

Extended material
Chapter 26: Breach of confidence

Not a sufficient degree of confidentiality

Case study: In 1982 the Court of Appeal lifted an injunction, granted under the law of confidence, which had stopped the *Watford Observer* publishing information about Sun Printers, a local company. In 1981 the company launched a 'survival plan', reducing its workforce from 1,800 employees to 1,300. It was chaired by the magnate Robert Maxwell, and had been making losses. Later in 1981 Maxwell appointed 'an independent commission' to prepare a report to make recommendations about the company's future, and asked the workforce to give it information, saying he would make a copy of its report available to the 'the trade union side'. When the report was finished, Maxwell arranged for six copies of it to be sent to general secretaries of trade unions, six to union branch secretaries, 10 to union officials among the workforce, 28 to directors and senior managers, with 60 copies going to middle and junior managers. The idea was that trade union officials would discuss the report's findings with the company's workforce – which meant the company expected information in the report to be shared with the workforce, so they could put their views to Maxwell. He had, on the basis of the report, already told managers and trade union officials that there needed to be a further 338 job losses at Sun Printers. Someone gave a copy of the report to the *Watford Observer*. After Maxwell heard that the newspaper planned to publish extracts, Sun Printers obtained a High Court injunction to stop it from doing so from a High Court judge who ruled that the report had been passed on in a breach of confidence. The newspaper appealed and the Court of Appeal lifted the injunction, allowing the newspaper to publish the extracts. The Master of the Rolls, Lord Denning said in the decision that the commission's report was so widely circulated by Sun Printers that it could not be regarded as confidential. 'It was for circulation amongst such a large number of people that it had not a sufficient degree of confidence to entitle it to the protection of the law'. So whoever handed a copy to the *Watford Observer* had not breached any confidence, and the newspaper did not take it knowing that there was a breach of confidence. Lord Denning also said that publishing the information would be in the public interest, because the matters in the report were of great interest to 'all the many people in the Watford area' who were concerned with printing. 'They were fit to be discussed, not only with the immediate workers in the Sun Printing works, but also those outside connected with the printing industry or interested in it' (*Sun Printers v Westminster Press Ltd*, [1982] IRLR 292).

Pictures contained confidential information

The Douglas case

The legal battle which was the *Douglas* case lasted for seven years, and showed that breaching the law of confidence can be very costly.

Case study: In 2000 the actors Michael Douglas and Catherine Zeta-Jones and the publishers of *OK!* magazine sued rival *Hello!* Magazine in the High Court for breach of confidence after it published unauthorised photographs of the couple taken at their wedding reception in a New York hotel. The couple had an exclusive £1 million deal with *OK!* under which their wedding pictures would be taken by their own photographer and only images which they approved would be published. But *Hello!* obtained unauthorised pictures from a paparazzi photographer who managed to get into the hotel and take the pictures covertly. *Hello!* rushed its next edition into print to publish his photos and so spoil the commercial impact of the *OK!* 'exclusive' pictures. Mr Justice Lindsay, ruling that *Hello!*'s publication of the unauthorised pictures infringed the couple's privacy, ordered it to pay them £14,600 in damages, as well as damages of £1 million damages to *OK!* magazine. *Hello!* appealed against the £1 million award, but in 2007 it was upheld by the House of Lords (*Michael Douglas, Catherine Zeta-Jones, Northern and Shell PLC v Hello! Ltd, HOLA SA, Eduardo Sanchez Junco (4), Marquesa de Varela, Neneta Overseas Ltd and Philip Ramey* [2007] UKHL 21).

In *Douglas* it was ruled that *Hello!* Magazine knew when it bought the unauthorised pictures that the 'information' they contained – images of the couple - was regarded as private and confidential, and was

also capable of commercial exploitation, and therefore *Hello!*'s conscience was touched - it was bound by the duty of confidentiality. It was noteworthy as regards the development of privacy law, and – for some in the media, controversial - that the decision in *Douglas* was that the couple's wedding was a private occasion, although there were 350 guests and the couple were exploiting it in the picture deal with *OK!* The ruling was that the security measures the couple took against intruders, and their insistence on approving which images were published, made it private.

Need for confidentiality outweighed public interest in publication

Case study: The Court of Appeal upheld a High Court decision which stopped international news agency Reuters from publishing information believed to have been taken from confidential documents sent to potential professional investors by a major hedge fund management company.

The central issue in the legal battle between Reuters and Brevan Howard Asset Management (BHAM) was whether the public interest in publishing the material outweighed the public interest in protecting the duty of confidentiality which attached to it - and in this case the judge was entitled to find that the balance came down in favour of restraining publication, the Court of Appeal held.

Reuters and financial journalist Maiya Keidan had wanted to publish an article based on material it received which was thought to be based on documents BHAM had sent to potential professional investors.

The package of seven documents was sent to the possible investors with a notice that it was private and confidential and not to be disclosed.

No details of the nature of the information at the heart of the case were ever disclosed.

BHAM, one of the largest hedge fund managers in Europe, first went to court on March 10, 2017, seeking an interim injunction, after Reuters approached it to confirm the accuracy of the material it had received. Mr Justice Popplewell granted an injunction restraining publication, pending trial, and Reuters appealed. The Court of Appeal - the Master of the Rolls, Sir Terence Etherington, sitting with Lord Justice Longmore and Lady Justice Sharp - rejected the appeal in a decision on July 7.

Sir Terence said that Guy Vassall-Adams QC, for Reuters, had argued that the judge had wrongly adhered to the law pre-dating the Human Rights Act in believing that the paradigm case of public interest was where publication would correct a false impression or reveal wrongdoing or hypocrisy, and that, in the absence of such a factor, disclosure would only be permitted in the public interest if that was "vital" and the case was "exceptional".

Sir Terence went on: "The legal principles applicable to the present case are well established. In applying them, the judge made no error of principle or law. His conclusions that the balance came down in favour of the preservation of the confidentiality of BHAM's information and that the grant of an injunction is a proportionate exception to Reuters' right to freedom of expression under Article 10 are ones he was entitled to reach."

The judge had applied the principles laid down by the Court of Appeal in *Associated Newspapers Limited v HRH Prince of Wales* ([2006] EWCA Civ 1776, [2008] Ch 57), which post-dated the Human Rights Act and was centrally concerned with the issue whether the common law of confidence had to be revised in order to give full effect to rights under Article 10 of the European Convention on Human Rights, which guarantees freedom of expression, Sir Terence said.

The Court of Appeal had said in that case that in a privacy case, where no breach of a confidential relationship was involved, a balance had to be struck between the right to freedom of expression and the right to respect for privacy and family life under Article 8, which would usually involve weighing the

nature of and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information.

But this was a case where the information was imparted and received in confidence.

The Court of Appeal had addressed the principles in such a case in the *Prince of Wales* judgment, observing (in paragraph 66) that the fact that information related to information received in confidence was a factor recognised under Article 10 (2) as being of itself capable of justifying restrictions on freedom of expression.

"There is nothing inconsistent between the approach in the Prince of Wales case and the jurisprudence of the European Court of Human Rights," Sir Terence went on.

"The Strasbourg court expressly recognised in *Markt Intern and Beerman v Germany* ((1990) 12 EHRR 161, at paragraph 35) that even the publication of items which are true and describe real events may have to be prohibited in order to respect the confidentiality of certain commercial information."

This consistency of approach was confirmed in domestic jurisprudence, he added, citing *Attorney-General v Times Newspapers Ltd* ([1990] 1 AC 109).

Reuters had criticised Mr Justice Popplewell for having quoted from the judgment of Lord Justice Griffiths in *Lion Laboratories Ltd v Evans* ([1985] 1 QB 526) and his use of the expression "vital in the public interest" as the touchstone for justifying publication in breach of confidence.

But that criticism was misplaced, Sir Terence said.

Mr Justice Popplewell had noted that the passage containing that expression was cited, without any disapproval, in the Court of Appeal judgment in the *Prince of Wales case*, he went on.

"That expression is no more than an indication that, in carrying out the necessary balancing exercise, there must be sufficiently significant matters of public interest in favour of publication to outweigh the public interest in the observance of duties of confidence," he said.

"It is entirely consistent with the statements in the Court of Appeal's judgment in the Prince of Wales case that there is an important public interest in the observance of duties of confidence and that it is not enough to justify publication that the information in question is a matter of public interest.

"The importance of *Lion Laboratories* was that it made clear that such significant matters of public interest are not confined to the disclosure of iniquity."

Sir Terence added: "The only question which the judge had to address, and which he did address, was whether the important public interest in the observance of obligations of confidence was outweighed by sufficiently significant matters of public interest in favour of publication. Unless his conclusion on that issue was one which no judge could properly reach, or he was swayed by matters he wrongly took into account or by failing to take into account matters he should have considered, his decision cannot be disturbed on appeal."

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