



**IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2007 No. 147**

BETWEEN:

THE COMMISSIONER OF POLICE

First Plaintiff

and

THE ATTORNEY GENERAL

Second Plaintiff

- and -

BERMUDA BROADCASTING CO. LTD.

First Defendant

BERMUDA PRESS (HOLDINGS) LTD.

Second Defendant

DEFONTES TELEVISION CENTRE LTD¹.

Third Defendant

BERMUDA SUN LTD.

Fourth Defendant

Delroy Duncan for the plaintiffs;
Dennis Dwyer for the first defendant;
Saul Froomkin QC for the second defendant;
David Cooper for the third defendant; and
Paul Smith for the fourth defendant.

JUDGMENT

INTRODUCTION

1. By this action the plaintiff seeks the delivery up of documents said to derive from police files relating to an investigation into the affairs of the Bermuda Housing Corporation ('the BHC'), and an injunction to restrain the publication of information contained in those documents.

2. The matter comes before me at an early stage for an interim injunction to restrain the defendants from further publishing any information contained in the documents pending trial².

¹ At the hearing on 13th June, counsel for the third defendant informed the plaintiffs and the court that it was not the proper defendant, being merely a TV sales shop, and that the broadcasting companies were DeFontes Broadcasting Company Limited and DeFontes Broadcasting (Television) Limited, and said it would not object to an amendment. The plaintiffs then applied to amend, and I allowed that. I have not, however, changed the title of the action pending service of the amended writ.

² A claim for delivery up of all such documents was intimated in the original summon, but not pursued at this interlocutory stage. This may be because the second defendant asserts, without deposing, that it does not have any of the documents in its custody, possession or control.

3. The writ and the application for the injunction were issued late in the day on Thursday 7th June. The injunction application described itself as being for an “ex parte injunction on notice”, but in fact no real notice had been given. As any injunction might have affected the next day’s publication of newspapers by the second and fourth defendants, and broadcasts by the other defendants, I insisted on notice being given, and waited until it was. In the event, representatives of the first and second defendants attended in Chambers at about 6.15 p.m. in the evening of 7th June, and after a short hearing the second defendant gave undertakings not to publish pending an early full hearing. I made interim orders against the other defendants in similar terms to the undertakings³, and adjourned the matter to Wednesday 13th June.

BACKGROUND

4. According to the plaintiffs’ evidence, the background is that on 23rd May the first defendant (‘ZBM’) broadcast on their evening television news programme a report which implied that they had in their possession documents from a police investigation of the BHC. The police had not authorized the release of those documents and so began an inquiry. On Friday 1st June the Mid-Ocean News, a weekly newspaper published by the second defendant⁴, carried further and extensive revelations based upon documents from the same investigation. This prompted the police to convert their existing inquiries into the leak into a full-scale criminal investigation “into the theft of confidential Police documents”. In the meantime the third and fourth defendants also carried features or articles relating to the documents, although these largely appeared to be derived from the earlier publications.

5. As part of their investigations the police obtained and executed search warrants on the premises of ZBM and the Mid-Ocean News. In the first case they found nothing. In the second case it appears that they accepted an assurance that the newspaper did not have any of the actual documents in their possession, custody or control.

6. The Deputy Commissioner of the Bermuda Police Service deposes that the information comes from confidential files compiled in the course of a police investigation. She says that she is certain that it could only have been obtained by someone reviewing documents concerning the investigation. She is concerned that “the theft of the records attacks the very foundation of what law enforcement are required to do.” She says that unless injunctive relief is granted she fears that “more confidential, and possibly unsubstantiated information will be released into the public domain”, as the

³ The orders restrained the first, third and fourth defendants until further order from (i) publishing any new material based on the documents, and (ii) publishing and or quoting from the documents.

⁴ I was informed at the hearing on 13th June by counsel for the second defendant that it is the holding company for the Royal Gazette Limited, which is the operating company which actually publishes both the Mid-Ocean News and the Royal Gazette. While I left it up to the plaintiffs to decide whether an amendment was necessary, I took the view that an order against the holding company would in effect bind its wholly owned subsidiary.

excerpts from the files which have so far been published represent only a fraction of the contents of “the documents which have been stolen”.

7. Despite the Deputy Commissioner’s repeated use of the word “stolen”, it is not at all clear from her affidavit whether it is alleged that physical documents have been removed from the possession of the police with the intention of permanently depriving the police of them, or whether the documents on the file have simply been copied by someone and released. It is an important distinction, because the actual removal of physical documents could amount to the theft of those documents, but the copying of them may not. In particular it is not possible to steal intangible information: see Oxford v Moss, 68 Cr. App. R. 183⁵. The Commissioner subsequently filed an affidavit which also addressed this issue, without bringing a great deal of clarity to it.

8. The documents, and the information they contained, concerned alleged fiscal improprieties by prominent public figures, including the present Premier of Bermuda. The evidence gives no details of the contents of the ZBM broadcast, but the Mid-Ocean News report is exhibited in full. I do not think that I need analyse it in detail, but the flavour of the report can be gathered from the opening sentence:

“Premier Ewart Brown was one of the subjects of a two-year police investigation into allegations of corruption as the Bermuda Housing Corporation, the Mid-Ocean News can reveal.”

A little further on the report states:

“The inquiry unearthed evidence which suggested that top-ranking Government MPs, including Dr. Brown, employed tactics of manipulations and abuse of power for their own financial gain - all at the expense of the taxpayer.”

Much of the rest of the newspaper article is concerned with the details of that allegation. It also reports that at the end of the lengthy police investigation the then acting DPP advised:

“On the evidence placed before me I see no criminal offence disclosed or suspected. Neither have the police been able to identify any suspected criminal offence . . . there is some indication that Dr. Brown has not paid for work done to one or more of his properties. Perhaps BHC should seek legal advice as to whether or not civil proceedings should be instituted for the recovery of the monies due to BHC.”

⁵ That case concerned an Oxford student who dishonestly obtained an advance copy of an examination paper, but returned it having read it. He was charged with stealing confidential information, but it was held that the information he obtained did not fall within the meaning of ‘intangible property’ in s. 4(1) of the Theft Act 1968, and so could not be stolen. The equivalent provision in Bermuda is s. 334(1) of the Criminal Code (as amended).

THE RESUMED HEARING

9. On the resumed hearing on 13th June the second defendants appeared by counsel and resisted the injunction. The third and fourth defendants separately filed affidavits stating that they neither had nor ever had the subject documents, and asserting that there was no evidence against them. They intimated that they opposed the application on grounds of principle. At the hearing, each of the first, third and fourth defendants appeared by counsel, who simply undertook that their clients would be bound by whatever order the court made, and then withdrew. The burden of the argument at the hearing was, therefore, born by the second defendant.

10. At the outset of the hearing the second defendant applied for the matter to be heard in open court as it concerned the freedom of the press. I acceded to that application, and adjourned the hearing into open court, although I made it plain that if there was a need to discuss confidential information, and in particular the contents of the unused material, I would adjourn back into Chambers to enable that to be done in private.

11. Before the hearing proper began, the plaintiffs applied to amend their claim to tidy up some drafting deficiencies and to make it plain that their action was for breach of confidence. I allowed the amendment on the usual terms as to costs. The amended writ seeks a declaration that the *information* in the documents “was impressed with a quality of confidentiality” and that the first plaintiff is “entitled to enforce the observance of [that] confidentiality against any person into whose hands [it] might come, whether directly or indirectly, from the Discloser or any other person(s).” The amended writ also claimed damages and an account of profits.

12. By concentrating on the confidentiality of the information contained in the documents rather than the documents themselves, the amendment to some extent meets the difficulties which the plaintiff might face if they were unable to show that any documents were in fact stolen, rather than simply being copied and the copies removed. Similarly it means that the plaintiff’s case no longer depends upon the defendants having the documents in their possession, custody or control, something which is vehemently denied and which, at this stage, I have no real reason to doubt.

13. The plaintiffs also amended the terms of the injunction that they sought, and in doing so accepted that they could no longer pursue an injunction to restrain further publication of what had already been made public in the first round of publications by ZBM and the Mid-Ocean news. That was, with respect, a proper concession, as the courts will not use their powers to prevent the publication of something which is already in the public domain: Attorney-General v Guardian Newspapers Ltd. (No. 2) [1990] AC 109 HL, and see also Lord Advocate v The Scotsman Publications Ltd. [1990] 1 AC 812 HL.

14. The hearing was, therefore, only concerned with further material from the police files which had not so far been disclosed. The affidavit evidence did not disclose in any detail what the unused material might contain, but I think it fair to infer that it would contain similar material to that already published. There was a question as to whether I should look at the material, or at least a summary of it. There were practical difficulties with either course. The material is said to be voluminous, so that it would be difficult for me to review. As to a summary, I was told that this would have to be based upon the recollection of those who had seen the material, because the original documents are no longer in the possession of the police, and their only set of copies has been sent overseas for forensic analysis. In the end I did not follow either course, taking the view that it was for the plaintiffs to put before me the evidence they relied upon, not for me to seek it out. As it was, they made no formal application to file any further evidence beyond the two affidavits to which I have already referred.

THE LAW

15. Breach of confidence is an actionable wrong – in other words it is what lawyers call a ‘tort’. There is no written legislation which defines it or prescribes remedies for it, but the ingredients of the cause of action have been developed by judicial decisions and are part of the common law. The remedies include, in an appropriate case, the award of monetary damages to compensate for any harm suffered, and, where publication of the confidential information has not yet occurred, an injunction to restrain it. The principles applicable to an injunction were explained by Lord Goff in Attorney-General v Guardian Newspapers (No. 2) [1990] 1 AC 109 HL at 281 as follows:

“I start with the broad general principle . . . that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.”

16. However, where an injunction to restrain publication is concerned the cause of action for breach of confidence necessarily comes into conflict with the constitutionally enshrined right of freedom of expression, and, where publication by the press is concerned, with the freedom of that institution. The freedom of the press is not itself separately embodied in, or recognized by the Constitution, and so has to find its legislative expression in the principles governing freedom of expression generally, but as a principle it is well known and recognized by the law.

17. Freedom of expression is guaranteed by section 9 of the Constitution in the following terms:

“Protection of freedom of expression

9 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes

freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law⁶ shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required—

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or

(b) that imposes restrictions upon public officers or teachers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(3) For the purposes of paragraph (b) of subsection (2) of this section in so far as that paragraph relates to public officers, "law" in that subsection includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government."

18. It is important that in this respect the Constitution is in similar (although by no means identical terms) to Article 10 of the European Convention on Human Rights ('the ECHR')⁷. Because of this I consider that the authorities decided in the United Kingdom under the Human Rights Act 1998, which itself implements the ECHR, are (subject to the qualification in paragraph 21 below) of direct application to Bermuda.

19. The result of these conflicting considerations is that a Judge considering an injunction in a breach of confidence case has to perform a balancing exercise. This is particularly so where the confidential material may disclose impropriety:

"The courts have, however, always refused to uphold the right to confidence when to do so would be to cover up wrongdoing. In *Gartside v. Outram* (1857) 26 L.J. Ch 113, it was said that there could be no confidence in iniquity. This approach has been developed in the modern authorities to include cases in which it is in the public interest that the confidential information should be disclosed: see *Initial Service Ltd. v. Putterill* [1968] 1 Q.B. 396, *Beloff v. Pressdram Ltd.* [1973] 1

⁶ For these purposes "any law" is defined to include "any unwritten rule of law": see section 102. In my judgment that includes any creation of the common law, such as the common law duty of confidentiality.

⁷ Article 10 of the ECHR says:

"ARTICLE 10

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. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A.E.R. 241 and *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526. This involves the judge in balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material. Even if the balance comes down in favour of publication, it does not follow that publication should be to the world through the media. In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry. If it turns out that the suspicions are without foundation, the confidence can then still be protected: see *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892. On the other hand the circumstances may be such that the balance will come down in favour of allowing publication by the media, see *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526. Judges are used to carrying out this type of balancing exercise and I doubt if it is wise to try and formulate rules to guide the use of this discretion that will have to be exercised in widely differing and as yet unforeseen circumstances. I have no doubt, however, that in the case of a private claim to confidence, if the three elements of quality of confidence, obligation of confidence and detriment or potential detriment are established, the burden will lie upon the defendant to establish that some other overriding public interest should displace the plaintiff's right to have his confidential information protected.”

Attorney-General v Guardian Newspapers (No. 2) [1990] 1 AC 109 HL at 268 per Lord Griffiths.

20. I need to make good my assertion above that the freedom of the press is also recognised by the law, and indeed accorded a special status. I take the modern expression of the law to be that set out in the judgment of Lord Woolf CJ in A v B plc & Anor. [2003] QB 195 CA at 204, where he formulated guidelines to assist in addressing the balance between freedom of expression and the right to confidentiality. I do not think it necessary to set them out in their entirety, although I have had careful regard to them all. However, I have had particular regard to the following:

“(iv) The fact that if the injunction is granted it will interfere with the freedom of expression of others and in particular the freedom of the press is a matter of particular importance. This well-established common law principle is underlined by section 12(4)⁸. Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified. Here we would endorse the approach of Hoffmann LJ in *R v Central Independent Television plc* [1994] Fam 192, 203-204, where he said:

⁸ i.e. section 12(4) of the English Human Rights Act 1998. There is no equivalent in Bermuda, but Lord Woolf plainly regarded it as expressing the common law. Section 12 provides:

“(1) This section applies if the court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

...

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –

(a) the extent to which – (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code.”

“Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute..... The principle that the press is free from both government and judicial control is more important than the particular case.”

(v) The fact that under section 12(4) the court is required to have particular regard to whether it would be in the public interest for the material to be published does not mean that the court is justified in interfering with the freedom of the press where there is no identifiable special public interest in any particular material being published. Regardless of the quality of the material which it is intended to publish *prima facie* the court should not interfere with its publication. Any interference with publication must be justified.”

21. I should note, however, one significant difference between the current English position and that in Bermuda, and that relates to the burden of proof. Lord Woolf, in the passage quoted above, considered that it lay upon the person seeking the injunction: “Any interference with publication must be justified”. In this he was no doubt influenced by section 12(3) of the Human Rights Act, which expressly prohibits an interlocutory injunction to restrain publication before trial “unless the court is satisfied that the applicant is likely to establish that publication should not be allowed”. In Bermuda I consider that the position is reversed, by reason of the wording of the proviso to section 9(2) of the Constitution: “except so far as that provision or, as the case may be, the thing done under the authority thereof *is shown not to be* reasonably justifiable in a democratic society.” It may be, however, that the precise allocation of the burden of proof to one party or the other may be neither helpful nor necessary in most cases.

DISCUSSION

22. It is important to understand from the outset that these proceedings are not brought by the subjects of the police investigation or the various individuals named in the newspaper report. It is, therefore, no part of the court’s function in these proceedings to decide whether the allegations are true or not. Nor is this action brought by the police to protect the confidentiality or privacy of those individuals, although that is a factor on which they rely. This action is brought by the police and the Attorney General to enforce the confidentiality of the police investigation on the grounds of the general principle that the disclosure of the documents “strike at the heart of community confidence in the Bermuda Police Service” and that for various other reasons relating to operational efficiency such matters should not be in the public domain. Those grounds are not particular to the BHC investigation or its subjects in any way. It is not, for instance, said that the reports will in fact reveal the identity of a confidential informant whose identity should be protected, or anything like that.

23. It is also important to appreciate that I am dealing with this matter at an interlocutory and not a final stage. That means that I cannot come to a final determination on disputed questions of fact which may arise, because it is too early in the proceedings, and there has not been time for the parties to marshal all the evidence. The law has devised an approach to deal with that⁹, which is as follows:

(i) first I have to decide whether there is a serious question to be tried. If there is not, that is the end of the application for an injunction.

(ii) If there is, then I have to go on to consider whether the award of damages at the end of the day would adequately compensate the plaintiff for any continuing wrong. If damages will put the injury right, then no interlocutory injunction should be granted.

(iii) If damages would be an inadequate compensation, then the court has to go on to consider where the balance of convenience lies, although that expression may be an unhappy one in a case such as this, which involves competing public interests. In such a case the expression ‘the balance of justice’ is to be preferred: see Sir John Donaldson MR in Francome & Anor. v Mirror Group Newspapers Ltd. & Ors. [1984] 1 WLR 892 at 898 E-F.

24. Before I get to the question of a serious issue to be tried, I have first to be satisfied that there is a likelihood of further publication. If the plaintiffs cannot show that, there is nothing to restrain by injunction. The second defendant has filed no evidence, and made no express statement about the intentions of either of its two newspapers. There is always the possibility that they are resisting on principle, and have no real intention or even ability of publishing anything further. That, indeed, appears to be the position of the two other defendants who have filed evidence. However, the Deputy Commissioner deposes that –

“... the excerpts from the Police files which have been released in the public domain represent only a fraction of the contents of the documents which have been stolen. We fear more information contained in the confidential police files will be released if an injunction is not granted.”

I think that that is sufficient to establish a real likelihood of further publication by at least the second defendants.

25. For the purposes of this hearing I think that the plaintiffs have made out a strong case that the documents are confidential police documents; that they contain information gathered by the police in the course of the exercise of their statutory functions, and opinions on that information by senior police officers and others; and that that

⁹ American Cyanamid Co. v Ethicon Ltd. [1975] AC 396

information is both confidential to the police service, and was known by the defendants to be so confidential at all material times. I think therefore that there is a serious issue to be tried that continuing publication of the information would breach the rights of confidentiality which the police service has in it.

26. However, that is not the end of the matter, because the issue is not just whether there is a serious question to be tried as to the confidentiality of the material, but also whether there is a serious question to be tried as to the right to a permanent injunction at trial. If, at the end of the day, the court is plainly not going to make a permanent injunction, it would be wholly inappropriate for the court to make one at an interlocutory stage. For the reasons set out below I consider that the plaintiffs fall at this first hurdle, because I consider that the defendants have demonstrated to me that this would never be an appropriate case for a permanent injunction. I have, before coming to that conclusion, reminded myself that this is an early, interlocutory stage of the proceedings. But the law is clear and the *relevant* facts are plain. It is hard, therefore, to imagine how further evidence is going to impact upon this issue, which turns upon a balancing of the competing interests of the police in confidentiality and of the press and the public in freedom of expression.

27. I should say that I would have come to same result if I had proceeded past the first step. I would have passed quickly over the second step, this being an obvious case where damages would be an inadequate remedy for either side. If the information is published, any harm to the police service could not meaningfully be compensated in money. Similarly if I wrongfully restrained further publication, the loss to the media is not readily capable of expression in cash terms. I would then have come to the balance of convenience, or of ‘justice’ if you prefer Lord Donaldson’s formulation. At that point I would have found that the balance lay in favour of publication. In doing so, I would have taken account of the fact that once confidential information is out of the bag it is impossible to put it back, and the damage will be done: see e.g. the observations of Lord Ackner in Attorney-General v Guardian [1987] 1 WLR 1248 at 1303 B - E. This obviously weighs against an interim injunction but it is not decisive:

“Even a temporary restriction on the exercise of freedom of expression is not to be imposed lightly. News is a perishable commodity. Public and media interest in topical issues fades.” Attorney-General v Punch Ltd. [2003] 1 AC 1046 HL at 1054 H per Lord Nicholls

and

“Any formalities, conditions, restrictions or penalties, to be permitted by article 10(2) [*of the ECHR*] must satisfy the principle of proportionality. In summary, they must be sensitive to the facts of the case, they must be rational, fair and not arbitrary, and they must impair the fundamental right no more than is necessary. In my opinion these tests must be satisfied at every stage of the judicial process that is liable to affect the exercise of the fundamental right. This includes the stage when the court is deciding whether or not to make an interlocutory injunction, and if so in what terms.” Ibid at 1075, per Lord Hope.

28. In carrying out this balancing exercise I have on the one hand the interest of the police service in the proper exercise of its functions. On the other hand I have the freedom of the press, and the proper interest of the public in being fully informed about the dealings and character of those who submit themselves for election to high public office.

29. The police say that the integrity of the investigative process will be damaged in future if people who come to the police with information feel that they cannot do so in confidence. To the extent that the information in this case concerns the expression of opinions by various officers upon the strengths of the case, they argue that such officers would be deterred from a free and frank expression if they felt that they might eventually become public. In this respect the plaintiffs rely heavily on certain dicta in the case of Taylor v Anderton [1995] 1 WLR 447 CA¹⁰. There are two points to make on that. First, that case concerned internal police investigations, which I take to be a notoriously sensitive area, and not ordinary criminal investigations. However, I do note that the principle has been extended to police reports to the Crown Prosecuting Service in ordinary cases (Kelly v Commissioner of Police of the Metropolis (1997) Times, 20 August), although the report of that case is too brief to give much help on the reasons why. Second, Taylor v Anderton was concerned with public interest immunity from disclosure in the course of documentary discovery in civil actions. That means that the balancing exercise was different, and did not involve the constitutional issues nor the public interest in favour of disclosure with which this case is concerned. I think, therefore, that while the arguments in favour of confidentiality derived from that case may be helpful by analogy, they are not determinative.

30. While I recognize the need to protect the integrity and confidentiality of police investigations, I think that on the facts of this case any real damage to that will be minimal. In particular, there is nothing to suggest that a confidential source will be compromised. I do, of course, recognize that disgruntled police officers who are not satisfied with the outcome of an investigation should not be able or encouraged to turn their materials over to the press. But the sanction for that is the appropriate disciplinary action, or even criminal proceedings, against anyone who does that, and in that regard I note that there is a high-level investigation into the source of the leak currently underway.

31. In any event, whether or not the material was ‘stolen’ or improperly disclosed to the media, is not itself decisive:

¹⁰ Indeed, paragraph 16 of the Commissioner’s affidavit, which deals with why he believes disclosure would be detrimental, is based upon and closely follows the wording of the affidavit in Taylor v Anderton. However, I do not think that that necessarily detracts from conviction of the opinions expressed, as was argued by Mr. Froomkin.

“There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer.” Lion Laboratories Ltd. v Evans [1985] 1 QB 526 CA at 536 G.

Nor is there anything to suggest that the press in general, or the Mid-Ocean News in particular, themselves stole any documents, or trespassed into police premises so as to copy them, and the likelihood is that they were the recipients of a leak by some person as yet unknown on the inside.

32. One point of difficulty is the extent to which the privacy of the individuals concerned goes in the balance. It was alluded to briefly in Taylor v Anderton, in that one of the arguments was that “Disclosure of the report in those circumstances [i.e. where no disciplinary action is taken] may cast a slur on the individuals identified, in circumstances where, as above, they may have no opportunity to put their side of the case.” That argument was, as noted above, quoted verbatim as his own by the Commissioner in his affidavit in this case. It was only one of many arguments advanced in Taylor v Anderton, and it is not clear at all from the report whether it was one which was accepted by the Court of Appeal. Despite that, I think it is something which should go into the balance. The weight to be attached to it will depend upon the nature of the allegations, the quality of the evidence in support and the identity of the individuals involved. I have, therefore, taken it into account, notwithstanding that they do not bring this action, and notwithstanding that no duty of confidentiality owed to them is in issue in these proceedings. However, in doing so I have born in mind that different considerations apply to those who have sought election to public office than apply to private individuals. I have also born in mind that they may have other, personal courses of legal action open to them if defamed.

33. On the other side of the balance there is the media’s constitutional right to inform the public about serious allegations concerning important public figures. As the cases cited above illustrate, that is a weighty and powerful consideration. The allegations are not gratuitous, in that there is some evidence to support them, as set out in the material so far reported. Nor do the allegations concern the private personal life of those concerned. They touch upon their conduct in office. In those circumstances I think that the public interest is genuinely engaged, and this is not a case of the public being officiously interested in matters which do not concern them. I think, therefore, that the balance comes down firmly against restraining the media’s freedom expression. I consider that that is the case even at this interlocutory stage, it being hard to envisage what a full trial could add to the considerations already before the court.

34. I therefore refuse an interim injunction, and dismiss the plaintiffs' application. I will hear the parties on costs.

Dated this 18th day of June 2007

Richard Ground
Chief Justice