Neutral Citation Number: [2018] EWHC 104 (Ch)

Case No: BL-2017-000477

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 26/01/2018

Before:

MRS JUSTICE ROSE

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Between:

APPLEBY GLOBAL GROUP LLC **Claimant**
- and -
(1) BRITISH BROADCASTING CORPORATION

(2) GUARDIAN NEWS AND MEDIA LIMITED **Defendants**

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Hugh Tomlinson QC and Lorna Skinner (instructed by **Osborne Clarke LLP**)
for the Claimant
Catrin Evans QC and Jonathan Scherbel-Ball (instructed by **Pinsent Masons LLP**)
for the First Defendant
Gavin Miller QC and David Glen (instructed by **Guardian News and Media Limited, Editorial Legal Services**) for the Second Defendant.

Hearing date: 16 January 2018

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Judgment Approved

Mrs Justice Rose :

1. The Claimant ('Appleby') issued a claim form in the High Court on 4 December 2017 against the Defendants ('the BBC' and 'the Guardian') claiming damages and a permanent injunction for breach of confidence. The claim arises out of the use and publication by the Defendants of confidential information contained in documents which Appleby alleges were illegally obtained from Appleby and which were and remain confidential to Appleby. The claim form was issued in the Business and Property Courts of England and Wales, allocated to the Business List (ChD). On the same day Appleby issued an application for an order that amongst other things the Defendants disclose and deliver up to Appleby copies of all documents in their possession or control "which emanate from or purport to emanate from the Appleby Group".

2. The hearing before me was the hearing of an application by the BBC issued on 6 December 2017 for an order that the claim be transferred from the Business List (ChD) to the Media and Communications List in the Queen's Bench Division of the High Court. That application is supported by the Guardian. The BBC has filed

evidence in support of its application in a witness statement of Stephen Harris, a solicitor in the Litigation Department of the BBC. The Guardian has provided a witness statement from Gillian Phillips who is an in-house lawyer there.

3. The Particulars of Claim were served on 19 December 2017 and describe the breach of confidence alleged. Appleby is the parent company of an international group of law firms based in offshore territories including Bermuda, the Isle of Man, the Channel Islands and the British Virgin Islands. The group provides legal and other services to corporate and private clients. It owns a global computer network and electronic data storage system referred to as 'the Appleby Server'. The Claimant's emails and documents are processed and stored on that Server. The Particulars allege that the Appleby Server holds many millions of documents including millions of confidential communications and documents containing information confidential to companies within the Appleby group and their clients. Many of the documents contain information which is protected by legal privilege – either litigation privilege or legal advice privilege. They also contain information relating to the private, personal and financial affairs of the group's clients and employees, including information concerning their salaries, their personnel records and their medical information.

4. In May 2016 Appleby became aware that there had been an unauthorised intrusion into the Appleby Server. An investigation by a cyber forensics team established that during the period November 2015 to May 2016 the Appleby Server was subject to unauthorised access by one or more people referred to in the statement of case as the Hacker. Appleby has not however been able to ascertain the number or nature of any documents taken. Appleby allege that the Hacker provided several million documents taken from the Appleby Server covering the period from the 1950s to 2016 to a German newspaper Süddeutsche Zeitung. It appears that the German newspaper received a total of 13 million documents of which about 6.8 million came from Appleby. The documents were made available by the German newspaper to an American body called the International Consortium of Investigative Journalists ('ICIJ') which created a database onto which it placed the documents. The database was thereafter made available to a large number of media organisations across the world including the BBC and the Guardian. Appleby allege that early in 2017 the media organisations including the Defendants began accessing the ICIJ database and "reading, reviewing, extracting, copying, communicating and receiving electronic copies of its contents", including some of the confidential documents. It is alleged that they did this without any grounds for suspecting that the database provided evidence of unlawful activity on the part of Appleby or their clients and that in fact no evidence of unlawful activity has been uncovered.

5. It is alleged in the Particulars of Claim that the Defendants owed a duty of confidence to Appleby and that in breach of this duty they misused Appleby's confidential information by accessing, reading and so forth the documents on the database. In particular, Appleby complains that the BBC published the information in broadcasts including two episodes of the BBC's current affairs programme *Panorama* broadcast on 5 and 6 November 2017 called "Offshore Secrets of the Rich Exposed" and "Britain's Offshore Secrets Exposed". Further, the BBC included a large number of articles on the BBC website containing information drawn from Appleby's documents, combined with the product of the BBC's own researches. As regards the

Guardian, it is alleged that the Guardian published a series of articles in its newspapers and on its website also derived from the confidential information.

6. In paragraph 23 of the Particulars of Claim, Appleby anticipates the defence it expects the Defendants to put forward. This was set out in the letter dated 28 November 2017 from the BBC to solicitors acting for Appleby. The BBC and the Guardian have said that the documents reveal widespread use by wealthy individuals and business entities of aggressive tax avoidance schemes and in some instances potential tax evasion. It is in the public interest, they say, that this information is published to contribute to the continuing political conversation about tax including the ethics and propriety of the offshore finance industry. It is asserted in paragraph 23 of the Particulars of Claim that there was no public interest in reviewing or publishing the confidential information. There were no grounds to suspect that the information disclosed illegal conduct and it did not in fact disclose anything other than the "obvious and generally known fact that individuals and corporations, acting rationally, would make whatever lawful tax and financial arrangements were most favourable to them".

7. The remedies sought in the Particulars of Claim are damages including but not limited to the costs of dealing with regulatory entities, clients, employees, agents and third parties in respect of the breaches of confidence and injunctive relief restraining the defendants from communicating or disclosing to any third-party, copying or in any other way using the confidential information.

8. It is not alleged that either of the Defendants knows the identity of the alleged Hacker and no allegation of illegal conduct is made against either of the Defendants.

9. The starting point for any consideration of an issue about which Division of the High Court should hear a particular claim is section 5(1) of the Senior Courts Act 1981 which establishes the three Divisions, the Chancery Division the Queen's Bench Division and the Family Division. Section 5(5) provides that:

> "Without prejudice to the provisions of this Act relating to the distribution of business in the High Court, all jurisdiction vested in the High Court under this Act shall belong to all the Divisions alike."

10. Section 61 of the Senior Courts Act 1981 deals with the distribution of business among Divisions. It introduces Schedule 1 to the Act which specifies that causes or matters relating to specified topics must be allocated to a particular Division. For example, the redemption of mortgages, bankruptcy and intellectual property business are assigned to the Chancery Division, applications for judicial review and the exercise of the High Court's Admiralty jurisdiction are allocated to the Queen's Bench Division and all matrimonial causes or adoption matters are allocated to the Family Division. Section 61(2) and (3) provide for changes to the distribution of business either by rules or by order of the Lord Chief Justice including a power to assign business of any description to two or more Divisions concurrently. Further, section 61(6) provides that subject to rules of court, the fact that a cause or matter commenced in the High Court falls within a class of business assigned by or under the Act to a particular Division does not make it obligatory for it to be allocated or transferred to that Division. Various CPR provisions do stipulate that certain proceedings be commenced in a particular Division of the High Court.

11. Section 64 of the Senior Courts Act 1981 is headed "Choice of Division by plaintiff" and provides:

> "64 (1) Without prejudice to the power of transfer under section 65, the person by whom any cause or matter is commenced in the High Court shall in the prescribed manner allocate it to whichever Division he thinks fit.
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> (2) Where a cause or matter is commenced in the High Court, all subsequent interlocutory or other steps or proceedings in the High Court in that cause or matter shall be taken in the Division to which the cause or matter is for the time being allocated (whether under subsection (1) or in consequence of its transfer under section 65)."

12. Section 65 deals with the power of transfer:

> "65 (1) Any cause or matter may at any time and at any stage thereof, and either with or without application from any of the parties, be transferred, by such authority and in such manner as rules of court may direct, from one Division or judge of the High Court to another Division or judge thereof.
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> (2) The transfer of a cause or matter under subsection (1) to a different Division or judge of the High Court shall not affect the validity of any steps or proceedings taken or order made in that cause or matter before the transfer".

13. The Rules of Court dealing with the transfer of claims are found in CPR Part 30. Rule 30.5 covers transfer between Divisions and to and from a specialist list:

> "30.5(1) The High Court may order proceedings in any Division of the High Court to be transferred to another Division.
>
> (2) A judge dealing with claims in a specialist list may order proceedings to be transferred to or from that list.
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> (3) An application for the transfer of proceedings to or from a specialist list must be made to a judge dealing with claims in that list.
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> (4) An order for transfer of proceedings between the Chancery Division and a Queen's Bench Division specialist list may only be made with the consent of the Chancellor of the High Court."

14. CPR r. 2.3(2) provides that a reference in the rules to a "specialist list" is a reference to a list that has been designated as such by a rule or practice direction. For example, CPR r 58.2(1) provides that the commercial list is a specialist list for claims proceeding in the Commercial Court and more recently CPR r 63A.2(1) has provided that the Financial List is a single specialist list. After some debate between the parties

it is now accepted that the Media & Communications List ('M&CL') is not a specialist list within the meaning of CR 2.3(2) and therefore that the governing provision here is CPR r. 30.5(1) and not sub-rules (2), (3) and (4).

15. The creation of the M&CL was announced in a press release on 27 February 2017. That stated as follows:

> "With the concurrence of the President of the Queen's Bench Division, the judge in charge of the Queen's Bench Civil List, Mr Justice Foskett, has invited Mr Justice Warby to take primary responsibility for cases involving one of the main media torts (defamation, misuse of private information and breach of duty under the Data Protection Act) and related or similar claims including malicious falsehood and harassment arising from publication or threatened publication by the print or broadcast media, online, on social media, or in speech.
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> To this end, a new list within the Queen's Bench Division called the Media and Communications List will be created and Mr Justice Warby will be designated as the judge in charge of the Media and Communications List. Subject to the ultimate authority of the President of the Queen's Bench Division and, where appropriate, following consultation with the Judge in charge of the Queen's Bench Civil List, the Judge in charge of the Media and Communications List will exercise judicial responsibility for the listing of cases of the nature set out above and of applications within them and will be responsible for considering emerging procedural issues in this context.
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> As from 1 March 2017 parties who consider that their case meets the foregoing parameters should entitle their claim appropriately upon issue or upon filing and Acknowledgement of Service. This should be done by inserting the words "Media and Communications List" below "Queen's Bench Division". Cases so designated will be assigned to the Media and Communications List by the court. The court will retain the power to move cases in and out of this list of its own motion or upon application.
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> These modifications apart, the new arrangement will not change existing practice (including the handling of those matters currently dealt with by the Queen's Bench Masters), but Mr Justice Warby is proposing to consult in due course with those who litigate in this area and the judiciary with relevant experience, with a view to establishing generally whether there are any improved practical arrangements that might be made for cases of the kind specified."

16. Breach of confidence claims were not mentioned in the press release but the Defendants assert that the position was clarified in December 2017 when the new allocation form prepared by the Queen's Bench Division was introduced and included

amongst the boxes to be ticked by the claimant under the heading Media and Communications List a box labelled "breach of confidence".

17. A consultation document was issued by Warby J in May 2017 and a report on the consultation was published in June 2017. The consultation raised a small number of procedural questions. It did not refer to any proposal to convert the M&CL into a specialist list within the definition in the CPR, although it records that one of the points raised by a consultee was whether rules should mandate that media cases be commenced in the M&CL. In the introduction to that report the President of the Queen's Bench Division, the Rt Hon Sir Brian Leveson, said:

> "As I have emphasised on many occasions, the media play and have always played a vital role in our democracy. Media communication is also very powerful. Holding the balance between freedom of speech and other competing rights and interests has long been a delicate task. Today, the proliferation of different forms of media communication and the ever-increasing role these play in public and private life makes that task all the more pressing and important."

18. The Defendants also referred me to a speech given by Warby J on 26 September 2017 to the Annual Conference of the *Media Law Resource Center* on the subject of media litigation in the High Court. He described the creation of the M&CL as a recent and important innovation in our High Court which he hoped would help all those involved in media litigation. He described the decline of the jury list for defamation cases and the increase in both the diversity and complexity of media law. This arose from a range of statutory sources including the Human Rights Act 1998 leading to the development of a new tort, misuse of private information. He also said that it has come to be recognised that media law is a significant specialty area which deserves its own special attention and "requires the attention of Judges who themselves have relevant experience".

19. Mr Tomlinson QC for Appleby downplayed the significance of the establishment of the M&CL. He argued that it was simply an administrative measure to deal with the listing of cases in the Queen's Bench Division and was not intended to make any changes to any other aspect of practice and procedure. I do not accept that the creation of the M&CL is so limited that it should have no influence on this court's consideration of a transfer application. The reason for its establishment is a recognition that the growing complexity and importance of media law cases means that the overriding objective will in some cases be best achieved by allocating cases to the judges in that List.

20. On the other hand, the starting point is, as I have said, that the claimant can generally speaking choose in which Division to start the claim. Inroads have been made into a claimant's ability to choose by the allocation of particular subjects to particular Divisions, by the creation of specialist lists and by the grant of a specific power to the judges of a specialist list to control the cases that are heard in it. The CPR restricts the definition of a specialist list to a list created by a rule or practice direction because that ensures that before a specialist list is created, the lengthy oversight procedures and broad consultation that precede the making of a new rule or the issue of a new Practice Direction will have been followed. The M&CL is in its early stages and is

proceeding by incremental steps. As Warby J stated in the "Conclusions and next steps" section of the report on the consultation, it was too early in the process to formulate any firm proposals for submission to the Civil Procedure Rules Committee. That Committee would need to consider whether and, if so, how any changes to the CPR or any new Practice Direction should be taken forward. In my judgment, the creation of the M&CL in its current form does not mean that media cases wherever commenced should now be transferred into that List, against the wishes of the claimant.

21. The test to be applied by the court in considering an application for proceedings to be transferred to a different Division was considered by Akenhead J in *Natl Amusements (UK) Ltd and others v White City (Shepherds Bush) Ltd Partnership and another* [2009] EWHC 2524 (TCC) ('*Natl*'). In that case the claimants had commenced proceedings in the Chancery Division and the defendant applied to the Technology and Construction Court for an order under CPR r 30.5(2) transferring the proceedings to that Court. The dispute concerned the construction of a cinema complex within the Westfield London Shopping Centre. The main allegation was that the defendants had failed to construct the cinema in accordance with the agreement or to satisfy requirements as to the critical dimensions of the structure. Akenhead J stressed the need always to bear in mind the overriding objective in CPR r 1.2, namely the just dealing with cases. This involves amongst other things dealing with cases in proportionate ways, bearing in mind amongst other things the complexity of the issues and the importance of the case, expedition and fairness. A judge has a discretion whether to order a transfer and that power must be used to secure the just disposition of the case in accordance with the overriding objective. He cited passages from the judgment in *Lumbermens Mutual Casualty Co v Bovis Lent Lease Ltd* [2004] EWHC 1614 (Comm) in which Colman J sitting in the Commercial Court was considering an application to transfer proceedings from that List to the TCC. Colman J had declined to make the transfer as he found that the issues in the case related to insurance and those issues were not only fundamental to the matters in dispute between the parties but were of far-reaching importance in the law of insurance generally. As to the ability of the Commercial Court to handle the technical construction issues also in dispute between the parties, Colman J noted that the Commercial Court from time to time has to deal with matters of great technical complexity in connection with construction contracts such as shipbuilding and oil rig building and also in connection with physical technical problems in all sorts of other fields. He concluded that the matter should remain in the Commercial Court and that the insurance issues should be determined first.

22. Akenhead J in *Natl* held that the court is entitled to have regard to the relative appropriateness of the different Divisions or specialist courts within them when considering whether the transfer should be made:

> "30. … Thus, given the increasing familiarity with and even greater competence of judges within the different divisions to deal with matters outside the traditional expertise of judges within their allotted divisions, the judge considering the transfer application should have regard to what is the more or most appropriate court to try the particular case. The judge considering the application must consider on the basis of the

> pleadings and other information put before the court upon what issues the bulk of the time, cost and resources involved in trying the case (and certainly the issues to be dealt with first) will be directed towards. Put another way, the Court needs to ascertain if possible where and within what areas of judicial expertise and experience the bulk or preponderance of the issues lies. If there is little or only an insignificant difference between the two venues, the discretion will generally be exercised in favour of the status quo to reflect the fact that a claimant is entitled to issue proceedings in whatever division it thinks fit and that either court is sufficiently experienced in addressing the issues. I would add that, where it is clear that significantly greater expedition will be achieved in one court rather than the other, that would be a material factor to be taken into account; expedition is a factor recognised within the overriding objective. On a similar basis, where it is established that costs will be less in one Division rather than the other, that is a material factor. In the context of the TCC, the Court should have specific regard to CPR Part 60 and the TCC Practice Direction with regard to the types of claim which are or may be appropriate for trial by the TCC. It is a reasonable presumption that, if the more or most appropriate court deals with the issues, there should be some saving in costs and time in disposing of the case.
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> 34. In essence, in my judgement, the Court should take a pragmatic approach to determine the most appropriate venue, taking into account the experience and expertise generally of judges therein, and any time and cost saving to be achieved in one venue rather than the other. It is not the case that the party seeking transfer must establish that it would be inappropriate for the case to remain in the Division in which it was issued. However, if it was to establish that factor, that would be a very strong ground in favour of transfer."

23. Applying that test to the case before him, Akenhead J held that the very large bulk of the factual issues between the parties related to building and engineering and the practice of parties involved in design, construction and development. The issues could be described as commonly dealt with in the TCC which has particular experience of development problems arising out of agreements for lease which require the developer or landlord to carry out construction works prior to the formal granting of the lease. He went on:

> "37. … That is not to say that the judges of the Chancery Division are unable or insufficiently experienced to deal with cases of this sort. However, the almost daily fare of the TCC is construction and engineering projects, whilst that is not the case, fortunately or unfortunately, in the Chancery Division."

24. There were other issues in the case which could be dealt with with equal confidence either by the Chancery Division or the TCC but that all things being equal, time and

cost would be saved by trial in the TCC, all of whose judges are extremely experienced in the area of construction and design.

25. The approach taken by Akenhead J in *Natl* was endorsed by Edwards-Stuart J in *CFH Total Document Management Ltd v OCE (UK) Ltd and another* [2010] EWHC 541 (TCC). He clarified that the suitability of the court in terms of the expertise of its judges to deal with the subject matter of a particular claim "is the single most important consideration" (see paragraph 20). He went on:

> "… There are many types of case where it is essential that the judge trying the case understands the practices, subject matter and terminology of the trade or industry concerned. That is why there are specialist lists. It is essential because fairness and the proper interests of justice require it. In addition, as Akenhead J has observed, the trial of the case by a judge with the appropriate experience is likely to result in savings of both costs and time."

26. Edwards-Stuart J declined to transfer the proceedings in that case from the Bristol Mercantile Court. The Defendants also referred me to the reasoned order of Warby J dated 3 April 2017 in *CRE v Justis Publishing Ltd* (claim HQ17M01260) in which he dismissed, following consideration on the papers, an application in a claim for misuse of private information to overturn the decision of the deputy Master in the Chancery Division to transfer the case to the Queen's Bench Division for hearing in the M&CL. Warby J said that the fact that the claim raised human rights issue was not a good reason for it to be transferred out of the M&CL but rather a good reason for its transfer into that list.

27. Applying the test set out in *Natl*, I turn to consider what are likely to be the main issues at the trial of this action. The Defendants have not yet pleaded their defence to the Particulars of Claim. The BBC's letter of 28 November 2017 to which I referred earlier makes few concessions on the following points:

i) the assertion in paragraph 8 of the Particulars of Claim that Appleby is under a duty to protect the confidentiality in the documents and that it has a reasonable expectation of confidentiality in the information held on the Appleby Server;

ii) the assertion in paragraph 9 that the confidential information contained in the documents held on the Appleby Server includes information protected by legal professional privilege and information relating to the private, personal or financial affairs of clients and employees;

iii) the allegations in paragraphs 16 and 17 as to the arrangement made between the Defendants and representatives of the German newspaper and the ICIJ in order for the Defendants to gain access to the ICIJ database;

iv) the allegation in paragraph 17 that the Defendants dealt with the confidential documents knowing that the ICIJ database contained confidential and privileged material;

v) the allegation in paragraph 17 that the Defendants had no grounds for suspecting that the database provided evidence of any unlawful activity on the part of Appleby or its clients and that no evidence of unlawful activity has been discovered by the Defendants;

vi) the allegation in paragraph 19 that the Defendants were under an equitable duty to keep the information confidential and not to misuse it because it was imparted in circumstances which imposed an equitable duty of confidence for the reasons set out in paragraph 20;

vii) the extent of any loss and damage suffered by Appleby including but not limited to the costs of dealing with regulatory entities, clients, employees, agents and third parties in respect of the breaches of confidence by the defendants;

viii) the nature of the relief to which Appleby is entitled.

28. Although Ms Evans QC appearing for the BBC argued that the primary issue will be whether the public interest defence is made out, it is not yet clear whether it will be conceded that the other building blocks of Appleby's cause of action are in place. Ms Evans argues nonetheless that the preponderance of the issues in this case lie within the fields of media law and Article 10 ECHR. She submits that the activities which Appleby alleges constitute the misuse of information namely accessing, reading, receiving, reviewing, extracting and copying it are "acts of journalism par excellence". She referred to *Abbey v Gilligan and another* [2012] EWHC 3217 (QB) which concerned the publication of amongst other things an email which the trial judge, Tugendhat J, found was confidential and personal to the claimant. The claimant brought a claim for breach of confidence and misuse of private information in relation to the obtaining and publication of that email. In considering the alleged breach of confidence based on the obtaining of the email the judge said;

> "62 … While I have found that this was confidential, and personal to Mr Abbey, in my judgment the email was not so clearly private and confidential that it could be said that it was a breach of confidence or misuse of private information for Mr Gilligan to obtain and read it.
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> 63 A journalist considering whether or not to publish information must, in many cases, have an opportunity to read the information to make that decision. It cannot be right that the court should in such cases too readily find that the obtaining or reading of the information is a breach of confidence. …"

29. Tugendhat J went on to hold that a public interest defence succeeded in a number of respects.

30. Further, the BBC says that the primary issue will be whether the Defendants' journalism was sufficiently in the public interest to outweigh the alleged breach of confidence. Ms Evans argues that the pleaded case illustrates the potential for important sub-issues of law and fact to arise related to the public interest and Article 10. These include (a) whether there needed to be grounds to suspect illegality for the

Defendants' initial accessing of the documents to be lawful journalism; (b) whether unethical conduct or other wrongdoing short of illegality is sufficient to justify a journalist's investigation and publication of confidential information; (c) whether in principle and fact it makes a difference to the public interest test that some or all of the confidential information in question may potentially be legally privileged; and (d) generally whether the journalism was "responsible" in all the circumstances. The BBC argues that all these issues engage Article 10 ECHR as well as the law of confidence and are potentially of wider importance for media law cases and journalism generally. This is particularly so given the increasing prevalence of huge data leaks as a source of journalistic material on serious subjects of public importance.

31. As to the remedies sought, the Defendants say that the remedies that Appleby is seeking would have far-reaching and chilling effects on journalism. The Defendants will wish to oppose the grant of the specific disclosure application on the grounds that the order will risk revealing the source of the information, contrary to section 10 of the Contempt of Court Act 1981 or might lead to UK media organisations being excluded from access to future data releases to ICIJ. The relief sought both in the claim and in the specific disclosure application is said directly to affect the Defendants' freedom of expression rights under Article 10 and therefore engage section 12 of the Human Rights Act 1998. This provides in subsection (4) that the court must have particular regard to the importance of the Convention right to freedom of expression and, where proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, to the extent to which it is in the public interest for the material to be published. The anxious scrutiny that is required in these cases and the delicate balancing exercise that the court is bound to carry out between the competing right of freedom of expression and the protection of confidential information are matters that are particularly within the experience and expertise of the judges in the M&CL - this is their "daily fare", to adopt the expression used by Akenhead J in *Natl*.

Discussion

32. I accept that it is likely that the primary issue in this case will be whether the Defendants can rely on the public interest defence, though it may well be that other significant issues will also need to be determined. I consider it much less likely that the court will have to examine in any detail the trusts, tax structures and other banking arrangements disclosed by the documents, still less to adjudicate on whether they cross the line between avoidance and evasion. I do not therefore place any weight on the argument put forward by Mr Tomlinson QC on behalf of Appleby that that aspect of the subject matter of the litigation makes it more suited to be heard in the Business List (ChD).

33. However, I do not regard the factors relied on by the Defendants in support of the application to transfer as sufficiently strong to override Appleby's choice of a different Division. There have been many leading cases in the field of media law which have been decided by judges in the Chancery Division. For example, *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) involved a careful balance between the Article 8 rights of the claimant and the right to freedom of expression of the newspapers seeking to publish the Prince of Wales' private travel journals, albeit in a very different context from the present case. Other Chancery cases have established new principles in the field of media law, for example the

mobile telephone voicemail interception litigation has been managed and determined by judges of this Division, and led to the first judgment to analyse how damages for such breaches of privacy should be compensated.

34. I accept that the court hearing this dispute will need to understand journalistic practices and consider whether what the Defendants did in this case can be described as 'responsible journalism', to the extent that that is relevant to the public interest defence. But wherever the case is heard, that issue will need to be the subject of evidence which will be placed before the court by the parties. This is prefigured, for example, in the evidence of Ms Phillips, who says that the Guardian journalists and editors devote much skill, time and effort to the process of the pre-publication investigation to ensure that the relatively small amount of material finally published can be justified, taking into account any legitimate countervailing interests such as national security and privacy/confidentiality rights. She describes the steps taken by the Guardian to this end. The assessment of the nature and quality of the BBC's pre-publication investigation into the documents and a consideration of the ethics of tax avoidance are matters that can be assessed by a judge using general judicial skills.

35. Similarly, any question of whether and precisely how disclosure of documents in response to Appleby's specific disclosure application may risk revealing the source of the information will also have to be the subject of evidence and submission. The BBC's letter of 28 November 2017 describes domestic and European authorities on source protection as having been 'well settled for many years" and cites some of the relevant case law. This is not an area like technical construction design and specification or the law of insurance or patents where many of the words or terms used are unknown to those outside the field and where a great deal of time and explanation would be needed before a judge could reach the same state of knowledge and understanding that a judge for whom those matters are daily fare has already achieved. The balancing of interests under Article 10 is certainly a delicate and important task. But there is guidance set out in the earlier case law which is available to a judge in this Division. I do not see that proceeding with the case in this Division will lead to more expense or would risk hindering the expeditious and fair determination of the case in a way that would be contrary to the overriding objective.

36. There was one additional case management issue raised by the Defendants. The BBC has received a letter of claim alleging libel by an individual whose business affairs were featured in the *Panorama* programme broadcast on 5 November 2017. In the event that libel proceedings are commenced, they will be brought in the Queen's Bench Division and allocated to the M&CL. One of the demands included in the letter of claim is that the BBC give pre-action disclosure of that person's confidential leaked documents or copies in the BBC's possession. The BBC argues that any such application would raise the same issues of principle as arise in the present proceedings, with the risk of inconsistent judicial approaches to the same question. I find this point unconvincing. Mr Harris in his witness statement describes a large number of important previous investigations into similar matters that the *Panorama* programme has carried out since 2012. He fairly says that neither the BBC nor the Guardian has previously been the subject of legal proceedings in any of these cases by the original data owners or holders. If a pre-action disclosure application were pursued by a potential libel claimant in respect of these data, I do not see that it would raise the same issues as Appleby's application. The libel claim only seeks disclosure

of that individual's documents. The inclusion of that person in the ICIJ database has been made public by the Defendants' broadcasts and does not appear to have enabled Appleby to identify the source of the data. The main reason the Defendants put forward to oppose the pre-action disclosure sought by Appleby is, as I understand it, the fear that something in the pattern of those whose documents have been included will in some way tip Appleby off as to who the source might be.

37. In my judgment, this is a case where there is no significant difference between the two venues and both the Business List (ChD) and the M&CL are sufficiently experienced and able to address the issues that this case is likely to raise. I therefore decline to order the transfer.