



Neutral Citation Number: [2007] EWHC 2677 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2007

Before :

MR JUSTICE TUGENDHAT

Between :

Northern Rock PLC

Claimant

- and -

The Financial Times Limited

Defendants

&

Person or Persons Unknown

Mr Richard Spearman QC (instructed by **Schillings**) for the **Claimant**

Mr Desmond Browne QC and **Mr Jonathan Barnes** (instructed by **Olswangs**) for the **1st Defendant**

Mr David Price of David Price Solicitors and Advocates for **Telegraph Media Group Ltd**

Hearing dates: Tuesday 13th November 2007

REASONS FOR JUDGMENT

If this 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 Tugendhat :

1. At about 18.50 hrs on Tuesday 13th November 2007 I granted an injunction to restrain the publication of certain information about the claimant set out in a document entitled "Briefing Memorandum". The injunction was subject to a proviso that it did not apply to information which had, at 19.00 hrs, been published otherwise than solely on a part of the FT.com website known as FT Alphaville. The injunction is to run until the return date namely Tuesday 20th November 2007.
2. The precise form of the injunction is as set out in the order itself. The hearing started at about 1630 hrs. I gave my decision at the end of the hearing, and stated that these reasons for it would follow. The hearing was in private. These reasons are given in public.
3. The financial difficulties of the claimant, and the fact that the Bank of England has given guarantees to its depositors, are matters which are both very widely known and of very great public interest. Since those difficulties have arisen, the claimant and many others have been actively concerned in attempting to resolve the crisis in its affairs. Three advisers retained by the Claimant are Merrill Lynch, Citibank and the Blackstone Group. They have prepared the Briefing Memorandum for distribution to financial institutions.
4. Earlier this month the claimant caused to be prepared, and sent out to a number of interested parties, a letter. This contained a provision for its terms to be accepted and agreed by the recipients. The letter states that in order to allow the addressee of the letter to evaluate the possible subscription for a class of shares in the claimant, or any other transaction between the addressee and the claimant, the claimant would deliver to the addressee, upon the addressee's execution and delivery to the claimant of this letter agreement, certain information about the claimant (i.e. the Briefing Memorandum). Before receiving such information the addressee was required to agree to keep specified information (referred to as "Proprietary Information") strictly confidential, and not to disclose, reproduce, distribute or reveal it to any person other than representatives (who are defined), subject to immaterial exceptions.
5. Events leading up to the application for an injunction include the following. On Thursday 8th November 2007 there was published in the Daily Telegraph an article of some length headed "Rock Deposits Drained by £10.5 billion". The article stated that that newspaper had seen the Briefing Memorandum and set out some information derived from it. The claimant considered what action to take. With the assistance of its legal advisors it prepared a draft form of order which included an injunction and other relief against persons unknown (that is those who had leaked in the information). However, a decision was made not to apply to the court. Instead representatives of a public relations firm were retained to approach newspapers and to ask them not to make any further publication from the document. The information before me as to how they set about that task, and whom they approached, is so sketchy that I can have little regard to it. There is no information before me that the editors of FT.com were approached.
6. The application before me was made on short notice to the publishers of the Daily Telegraph, who appeared by Mr David Price, and the publishers of the FT who

appeared by Mr Browne QC. The hearing was conducted without any formal documents having been drafted. The facts relied on were given to me partly orally through counsel, and partly by counsel handing me copies of the various publications and letters referred to. Both Mr Browne and Mr Price said that their clients were unaware of any approach from a representative of any public relations firm asking that there be no further publication.

7. Five days later, at (or at some time after) 10.37 on 13th November (the day of the hearing) the entire contents of over ten pages of the Briefing Memorandum were posted on to a part of the FT.com website known as FT Alphaville. It is not suggested that any other publisher had published the entire contents of those pages before. Moreover, on the information available to me, there remain many pages of the Briefing Memorandum which have not been published on FT.com or anywhere else.
8. At 11.30 on the same day this was picked up by Dow Jones who published a part of that information from the FT website. Mr Spearman QC who appears for the claimant was instructed at about midday. Shortly before 14.00 hrs the publishers of the FT received a letter from the solicitors for the claimant requesting, amongst other things, that by no later than 2.30 pm they undertake not to publish the claimant's confidential information. Shortly after that the West End Final edition of the Evening Standard appeared with an article making clear that they had received a copy of the Briefing Memorandum. That article disclosed a few pieces of information from it. The BBC published some information from the FT at about 15.15 hrs. The Guardian website made a publication also sourced to the FT website at about 16.00 hrs. At about 16.12 hrs the Reuters website published some material about the claimant sourced to the FT website. These publications were all sufficiently brief that in each case a printout covered no more than a page or two.
9. Mr Spearman stated that the claimant is concerned that continued or further publication of the detailed information from the Briefing Memorandum may cause serious harm to the claimant, for reasons which he summarised during the hearing.
10. In the circumstances in which the application was made, there was little elaboration of these concerns and it is not easy to know what weight to place on them. Nevertheless, I accept that there may be some force in the concerns held by the claimant that publication of such detailed information might well be very harmful. Much of the information in the Briefing Memorandum is in the form of detailed financial statistics and projections. The case for saying that this commercial information is confidential seems to me to be a strong one.
11. Mr Spearman stressed that this application is founded on a contractual confidentiality agreement. He was referring not just to the confidentiality agreement set out in the letter referred to above. There must be a strong inference that whoever leaked the Briefing Memorandum was in a position to do so only because he or she had received it in the course of employment, the contract for which included a confidentiality clause. Mr Spearman referred to the recent decision of the Court of Appeal *HRH Prince of Wales v. Associated Newspapers Limited* [2006] EWCA Civ 1776 at para 71 the court said:

“There is an important public interest in employees respecting the obligation of confidence that they have assumed. Both the

nature of the information and the relationship of confidence under which it was received weigh heavily in the balance in favour of [the claimant]”.

12. The Human Rights Act 1998 Section 12 (4) provides:

“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... to

(a) (i) the extent to which 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”.

13. The Convention right to freedom of expression is set out in art 10. That provides:

‘Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

14. Any injunction of the kind sought here is a restriction on the exercise of the right to freedom of expression. The effect of article 10 is that an injunction must be justified as being no more than is necessary in a democratic society in the interests stated, one of which is preventing the disclosure of information received in confidence. It is not suggested in this case that Art 8 (right to respect for private life) or any other convention right requires consideration.

15. Whether or not the fact that information has already become available to the public should lead to the refusal of an injunction requires a qualitative and not just a quantitative assessment. For example, material sought to be restrained may, depending on the facts of each case, already have become available to the public by no more than a single publication, say on an obscure website. Another example may

be mass distribution through multiple media. And different items of information from a single confidential source may likewise have received different degrees of publication.

16. In the present case Mr Spearman draws a distinction between publication on the FT.com website of many pages copied directly from the Briefing Memorandum and the limited extracts published in the Daily Telegraph, Reuters, and the other media referred to. The FT.com website publication, while available to anyone, is unlikely to have a readership of anything like the same magnitude as the readership of the other web or paper publications in which information from the Briefing Memorandum has been published. And none of the other media have published the full and detailed figures contained on the pages published on FT.com. I was not told of any other publication which, at the time of the hearing, mirrored the entire contents, or even most of the contents, of the FT website or the Briefing Memorandum itself. I proceeded on the assumption that the material on the FT website had been published in that unredacted form only on that website and only at or after 10.37 am.
17. Mr Browne submitted that the case for saying that real damage will be suffered is slender. He pointed out that much important information was published by the Daily Telegraph several days ago, on 8th November, and no evidence has been put forward of anything detrimental to the claimant occurring during those 5 intervening days. He submitted that the claimant's decision to deal with the matter by using PR contacts to approach newspapers was inappropriate, and they must suffer the consequences of their delay (since 8 November) in applying to the court. He submitted that the information as published on the FT website has become available to the public to such an extent that for that reason alone no injunction should be granted.
18. Further Mr Browne submitted that there is a public interest in the disclosure. He submitted that share holders should know where they stand, and a false market may be created if an injunction is granted.
19. There is no doubt that there can be a public interest in the publication of information which is the subject of a confidentiality agreement. See eg *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491. But I can see no public interest in the publication at the present time of the unredacted and detailed commercial information which FT.com has published. On the contrary as the court said in *HRH Prince of Wales v. Associated Newspapers Limited* at para 67-68:

“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. ... the test is ... whether a fetter on 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 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 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 having regard to the nature of the information and all the relevant circumstances, whether 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”.

20. In some cases there is a public interest for material to be published because without publication there is a risk of members of the public being deceived, or being kept from information which they are entitled to know in a democratic society. It is hard to see an argument of that kind succeeding on the information that has been given to me. On the other hand, in a democratic society such as ours it is essential that some financial information be protected by law from premature publication. The detailed commercial information in issue in the present case is, in my judgment, close to the example of the Budget speech, and a long way from the carefully redacted report that was in issue in the *LRT* case.
21. Both sides referred me to *Cream Holdings Limited v. Banerjee* [2004] UKH 44, paras 17-22, including the passage:

“... 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 prospect of success at the trial is sufficiently favourable to justify such an order being made in the particular circumstances of the case.”
22. Those paragraphs refer specifically to the situation I find myself in. I am not in a position to decide whether on the balance of probability the claimant will succeed in obtaining a permanent injunction at the trial. I would require the evidence to be available in the proper form of witness statements, with an explanation of who on behalf of the claimant holds the concerns that Mr Spearman was instructed to express, and why, and to hear submissions on the evidence from both sides. But in the meantime, I must do something pending the hearing of a proper hearing unless the case is so weak that that would not be right.
23. There is in my judgment a distinction to be drawn between the extensive word for word copying of whole sections of the Briefing Memorandum on the one hand, as has happened in the case of the FT website, and the relatively short and much less precise publications in the other media referred to.

24. I consider first the injunction sought to restrain republication of the extracts from, or information from, the Briefing Memorandum which had been published in the Daily Telegraph on 8 November, and more recently in media other than the FT website. I accept Mr Price's submissions, and consider that the extent to which they have become available to the public is so great, that an injunction would be futile.
25. But information from the Briefing Memorandum which has become available to the public only through the FT website seems to me to be in a different category. It is detailed financial information of a kind that the courts commonly recognise as commercially sensitive. It seems to me arguable that there is a real possibility that further publication may do harm that has not already been done. There is no suggestion that the Briefing Memorandum contains flaws so grave that they should be made public, or that there is a public interest arising from anything of that kind. I consider that the public interest in the enforcement of duties of confidence such as were undertaken by the recipients of the letter I have referred to, and by those through whose hands the document has passed, is such that 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 of the action.