JDS in 1995. Very recently the ICAEW ceased to refer new cases to the JDS, the latter’s role now being assumed by a new self-regulatory body. The JDS remains in being to complete its existing case load. The First Defendant, Mr Christopher Dickson, is the Executive Counsel of the JDS. The Second Defendant, Mr William Morrison, is the Chairman of the JDS’s Executive Committee. The Fourth Defendant, VNU Business Publications Limited (“VNU”), is the publisher of “Accountancy Age”, a weekly trade magazine with a wide circulation among accountants and those working in related sectors of the economy.

2. The First Claimant is Deloitte & Touche LLP (“Deloitte”). In the 1990s it carried out audit and other work on behalf of Capital Corporation Plc (“Capital”). In March 1999 the ICAEW notified it that a complaint had been received arising out of the manner in which this work had been performed. In June 1999, the ICAew gave further notice that it was investigating an additional matter relating to the purchase from Capital of a Range Rover car by a Mr Stephen Ives, who was at that time a partner in Deloitte and had been involved in the audits of Capital. In September 1999 the ICAEW referred these matters to the Executive Committee of the JDS which, in turn, referred them to Mr Dickson for investigation. On 25 October 1999, the JDS issued a press release making public the fact that the matter had been referred to them and was under investigation. A press notice was issued on 24 June 2003 in which it was announced that Mr Dickson had laid formal complaints against Mr Ives and another. On 17 November 2004, a further press notice was released in which it was announced that Mr Ives was being excluded from membership of the ICAEW for fraud and for manipulating Deloitte’s books to conceal his wrongdoing. That press release was accompanied by a “background note” which set out in some detail the allegations and findings against Mr Ives. The latter included the statement:

   > “An investigation into other matters relating to Capital has now been completed, and a decision will be announced shortly.”

3. Under cover of a letter dated 3 February 2005, Mr Dickson informed Deloitte that, following the conclusion of his enquiry, he had laid formal complaints before the Executive Committee pursuant to paragraph 6(f) of the JDS. He provided Deloitte with copies of the complaints, a “Summary of Facts” on which the complaints were based and a Press Notice, to be released on Wednesday 9 February 2005 (“the 2005 Press Notice”). Mr Morrison approved its terms and its issue. A copy of it was made available to VNU for publication in Accountancy Age.

4. The 2005 Press Notice refers to complaints to be made against both Deloitte and Mr Martin A Scicluna, Chairman of its Board of Partners. Mr Scicluna is the Second Claimant. It is the proposed release of the 2005 Press Notice which has given rise to the current application. As Mr Mark Howard QC, who appears with Mr Alan Maclean for the Claimants, summarises the Claimants’ case, it is alleged that the issue of the 2005 Press Notice to VNU and its subsequent publication, or the publication of its

contents, would be a breach of the terms of the JDS and the subordinate Regulations in accordance with which the JDS is operated and additionally it would amount to a breach of the duty of confidence owed to the Claimants by each of the Defendants. In either case it will be causative of serious and irreparable harm to the reputation and business of the Claimants, which would not be capable of being easily quantified, such that the remedy of a final injunction is appropriate.

5. The difference between the two ways in which the Claimants' put their case is significant. Under the first head it is argued that press notices can only be issued in the limited number of cases where the JDS and the subordinate Regulations expressly so provide. In all other cases, of which the 2005 Press Notice is one, there is no such power, no matter how anodyne the notice may be. Under the second head, the argument is that, even if the power to publish exists, the 2005 Press Notice contains confidential information of the Claimants which the Defendants are not at liberty to make use of or disclose outside the JDS. The latter, therefore, involves an analysis of the contents of the 2005 Press Notice. In relation to this, I understand Mr Howard to accept that the position of Deloitte may be somewhat different to that of Mr Scicluna.

6. In view of the Claimants' fears that publication of the 2005 Press Notice would cause them harm, they applied without notice for injunctive relief on 8 February before Park J. That application was successful. He granted an injunction prohibiting the publication or disclosure of the 2005 Press Notice or its contents or from publishing, disclosing or using

> "any information concerning the First Respondent's investigation and or the Joint Disciplinary Scheme proceedings against the First Applicant (i.e. Deloitte), its partners and staff referred to in the draft Press Notice save to the extent that disclosure is necessary for the purpose of the said proceedings."

7. On 14 February, on a further without notice application, the Claimants obtained an order from Deputy Master Arkush prohibiting the inspection without permission of the court of any document on the court file, other than any judgment given in public.

8. The injunction and order appear to have been only partly successful in preventing publication of the material to which the Claimants object. The press got wind of the existence of these proceedings and the injunction obtained and have published a number of reports which, with varying degrees of accuracy, have commented on Deloitte's actions and the purpose of the injunction they obtained from Park J.

9. This is the return date of the application brought before Park J. The parties have served written evidence. They now agree that this application should be treated as the trial of the action.

10. The non-pecuniary relief sought now is in the following terms:

> "(1) An injunction to restrain the Defendants and each of them whether by themselves, their employees agents or any other person howsoever, until the last to occur of i) the dismissal of all the Complaints ii) the publication pursuant to paragraph 7(i) of the Scheme of all the reports of the Joint Disciplinary

Tribunal following the hearing of the Complaints or any of them iii) the publication of all of the Appeal Tribunal's reports on the Complaints or any of them pursuant to paragraph 9(m) of the Scheme:

a) from publishing, publicising or disclosing the embargoed Press Notice provided by the First Defendant to the Fourth Defendant on or about 4 February 2005 or the contents thereof; and

b) from publishing, disclosing or using any information concerning the First Defendant's investigation and or the Joint Disciplinary Scheme proceedings against the First Claimant, its partners and staff referred to in the said Press Notice save to the extent that disclosure is necessary for the purpose of the said proceedings.

(2) a Declaration that the issue of the Press Notice was a breach of the Scheme and of Regulation 52 of the Regulations and of the duty of confidence owed to the Claimants by the First and or Second and or Third Defendant.

(3) As against the Fourth Defendant, delivery up of all documents and materials which are in its possession power custody or control the use or disclosure of which would offend against the foregoing injunctions or any of them."

The Power to Issue a Press Notice

11. The starting point for an analysis of the power to issue press notices must be the terms of the JDS itself. This was established by the participating professional bodies and approved by the Privy Council. Insofar as material, the scope and objectives of the scheme are as follows:

"**3 Scope**

This Scheme embraces the professional and business activities of all Members and Member Firms and sets out the procedures for investigating and regulating their professional and business conduct, efficiency and competence in circumstances which give rise to public concern in the United Kingdom. …

4 Objectives

The objectives of this Scheme are to promote the highest possible standards of professional and business conduct, efficiency and competence:

a. by Members in the performance of their professional or business activities (including duties as a director, servant, partner or employee of any organisation); and

b. by Member Firms in the provision of the services which they offer to the public;

by providing a system for the investigation and regulation of the activities of Members and Member Firms so as to secure their adherence to all professional criteria including but not limited to all relevant recommendations and standards promulgated from time to time by or with the approval of the Councils of the Participants."

12. The scheme is administered by an Executive Committee (JDS paragraph 5) which, among other things, appoints a legally qualified Executive Counsel (JDS paragraph 6). At all material times Mr Dickson has been the Executive Counsel.

13. Each of the participating professional bodies has an investigating committee. It must investigate complaints against a member of the body. It can then report its conclusions to the Executive Committee which must consider the report in accordance with JDS paragraph 6b:

> "Whenever the Executive Committee receives a report from an investigation committee of a Participant which concerns, or which in the opinion of the investigation committee may concern, the professional or business conduct, efficiency or competence of one or more Members and/or Member Firms (whether or not referred to specifically in the report) and the investigation committee making the report certifies that in its opinion the circumstances of the matter are ones which give rise to public concern in the United Kingdom, the Executive Committee shall refer the report to the Executive Counsel to be dealt with in accordance with this Scheme. *The Executive Committee shall at the same time make public the reference to the Executive Counsel of the matter*." (italics added)

14. Once seized of a report, the Executive Counsel has powers of investigation (JDS paragraph 6c). Once he has made his inquiries, he can deal with the matter in one of three ways. First, he can recommend to the Executive Committee that it refers the matter back to the reporting professional body so that the latter can deal with the complaint under its own disciplinary powers (JDS paragraph 6g). Second, he can recommend that the Executive Committee set up a Joint Disciplinary Tribunal to consider the complaint. If that course is followed, he must lay a formal complaint before the Executive Committee. Third he may decide that there is no case to answer and report to the Executive Committee accordingly. The second and third of these courses are germane to this case. They are provided for in JDS paragraphs 6f and 6j respectively which are in the following terms:

> "f. If, following his enquiry, the Executive Counsel is of the opinion that there are grounds upon which a Joint Disciplinary Tribunal could make an adverse finding concerning the professional or business conduct, efficiency or competence of a Member or Member Firm he shall request the Executive Committee to appoint such a Tribunal at the same

time delivering to the Executive Committee a formal complaint specifying the manner in which he alleges that the conduct or quality of work of the Member or Member Firm concerned fell below that which was to be expected of such a Member or Member Firm at the time of the activities in question and giving particulars sufficient to enable it to be properly understood by a Joint Disciplinary Tribunal.

> j. If the Executive Counsel concludes from his enquiry that there is no case to answer against any Member or Member Firm he shall report to the Executive Committee accordingly. Any such report shall be dated and signed by the Executive Counsel. *The Executive Committee may, and shall if so requested by the Member or Member Firm concerned, cause the result of the enquiry or the report to be published as soon as practicable in such manner as it thinks fit*." (italics added)

15. The scheme includes provisions which prescribe the procedure to be followed by the Joint Disciplinary Tribunal if a matter is referred to it. If it finds against the complainee it has disciplinary powers (JDS paragraphs 7f and 7g). Furthermore there are provisions relating to the publication of any such finding:

> "7 i. Any order made under paragraph 7(f) or 7(g) shall take effect from the date of the order.
>
> i. (i) Subject to sub-paragraphs (ii) and (iii) below the *Executive Committee shall cause the report or reports to be published* as soon as practicable in such manner as it thinks fit.
>
> ii. No publication shall be made of any report incorporating an adverse finding or any order until the expiry of the appeal period referred to in paragraph 9(a).
>
> iii. If notice of appeal is received then no publication shall be made of any report incorporating a finding or order which is the subject of appeal until the appeal is determined." (italics added)

16. The appeal procedure is set out in JDS paragraph 9. For present purposes it is only necessary to note that the Appeal Tribunal set up under the scheme must report back to the Executive Committee after hearing the appeal and that the Executive Committee "shall cause the report (or reports) to be published as soon as practicable in such manner as it thinks fit" (JDS paragraph 9m).

17. There are three other provisions in the JDS to which reference must be made. First, paragraph 11 imposes on every member of the participating professional bodies an obligation to co-operate fully with the Executive Counsel, Joint Disciplinary Tribunal and Appeal Tribunal and to provide information and access to documents on request. Second, paragraph 15 provides:

> “**15 Amendment of this Scheme**
>
> This Scheme may be altered or amended with the consent of the Council of each of the Participants but no such alteration or amendment which, in the opinion of the Council of any of the Participants, would fundamentally alter this Scheme shall become effective unless and until the same shall have been further approved by general meetings of each of the Participants and by Her Majesty’s Privy Council.”

18. Third, over and above the specific powers and obligations referred to above, the JDS contains provisions bestowing on the Executive Committee various powers designed to facilitate the operation of the scheme. In particular it provides:

> “5d. The Executive Committee shall have power:
>
> xii. to do all such other things as the Executive Committee may consider necessary or conducive to attain the objectives of this Scheme, including power to lend or to invest on such terms and in such manner as the Executive Committee may consider appropriate any moneys not immediately required for the purposes of this Scheme and to vary any such loan or investment;”

The parties’ arguments

19. As indicated above, Mr Howard says that the Executive Committee (and the Executive Counsel on its behalf) has no general power to issue press notices. It can only do those things which are sanctioned by the JDS. He says that there is an implicit negative covenant against releasing press notices at other times. This means that press notices can only be issued in the circumstances prescribed in paragraphs 6b, 6j, 7i i (i) and 9m as set out above. It has no general power to keep the public informed of what it is doing. Had it the general power claimed by the Defendants, there would have been no point in including within the JDS the express provisions in respect of some, but not other, stages in the JDS investigations. If this power is too restricted, the solution is to amend the JDS pursuant to the power to do so given by paragraph 15 of the Scheme.

20. Mr Michael Beloff QC, who appears with Mr Jonathan Evans for all the Defendants except VNU, advances two arguments against this construction. The first is that the JDS is a body corporate incorporated by Royal Charter. As such it enjoys the powers of a natural person, including the right to impart information as safeguarded by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, now given effect to in our law by the Human Rights Act 1998. Therefore it and the Executive Committee and Executive Counsel are at liberty to inform the public. Second, he says that the power to make statements to the public is a necessary incident to the Executive Committee’s and Executive Counsel’s powers under the scheme and, in particular, within the scope of paragraph 5d(xii). Miss Joanne Cash, who appears for VNU, did not address this point since it was not central to the issues affecting her client.

The powers of the Executive Committee and the Executive Counsel

21. In my view it is not necessary to have regard to Human Rights principles to determine this issue. Mr Howard's argument is based on the submission that the powers of the Executive Committee in respect of publicity are restricted to those expressly bestowed under the JDS. If this is so, the consequence would be surprising. It would mean that any press statements other than those expressly covered by the JDS would be prohibited. For example the Executive Committee would have no power to announce that it had appointed, say, a particular highly qualified individual to the post of Executive Counsel, nor would it be able to announce the membership of a particular Appeal Tribunal. I do not think that the JDS requires such a limitation on the Executive Committee's powers.

22. Mr Howard's submission involves too restrictive an approach to construction. If he were right and the limits of the power to make public statements is to be found in the express wording of the JDS, it would be possible to argue that the only prohibition on making public statements is that contained in JDS paragraph 7 i i (ii) (see paragraph 15 above). The provisions in the JDS which deal expressly with issuing statements to the public are all ones in which the Executive Committee is or can be obliged to issue such a statement. In other words the JDS only makes explicit provision for publicity in those situations where the Executive Committee is or can be deprived of a discretion whether to publicise or not. This is even true in the case of JDS paragraph 6j (see paragraph 14 above). However it is not a necessary corollary of the existence of these express requirements in defined circumstances that, outside those circumstances, the Executive Committee has no discretion to issue such statements. Indeed, were it so the express prohibition in 7 i i (ii) would be otiose. In my view there is no reason to construe the JDS so restrictively. There is no express or implicit prohibition on the release of the 2005 Press Notice.

23. This conclusion is bolstered by the provisions in JDS paragraph 5d(xii) which confirms that the Executive Committee has power to do all such things as it may consider are conducive to securing the objectives of the scheme. As set out in JDS paragraph 4, those objectives include the promotion of the highest possible standards of professional and business conduct.

24. This is a matter touched upon in Mr Dickson's Witness Statement. He says:

> "13. The JDS is a public interest scheme, dealing only with cases which have given rise to public concern in the United Kingdom. Most JDS cases involve the behaviour of auditors, and this is usually a significant part of the investigation. Auditors play a most important role in the financial affairs of public limited companies, particularly those which are listed on the Stock Exchange. Such companies play a vital part in the lives of most people in the United Kingdom, not only in the provision of employment and the supply of goods and services, but also in terms of investment, principally by pension funds and other institutional investors. Public confidence in the integrity of such companies and the reliability of their financial statements is of the greatest

> importance. One of the ways in which such public confidence can be maintained is through the audit process."

25. It seems to me to be a necessary incident of the maintenance of the highest standards of the profession that the public is reassured that the self-regulatory disciplinary system will be invoked and pursued. As Mr Dickson points out later in the witness statement, the gap between the referral of the case to the Executive Committee by one of the professional bodies and the final determination by the Appeal Tribunal, at both of which the Executive Committee must issue a press release, is normally measured in years. That will certainly be the case here. As he explains, the Executive Committee's policy of publishing the fact that the Executive Counsel has laid a complaint has been to improve the accuracy of reporting about JDS cases. As he puts it:

> "26. … There has been far less speculation, because journalists know that appropriate information will be released at three separate points. The date of the referral of a case and the publication of the Tribunal Report are typically several years apart. If there can be no information about a case between those dates, such a period of silence is likely to lead both to uninformed speculation, and to public concern that nothing is happening."

26. In these circumstances it is reasonable for the Executive Committee to have considered that the issue of such a press release would be "conducive to attain the objectives" of the JDS and therefore within the powers granted in paragraph 5d(xii).

27. It follows that I do not accept that the Executive Committee or the Executive Counsel on its behalf was acting ultra vires when it proposed issuing the 2005 Press Notice. This does not mean that the Executive Committee is given a free hand to publish what it likes. For example, it cannot ignore the constraints imposed by libel law, nor may it publish anything where to do so would be an actionable breach of confidence.

28. In the light of this conclusion, it is not necessary to consider Mr Beloff's argument arising out of the status of the JDS as a body corporate.

Breach of confidence

29. The Claimants' case in breach of confidence is quite different to the allegation, considered above, that the Defendants had no power to issue a press notice. As noted already, the latter argument, if correct, would prevent the Defendants from issuing any press notice, no matter what its contents. By contrast, the claim for breach of confidence is tied to the particular contents of the notice which it is intended to publish. The injunctions granted by Park J were in the wider form, prohibiting the publication of the 2005 Press Notice and "any information concerning" the JDS investigation of the claimants. It was not limited to the publication of the Claimants' confidential information. The relief sought from me is in similarly wide terms.

30. The Claimants' case on breach of confidence is summarised in paragraph 32 of Mr Howard's skeleton:

> "Insofar as the Press Notice contains information which came to Mr Dickson's attention in the course of his investigation, which information shall be treated as confidential (subject to the proviso in regulation 52(a), which does not apply to the present case) the issue of the Press Notice was in breach of a duty of confidence owed by the First – Third Defendants to the Claimants. For example, Mr Dickson only became aware of the information which gave rise to the complaint against Mr Scicluna in the course of his investigation and because of his use of his coercive powers. That information is to be treated as confidential within Regulation 52."

31. There is no dispute as to the relevant principles of the law of confidence. They are encapsulated in the well known passage from the judgment of Megarry J in _Coco v A N Clark (Engineers) Ltd_ [1969] RPC 41, 47:

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene MR in _Saltman Engineering Co Ltd v Campbell Engineering Co Ltd_ (1948) 65 RPC 203, 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

32. Thus if A conveys information to B in circumstances of confidence, A can normally prevent B from using or publishing it without his permission. The party communicating the information can prevent his information being used in an unauthorised manner. Needless to say, B cannot prevent A from disclosing A's information as he wishes. It is up to A whether he wants to keep his own information confidential. It follows that the party who can seek relief is the party whose information is being misused (see *Fraser v Evans* [1969] 1 QB 349 for a case where a party which was not owed the obligation of confidence was refused relief).

33. Following from this, in this case the Claimants must show that the Defendants are intending to publish information which came from them and which was obtained by the First to Third Defendants in circumstances giving rise to an obligation of confidence. If VNU is to be liable, these factors have to be proved and, in addition, it must be shown that the obligation of confidence extends beyond the First to Third Defendants and binds it. I will return to this issue later.

34. There is no dispute between the parties that an obligation of confidence can arise other than expressly. However here, save in respect of the claim against VNU, it is not necessary to investigate this subject. The Claimants' case is that the express obligation of confidence is created by the terms of the JDS itself.

35. Even if information is communicated in circumstances imposing an obligation of confidence, the communicator will lose his ability to enforce the obligation if the information becomes generally available to the relevant public. It seems to me that this may impact on the communicator's rights in two ways. First, if, at the time of the

unlicensed use by the recipient, the information is public knowledge, there is no cause of action. There is no confidence left to breach. If, on the other hand, at the time of the unlicensed use the information is not in the public domain but, at the time the court is called on to grant relief, it is, then the latter fact may well have an impact on the relief to be granted. For example a court is unlikely to grant an injunction restraining publication of information which is already widely disseminated to the public and which is, in practice, in free circulation (see *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 - the "*Spycatcher* case"). The Defendants argue that all or most of the contents of the 2005 Press Notice were public knowledge before February 2005 or became so as a result of press comment following Park J's order.

36. In addition to these features of an action for breach of confidence, all the Defendants rely on claims to be entitled to publish in the public interest. This is put in a number of ways. I will consider this issue towards the end of this judgment.

The creation of the obligation of confidence

37. I have already mentioned that paragraph 11 of the JDS obliges every member to co-operate fully with the Executive Counsel and any Joint Disciplinary Tribunal or Appeal Tribunal. That includes an obligation to provide information orally and in writing. These obligations are also touched on in the Regulations made under the JDS. A general obligation to co-operate and to provide information is contained in Regulation 9. Regulation 52 provides:

> "52 (a) Information, whether oral or in writing, which comes to the knowledge of the Executive Counsel, the Executive Committee, a Joint Disciplinary Tribunal or an Appeal Tribunal in the course of an investigation or disciplinary proceedings under the Scheme shall be treated as confidential save to the extent that disclosure is necessary for the purposes of such investigation or proceedings.
>
> (b) Any disclosure of such information, whether oral or in writing, by the Executive Counsel, the Executive Committee, a Joint Disciplinary Tribunal or an Appeal Tribunal (save in a report to be published pursuant to the terms of the Scheme) shall be on terms that it is confidential and no such information shall be disclosed (directly or indirectly) by the person provided with it except:
>
> (i) to his legal advisers for the purposes of the investigation or disciplinary proceedings;
>
> (ii) …………
>
> (iii) to any other person to whom disclosure is necessary for the purposes of obtaining evidence, information or assistance in connection with the investigation or disciplinary proceedings."

38. Mr Beloff QC argues that what is at issue in this case is information which is not "inherently confidential". He says that nothing in the 2005 Press Notice is sensitive. It does not purport to prejudge whether Deloitte or Mr Scicluna are guilty. He draws a parallel with *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company* [2004] EWCA Civ 314. Only significant information will be protected by the law of confidence.

39. Where there is no express agreement or understanding between the parties that an obligation of confidence exists, the obligation can arise from the circumstances in which the information was communicated. This was explained in *Coco v Clark* as follows:

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence …" (p 48)

40. In *Coco v Clark*, Megarry J was considering cases where the obligation of confidence arose from the circumstances surrounding the transmission of the information. In other words he was considering cases other than those where the parties have expressly defined to what information the obligation of confidence applies. Hence his use of the words "apart from contract" in the passage cited at paragraph 31 above. In cases where the obligation has to be discovered from the surrounding circumstances rather than where it is the subject of an express agreement or understanding between the communicator and the recipient, it is for the notional reasonable recipient to determine what is covered. Where information is trivial or does not appear sensitive it might be that the reasonable man would not have realised it was being given in confidence. In such a case no obligation would be created. The circumstances of transmission would point away from restriction on use. But I am not persuaded that this analysis applies where, as here, the communicator and the recipient have expressly determined what shall be treated as confidential. The terms of Regulation 52 are clear and wide. Information is supplied by members to the Executive Counsel on the basis, known to both of them, that it will be treated as confidential. The Regulation applies to all information, not just to "sensitive" or "inherently confidential" material. It may be that were there a dispute about the publication of some really trivial matter, such as the flavours of the ice-cream in the partners' dining room, the court would refuse to grant injunctive relief on the basis that its discretion should not be exercised to protect such minutiae. It may be that any financial relief would be nominal. But these are not relevant considerations here. In my view all information conveyed by the Claimants to the Executive Counsel was to be treated as confidential whether or not it was sensitive or important. It follows that I reject Mr

Beloff's argument that the information at issue here can be excluded from the obligation of confidence because it is not sufficiently valuable.

Does the 2005 Press Notice consist of or contain information covered by the obligation of confidence?

41. The Press Notice is in the following terms. It is reproduced from an annex to the Particulars of Claim The italics have been added by the Claimants for reasons which will be explained later.

> "CAPITAL CORPORATION PLC
>
> DELOITTE & TOUCHE and MR MARTIN ANTHONY SCICLUNA FCA
>
> The Executive Counsel to the Joint Disciplinary Scheme, Mr Christopher Dickson, has completed his investigation into the case of Deloitte & Touche ("D&T"), the auditor of Capital since 1989, *and Mr Scicluna, the Chairman of D&T, and has laid Complaints against them, as follows:*
>
> > *(a) (D&T only) at the time of Capital's 1996 interim announcement, acquiescing in Capital's misleading amendments to the disclosures D&T had recommended that Capital make to the market;*
> >
> > *(b) (D&T only) at the time of Capital's 1996 interim announcement, failing to resign as auditor of Capital, amongst other reasons because of Capital's failure to disclose to the market that D&T was unable to form a view on whether or not Capital's interim accounts were materially correct;*
> >
> > *(c) (Mr Scicluna only) in September 1996, failing to report Mr Stephen Edward Ives, at the time a D&T partner, to the Institute of Chartered Accountants in England and Wales ("ICAEW"), or failing to ensure that the senior partner of D&T reported him.*
>
> A Joint Disciplinary Tribunal will be appointed to hear the Complaints. The Tribunal's report will be published."

42. This can be split into three parts. First it states that the Executive Counsel has completed its investigations into Deloitte and Mr Scicluna and that he, that is to say the Executive Counsel, has laid complaints against them (the "Executive Counsel's Conclusions"). Second, in three short paragraphs it indicates the nature of the complaints (the "Summary of Complaints"). Third it states that a Joint Disciplinary Tribunal will be appointed to hear the Complaints and its report will be published ("Future Progress").

43. The Claimants say that they want all this material withheld. As a full-back position they argue that there should not be publication of any of the words set out in italics. In other words they do not want there to be publication of the fact that a complaint has been laid against Mr Scicluna or any part of the Summary of Complaints.

44. Notwithstanding the breadth of the relief sought, the evidence and submissions make clear the Claimants' real objection. For example Mr Scicluna says in his witness statement:

> "8. The only reference to me in the press in any of these stories is a brief reference in the Guardian on 11 February 2005 to the fact that I was the person to whom information was provided by Mr Ives. The fact that I am the subject of a complaint to the Tribunal is not yet within the public domain. Nor is it something that will be apparent to anyone reading any of the press comment about Capital Corporation.
>
> 10. ... However, it would be very damaging to me now if it become (sic) known that the First Defendant had investigated and formed the view that there was sufficient evidence to justify a Complaint against me in circumstances in which I had not been able to defend myself and the subsequent repeated comment about the Complaint would exacerbate the damage to me.
>
> 21. Although the Complaint is one that I strongly reject and will contest vigorously, the reality is that the damage caused to my professional standing would have been suffered whatever the outcome of the Tribunal decision. I will be obliged to inform the audit clients for whom I work of the complaint together with target clients of the firm for whom I may wish to work. A listed company will inevitably wish to consider very carefully whether it wishes to have as its main audit partner someone known to be facing a complaint before the JDS (even though that complaint is not related to the quality of my audit work). There is no doubt that there is a professional stigma that attaches to those known to be facing proceedings brought by the JDS, particularly in relation to PLC clients.... Further the role of Chairman of the Board of Partners is one that I hold because of the trust and respect of my fellow partners. However supportive my fellow partners are likely to be, the role will inevitably become more difficult if the details of the complaint against me are made public."

45. This evidence is relied on by Mr Gwyn James Griffiths for Deloitte:

> "18. There is no question but that publicity in the form of that proposed by the First Defendant is damaging to Deloitte. There will inevitably be damage to the firm's brand value caused by the publicity. It is difficult to quantify the precise damage. However, Deloitte, like its competitors, is obliged to go out into

> the market and win new work. This process can take a number of years with some potential clients who may be in no rush to appoint new auditors or advisers. Publicity such as that proposed is highly damaging to that process of winning new clients.
>
> 19. Further there is particular damage in this case where the publicity involves the naming of one of Deloitte's senior audit partners and the Chairman of its Board of Partners as party to a disciplinary complaint. Mr Scicluna is a high-profile partner who regularly represents the firm at proposals and at marketing events (including to major listed companies). Mr Scicluna is also at the forefront of the firm's charitable and other community programs. His ability to perform these roles for the firm will be handicapped in the event of the First Defendant's proposed press notice."

46. The Claimants' concern and the matter which it is alleged will harm them is the disclosure that complaints have been laid against them. As at the date when the Claimants started these proceedings, as Mr Scicluna says, that was not yet in the public domain. Although at the end of paragraph 21 of his witness statement, Mr Scicluna complained about publication of the "details of the complaint", nowhere is it explained how the details of the complaints, as opposed to the publication of the fact that complaints have been laid, is damaging. Indeed there is no suggestion anywhere that the grounds for the complaints, as opposed to the fact that the complaints have been laid, is damaging or of concern.

47. I fail to see how the fact that the Executive Counsel has decided to lay complaints against the Claimants or either of them is covered by a duty of confidence owed to the Claimants. The Executive Counsel's conclusions and his decision what to do in the light of them are his. They are not matter supplied to him by the Claimants. Similarly the statement of Future Progress is not information supplied by the Claimants. Publication of this material is not publication of information which has been made known to the Executive Counsel by the Claimants. The action in respect of breach of confidence in relation to these parts of the 2005 Press Notice fails accordingly.

48. A finding along these lines probably comes as no surprise to the Claimants. As pointed out in paragraph 41 above, in their pleadings the Claimants have italicised some of the wording in the 2005 Press Notice. I understand from Mr Howard that this represents the Claimants' fall back position. The allegations of breach of confidence are directed particularly at the italicised words. However even that does not go far enough. This fall back position still involves the Claimants asserting confidence in the fact that complaints have been lodged and that the Executive Counsel has laid one such complaint against Mr Scicluna.

49. It follows that the Defendants are free to publish the fact that the Executive Council has determined to lay complaints against Deloitte and Mr Scicluna and that, pursuant to that, a Joint Disciplinary Tribunal will be appointed to hear the complaints. If the Claimants can object, it must be as to the whole or part of the Summary of Complaints. I turn to consider them.

50. In relation to each complaint, Mr Griffiths explains which information is said to be confidential having been obtained by Mr Dickson from Deloitte's files and/or as a result of the interviews conducted with partners and staff of Deloitte. It will be seen that two of the complaints are levelled at Deloitte alone. The third is levelled at Mr Scicluna alone. I will consider the latter first.

51. By February of this year it was well-known both as a result of press releases and from extensive press comments that Deloitte had carried out the audits of Capital at the relevant time, that Mr Ives, one of Deloitte's partners, was involved in those audits, that he had been found guilty of fraud and forgery and that he had been expelled from the accountancy profession. It was also well known that the role played by Deloitte was still being investigated by the Executive Counsel. No doubt in the light of that, Mr Griffiths explains that Deloitte's objection to the publication of the Summary of Complaint against Mr Scicluna is very limited. The information claimed to be confidential is:

> "Mr Scicluna's involvement in the examination of Mr Ives' conduct, such information being derived from the interviews conducted by the First Defendant and Deloitte's confidential Board papers".

52. If this is compared with the relevant paragraph in the Summary of Complaints it will be appreciated that there is no assertion that the failure to report Mr Ives to the Institute of Chartered Accountants in England and Wales or the failure to ensure that the senior partner reported him is confidential information relied on by the Claimants. This is not surprising, the Executive Counsel no doubt knew from other sources that no one in Deloitte had reported Mr Ives to the Institute. This was not information which came from the Claimants. The Claimants could not complain were the relevant part of the 2005 Press Notice to be re-written to say that the complaint related to the non-reporting of Mr Ives as long as it did not suggest that it was any individual's fault and, in particular, Mr Scicluna's fault.

53. This paragraph of the 2005 Press Notice discloses that an individual within Deloitte, in particular Mr Scicluna, was involved both in the examination of Mr Ives and the determination of what, if any, steps were to be taken in relation to him. On the unchallenged information before me, that was information derived from the Claimants and was not in the public domain. Prima facie, the First to Third Defendants are not free to disclose it.

54. I turn to consider the summaries of the two complaints levelled at Deloitte. It will be remembered that the first of these is in the following terms:

> "(a) (D&T only) at the time of Capital's 1996 interim announcement, acquiescing in Capital's misleading amendments to the disclosures D&T had recommended that Capital make to the market;

55. Mr Griffiths' evidence is that

> "The fact that Deloitte had recommended that Capital make disclosures to the market is confidential information derived

> from Deloitte's audit working papers and/or interviews conducted by the First Defendant; the fact that Capital amended those proposed amendments is confidential information obtained from Deloitte's audit working papers and/or interviews conducted by the First Defendant; the suggestion that Deloitte 'acquiesced' in those amendments is based on confidential information contained within Deloitte's audit working files and/or interviews conducted by the First Defendant."

56. What Mr Griffiths is saying is that the allegation of acquiescence is a conclusion drawn by Mr Dickson from the information he obtained from Deloitte. He is right in that. However it is not information supplied by Deloitte nor does it, of itself, disclose or suggest what information was supplied by Deloitte. It follows that this conclusion is not covered by the obligation of confidence. On the other hand, on the evidence before me, the two other matters, that is to say the fact that Deloitte had recommended to Capital that it should make certain disclosures and that Capital amended Deloitte's proposals, are both pieces of information supplied by Deloitte to Mr Dickson. Prima facie, the First to Third Defendants are not free to disclose these items.

57. The remaining paragraph in the Summary of Complaints to which the Claimants object is:

> "(b) (D&T only) at the time of Capital's 1996 interim announcement, failing to resign as auditor of Capital, amongst other reasons because of Capital's failure to disclose to the market that D&T was unable to form a view on whether or not Capital's interim accounts were materially correct"

58. In relation to this, Mr Griffiths says:

> "The reference at sub-paragraph (b) of the proposed Press Notice to Capital's failure to disclose to the market that Deloitte & Touche were unable to form a view on whether or not Capital's interim accounts were materially correct is confidential information derived from Deloitte's audit working files and/or interviews conducted by the First Defendant."

59. Once again it is necessary to distinguish between what is said to be confidential and what is not. In relation to this complaint, Mr Dickson's conclusion that, because of information known to it, Deloitte should have resigned at the time of Capital's 1996 interim announcement is not said to be confidential. This is not surprising. It is not Deloitte's information. On the other hand the rest of the paragraph, which explains what Deloitte knew and should have reacted to, is, on the evidence, confidential and came from Deloitte. Prima facie, the First to Third Defendants are not free to disclose this either.

60. It follows from the above analysis that the Claimants would have no grounds for complaint on the ground of breach of confidence were the Defendants to issue a Press Notice either in the following terms:

> "The Executive Counsel to the Joint Disciplinary Scheme, Mr Christopher Dickson, has completed his investigation into the case of Deloitte & Touche ("D&T"), the auditor of Capital since 1989, and Mr Scicluna, the Chairman of D&T, and has laid Complaints against them.
>
> A Joint Disciplinary Tribunal will be appointed to hear the Complaints. The Tribunal's report will be published."

61. or as follows:

> "The Executive Counsel to the Joint Disciplinary Scheme, Mr Christopher Dickson, has completed his investigation into the case of Deloitte & Touche ("D&T"), the auditor of Capital since 1989, and Mr Scicluna, the Chairman of D&T, and has laid Complaints against them, as follows:
>
> (a) (D&T only) at the time of Capital's 1996 interim announcement, acquiescing in certain of Capital's actions;
>
> (b) (D&T only) at the time of Capital's 1996 interim announcement, failing to resign as auditor of Capital, in view of certain matters known to them;
>
> (c) (Mr Scicluna only) as a result of certain failures on his part in September 1996.
>
> A Joint Disciplinary Tribunal will be appointed to hear the Complaints. The Tribunal's report will be published."

62. However, the Claimants have a case that the 2005 Press Notice does breach obligations of confidence because, as explained above, it contains items of information obtained from the Claimants.

Public Interest considerations

63. The Defendants argue that in this case the obligation of confidence owed to the Claimants is displaced by a public interest in favour of publication of the 2005 Press Notice. Mr Howard does not dispute the general principle that confidentiality can be overridden in the public interest. He also accepts that there is a public interest in the proper regulation of accountants and auditors. But he does not accept that there is any public interest in the publication of the 2005 Press Notice or its contents.

64. Two questions need to be answered. First, what are the principles which determine the scope of the public interest defence? Second, do the facts in this case when applied to those principles give rise to a defence?

65. The general principle of publication in the public interest was stated by Lord Goff in the *Spycatcher* case:

> "[the] third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is

> that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure." (p 282).

66. Lord Goff went on to explain that this defence originally was narrow and applied to cases of iniquity. But as he pointed out, the principle had grown and now applied wherever disclosure was required in the public interest.

67. As Lord Goff said, what is involved is a balancing operation. Some factors point away from publication. Of course the first of these is the obligation of confidence itself. Such an obligation only arises where the parties have agreed or the court has decided to impose a restriction on the receiver's use of the communicator's information. Prima facie the communicator is entitled to rely on the protection so created. However not all confidences are equally worthy of protection or weigh as much in the balancing operation. Mr Howard drew my attention to *A v B plc* [2003] QB 195 where Lord Woolf L.C.J. said:

> "The weaker the claim for privacy the more likely that the claim for privacy will be outweighed."

68. In the balance in favour of publication is the principle of freedom of expression. This was explained by Lord Steyn in *R. v Home Secretary Ex p. Simms* [2000] 2 A.C. 115:

> "The starting point is the right of freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible. Nevertheless, freedom of expression is not an absolute right. Sometimes it must yield to other cogent social interests. …
>
> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), 'The best test of truth is the power of the thought to get itself accepted in the competition of the market:' *Abrams v United States* (1919) 250 U.S. 616, 630, *per* Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country:

> see *Stone, Seidman, Sunstein and Tushnet, Constitutional Law,* 3rd ed. (1996), pp. 1078 – 1086." (pp 125 – 6)

69. Later, mirroring the sentiments of Lord Woolf in *A v B plc* in relation to confidential information, Lord Steyn pointed out that not all types of speech have an equal value. The desirability of making information public varies according to the nature of the information in issue.

70. The principles set out in *Simms* are consistent with the provisions of Articles 8 and 10 of the Convention for the Protection of Human Rights as explained in *Campbell v MGN* [2004] 2 AC 457. In that case also the House of Lords emphasised the need to balance the competing interests of confidentiality and freedom of expression. As Lord Hope explained:

> "The rights guaranteed by [Articles 8 and 10 of the Convention] are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in Article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but Article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life." (para 105)

71. Lord Hope also cited with approval the following passage from the judgment of Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967:

> "The case being one which affects the Convention right of freedom of expression, section 12 of the Human Rights Act 1998 requires the court to have regard to article 10 (as, in its absence, would section 6). This, however, cannot, consistently with section 3 and article 17, give the article 10(1) right of free expression a presumptive priority over other rights. What it does is require the court to consider article 10(2) along with article 10(1), and by doing so to bring into the frame the conflicting right to respect for privacy. This right, contained in article 8 and reflected in English law, is in turn qualified in both contexts by the right of others to free expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality." (p 1005, para 137)

72. Whether one talks in terms of proportionality or balance, the consistent theme is that the court has to assess whether, in the particular circumstances of the case, the right of confidence or the right to freedom of expression is the more compelling.

73. As mentioned already, the nature of the information is likely to be a significant factor in determining where the balance lies. Some information is more relevant to the public than others and the criticality of the confidentiality will vary from case to case. The cases drawn to my attention illustrate that other considerations may also play a part in the balancing operation. For example there may be a legitimate public interest in disclosing material to a regulating body but less or no public interest in disclosing it to the world at large (see *Re A Company's Application* [1989] Ch 477 and *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All E. R. 385). Furthermore one of the considerations which must be relevant is the extent of the damage which will be inflicted on the communicator by publication of his information. The greater the damage, the greater the weight against publication. All of these factors have to be taken into consideration here.

74. There can be no doubt that the JDS is a scheme designed to foster public confidence in the way in which accountants and auditors perform their tasks. That is clear from the objectives of the JDS which I have referred to at paragraphs 23 to 25 above. It seems to me that this explains why disclosure to the public at large is appropriate. Mere disclosure to the Joint Disciplinary Tribunal would do nothing in the short term to convince the public that the professions were taking seriously the supervision of their members. As against these factors I accept that publication of the 2005 Press Notice may have an adverse impact on both Deloitte and Mr Scicluna. It must be borne in mind that this is not a case where what is proposed is publication of an iniquity. Even in the JDS, one is presumed innocent until proved guilty.

75. However, in my view one of the important factors here is the narrow scope of the confidential information at issue. On the assumption that my analysis above is correct, the Defendants would be free to publish either of the more abbreviated Notices set out in paragraphs 60 and 61 above. It is the publication of that material, which contains none of the Claimants' information, which will cause the Claimants disquiet. As far as I can see, there is nothing in the confidential details publication of which could harm the Claimants. The Claimants have not identified any harm which would be caused by the publication of that material. The publication of the 2005 Press Notice will be no more offensive than the publication of the Lawtel summary in the *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company* case referred to above.

76. Furthermore in *Campbell* Lord Hope referred to *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, in which the court said, amongst other things,

> "Article 10 of the Convention does not, however, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it 'duties and responsibilities' which also apply to the press. These 'duties and responsibilities' are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and examining the 'rights of others'. As pointed out by the government, the seal hunters' right to protection of their honour and reputation is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights. Also of

> relevance for the balancing of competing interests which the Court must carry out is the fact that under article 6(2) of the Convention the seal hunters had a right to be presumed innocent of any criminal offence until proved guilty. By reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith to provide accurate and reliable information in accordance with the ethics of journalism."

77. Although that passage was concerned particularly with the duties and responsibilities of journalists, the accuracy and reliability of information to be made available to the public should be a factor taken into account whenever a balancing exercise is undertaken. In this case the environment into which the Press Notice will be issued is one in which there has already been widespread publicity about and comment on the finding that Mr Ives, while a senior partner in Deloitte, engaged in fraud and forgery. It seems to me that the publication of the redacted press notices set out in paragraphs 60 and 61 above which, for the reasons set out could not be prevented, would give rise to the significant risk that some members of the public will speculate or assume that Deloitte or Mr Scicluna were in some way involved in or responsible for those wrongful activities. The publication of the Press Notice as proposed would make it clear that the allegations against Deloitte and Mr Scicluna are not of that sort. In other words the inclusion of the limited confidential information would result in the Press Notice being more accurate and less harmful to the Claimants. In these circumstances, I have come to the conclusion that the balancing operation comes down in favour of publishing the Press Notice. It follows that the claim fails.

78. In the light of these conclusions it is not necessary to consider the further arguments advanced by VNU to the effect that it was not bound by any obligation of confidence even if the other Defendants were, that all or substantially all of the information was in the public domain or that publication should be allowed on the same basis that publication would be allowed in a case of libel.