



In The Supreme Court of Bermuda

IN THE MATTER OF ORDER 32, RULE 6 OF THE RULES OF THE SUPREME COURT OF BERMUDA, 1985

CIVIL JURISDICTION

2021: No. 303

BETWEEN:

EVATT ANTHONY TAMINE

Plaintiff

- and -

BERMUDA PRESS (HOLDINGS) LTD.

Defendant

REDACTED RULING

Date of Hearing: 13, 26 October 2021

Date of Ruling: 24 January 2022

Appearances: Paul Harshaw, Canterbury Law Limited, for Plaintiff

Allan Doughty, MJM Limited, for Defendant

RULING of Mussenden J

Introduction

1. This matter comes before me on a Summons dated 12 October 2021 by the Defendant Bermuda Press (Holdings) Ltd. (“BPHL”) the publisher of Bermuda’s only printed daily

newspaper, the Royal Gazette (the “**RG**”), which also publishes an online version (the “**RG Online**”). The application is for an order to discharge an *ex parte* order (the “**Ex Parte Order**”) made by me and entered against BPHL on 24 September 2021 by the Plaintiff, Mr. Evatt Tamine (the “**Plaintiff**” or “**Mr. Tamine**”) in respect of the content of some articles and hyperlinks to documents in the articles as published on the RG Online as set out below.

2. The application to discharge is supported by the First Affirmation of Ms. Sam Strangeways dated 7 October 2021 (“**Strangeways 1**”) along with accompanying Exhibits “**SS-1**” to “**SS-9**” and the Second Affirmation of Ms. Strangeways dated 12 October 2021 (“**Strangeways 2**”) along with accompanying Exhibits “**SS-10**” to “**SS-13**”.
3. The application is opposed by Mr. Tamine.

The Application for the *Ex Parte* Order

4. On 24 September 2021 Mr. Tamine caused a Generally Indorsed Writ of Summons (the “**GI Writ**”) to be issued. The basis of the GI Writ was that on or about 16 September 2021 BPHL caused to be published in the RG Online two articles providing previously unreported details concerning Mr. Tamine’s dealings with a Mr. Robert Brockman (“**Mr. Brockman**”), a US national who is presently under indictment in the United States for charges of tax fraud (the “**US Proceedings**”). The articles also summarised an affidavit sworn by Mr. Tamine on 4 July 2020 (the “**ET 2020 Affidavit**”) in filed in relation to Supreme Court trust proceedings known as “*In the Matter of the B Trust*” bearing the Supreme Court cause number 2018: No. 376 (the “**Trust Matter**”). The GI Writ set out that the court file in the Trust Matter is sealed and not available for inspection by non-parties. Further, each article also included a hyperlink to a copy of the ET 2020 Affidavit, such hyperlinks not pointing to the United States District Court for the Southern District of Houston (the “**Houston Court**”), which is the Court referred to in the articles where the ET 2020 Affidavit was first disclosed, but instead pointing to a third party website¹.

¹ In a Statement of Agreed Facts dated 27 October 2021, it was agreed that the RG downloaded and published the ET 2020 Affidavit. It was downloaded from an official US Government website. Mr. Tamine’s residential address in England was redacted and rendered illegible prior to its publication in the RG. The ET 2020 Affidavit was separately republished through the Naviga

5. The GI Writ also set out that at the time of publication, BPHL knew that the ET 2020 Affidavit was filed in the Trust Matter in which the Court file was sealed. Specific sentences were referenced from the articles, which referred to the ‘sealed affidavit’ being now a publicly-available court document in the US. Further, the material was being published in defiance of court orders that the court file be sealed. The GI Writ claimed that the hyperlinks to the ET 2020 Affidavit and any content from it should be removed from the RG Online articles, a declaration that by publishing the articles BPHL committed a contempt of court and damages.
6. On 24 September 2021 I heard an *Ex Parte* application for an order for BPHL to remove from the two articles in the RG Online the hyperlinks that accessed the third party website hosting the ET 2020 Affidavit and all the content in the article as taken from the ET 2020 Affidavit. The application was supported by the First Affidavit of Mr. Tamine lodged with the Court on 24 September 2021 (“**Tamine 1**”) and the accompanying exhibits “**ET-1**” and “**ET-1A**”².
7. During the hearing of 24 September 2021, the Court was informed that the ET 2020 Affidavit had been published online by the US Government as part of a larger filing made by the US Department of Justice (the “**DOJ**”) in the US Proceedings. In Tamine 1, Mr. Tamine had stressed that the ET 2020 Affidavit should never have been disclosed to a third party and it should never have been deployed by that third party in the US Proceedings. Mr. Tamine further stated that his US Counsel had informed him that an application was pending before the Houston Court to place the ET 2020 Affidavit under seal in the US Proceedings. However, I should point out at this stage that the Court was not informed that in an order dated 23 September 2021 signed by Judge George Hanks Jr. of the Houston Court, the application to seal the ET 2020 Affidavit in the US Proceedings was denied.
8. Counsel for Mr. Tamine, Mr. Jerome Lynch QC and Mr. Harshaw filed written submissions and made oral arguments relying on the case *Attorney-General v The Times Newspapers*

Publisher hosting software that hosts the RG’s www.royalgazette.com website. The Naviga platform is cloud-based and is not located in Bermuda.

² Due to the urgent nature of the application and COVID-19 protocols in place at the time the Affidavit was lodged with the Court in approved by unsworn form with the usual undertaking from counsel to file a sworn version.

*Ltd. (No. 3)*³. In that case, the UK Attorney-General had obtained injunctions against several UK newspapers to stop them from printing extracts from the book “*Spycatcher*” written by a former officer of Her Majesty’s Secret Service. The former officer had earlier been prohibited from having *Spycatcher* published in the United Kingdom but he had arranged for it to be published in Australia and later in the United States.

9. Mr. Lynch QC submitted that the relevant law under consideration in the *Spycatcher* case was the common law of contempt of court where Lord Ackner traced the history of the law relating to contempt of court and then posed the following question “*Whatever would be the point of a court making an order designed to preserve the confidentiality of material, the subject matter of a dispute between A and B, pending the trial of the action, if at the whim of C, the protection afforded by the court by its order could be totally dissipated?*” Counsel for Mr. Tamine answered that question by submitting that of course there would be no point and that the Courts do not embark on pointless exercises. They stressed that in the present case, the issue was that there was a confidentiality order in the Trust Matter and BPHL knowingly breached that order. They also argued that whilst they could not point to the precise terms of the confidentiality order because the Plaintiff does not have access to the court file, Mr. Tamine can point to the fact of the order and asserts that it is at least in “*standard Confidentiality Order*” terms, that is, it (a) anonymises the title to the proceedings and (b) seals the file from public inspection.
10. On that same 24 September 2021, after hearing submissions from Counsel for Mr. Tamine, I granted the *Ex Parte* Order.
11. On 7 October 2021 Mr. Tamine swore his affidavit and on 12 October 2021 Mr. Tamine filed in Court his affidavit in support of his application for an interim injunction against the BPHL in accordance with counsel’s undertaking.

³ [1992] 1 A.C. 191

The Application to set aside the *Ex Parte* Order

Preliminary points

12. On 13 October 2021 I heard submissions from counsel for BPHL. As a preliminary point, I ruled that no information about these proceedings could be published until I had ruled on the matter. I also made an order that the copies of the ET 2020 Affidavit filed in these proceedings would be sealed until further order. I also granted leave to admit Strangeways 2.

Main Application to set aside by BPHL

13. Mr. Doughty submitted that the *Ex Parte* Order should be set aside for several reasons. First, his initial concern was to query why Mr. Tamine failed to inform the Court and BPHL of the vital piece of information that the Houston Court had denied the application to seal the ET 2020 Affidavit in the US Proceedings. In reply to this point, Mr. Harshaw submitted that Mr. Tamine had only found out about the result after the injunction had been granted in the Bermuda Court.
14. Second, in recognizing that Mr. Tamine was alleging breach of confidence as the cause of action in the GI Writ, Mr. Doughty submitted that the *Ex Parte* Order should be set aside per the authority of *American Cyanamid Co. v Ethicon Ltd*⁴ on the grounds that: (a) there is no serious issue to be tried in that the “djinni is now out of the bottle”; (b) Mr. Tamine has failed to establish that he will suffer irreparable harm that cannot be compensated through monetary damages; and (c) the balance of convenience does not favour Mr. Tamine’s attempt to suppress BPHL’s guaranteed right of freedom of expression and the public’s interest in understanding how Bermuda was used as a base for an enterprise that the DOJ claims was a vehicle for tax evasion.

⁴ [1975] A.C. 396 (HL)

Whether there was a serious issue to be tried

15. Mr. Doughty submitted that as the claim was for “breach of confidence”, now that the information has lost its confidential nature through accessibility on the internet, the claim must fail. He relied on the ruling of the European Court of Human Rights in the *Spycatcher* case⁵ which provided a comprehensive history of all the proceedings in Australia and the UK. He submitted that the UK Attorney-General sought interlocutory injunctions in the UK against *The Mirror* and *The Guardian* newspapers which had reported on the proceedings in Australia and quoted excerpts from *Spycatcher’s* manuscript. The UK Attorney-General then sought permanent injunctions claiming breach of confidence against *The Mirror* and *The Guardian* and later against other UK based periodicals which published further excerpts from *Spycatcher*.
16. Mr. Doughty further submitted that the claims for permanent injunctions were ultimately rejected at their respective substantive hearings for the primary reason that that the information in question was no longer confidential in that: (a) *Spycatcher* had been published in the US and Canada; (b) copies of the book were attainable in the UK through mail order; and (c) copies of *Spycatcher* had been brought into the UK by UK citizens travelling abroad. He added that all of the courts reviewing the matter found that the quality of confidence, which had previously attached to the information, was destroyed on account of *Spycatcher’s* publication in North America. As a result, the injunctions were discharged and full publication was able to proceed thereafter. Mr. Doughty then submitted that the European Court of Human Rights found that interlocutory injunctions violated the right to freedom of expression.
17. Mr. Doughty submitted that the logic in the final outcome of the *Spycatcher* cases was recognized and applied in Bermuda in *Attorney General v Bermuda Press Holdings Limited et al*⁶ in a case concerning an *Ex Parte* injunction which restrained the RG from publishing a ‘leaked’ cabinet memorandum which provided details of the sale of a property to the Government. A local television station provided its own report on its evening news

⁵ *Sunday Times v The United Kingdom* (No. 2) (application No. 13166/87)

⁶ [2009] Sc (Bda) 60 Civ (18 December 2009) para 13

programme concerning the contents of the cabinet memorandum. Bell J (as he then was) stated:

“[With] the underlying subject matter of the cabinet memorandum now being in broad terms, in the public domain, I do not think the Court should restrain the publication of the cabinet memorandum which was the subject of the injunction which I granted on 15 December 2009.”

Whether Mr. Tamine will suffer irreparable harm that cannot be compensated for in damages

18. Mr. Doughty submitted that in Tamine 1, Mr. Tamine speaks about:

- (a) The steps he took to instruct counsel in England to act on his behalf once he became aware that the RG wanted to interview him;
- (b) Other media outlets misreporting the Brockman case and his involvement in it; and
- (c) Commencing proceedings against *The Sydney Morning Herald* which previously published similar statements and allegations to those made by Ms. Strangeways in her articles, extracting damages, a withdrawal of the articles and an apology.

Mr. Doughty submitted that Mr. Tamine has never specified what type of damage he expected to suffer and having confirmed that the damages amounted to \$190,000, it contradicted the claim that he would suffer harm that cannot be compensated for in damages.

19. Mr. Doughty relied on the case of *Brewster et al v Premier of Bermuda et al (No. 1)*⁷ where Hargun CJ stated:

“In Spencer v The Attorney General of Canada [2021] FC 361, Ottawa, Ontario, 23 April 2021, another Canadian case relied upon by Mr. Duncan QC, Pentney J emphasised that this high bar must be established through evidence at a convincing

⁷ [2021] SC 45 (Bda) Civ (9 June 2021) at para 27

level of particularity and demonstrate a high likelihood that harm will occur, not that it is merely possible. At [81] Pentney J held:

“The term irreparable harm refers to the nature of the harm rather than its scope or reach; it is generally described as a harm that cannot adequately be compensated in damages or cured (RJR– MacDonald at p 341). It has often been stated that this harm cannot be based on mere speculation, it must be established through evidence at a convincing level of particularity ... In addition, the evidence must demonstrate a high likelihood that the harm will occur, not that it is merely possible. This will obviously depend on the circumstances of each case””

Whether the balance of convenience favours Mr. Tamine or BPHL

20. My. Doughty submitted that Mr. Tamine’s application for an interlocutory injunction is a direct assault on the RG’s right to freedom of expression as guaranteed by Section 9 of the Bermuda Constitution Order 1968 (the “**Constitution**”) which provides:

“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 law 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.

... ”

21. Mr. Doughty submitted that the right to freedom of expression is not an absolute right and must be balanced against: (a) the reputation of others; (b) the private lives of persons concerned in legal proceedings; (c) preventing disclosure of information received in confidence; and (d) maintaining the authority and independence of the courts. Further, in balancing the convenience of the parties, the Court should properly consider the above factors as part of its balancing exercise. He added that as Mr. Tamine was not pleading “Misuse of Private Information” or “Breach of Privacy”, none of the factors of Article 8 of the ECHR need to be considered, thus the reputation of others and the private lives of persons concerned in legal proceedings fall away as neither of the above factors are protected in claims of “Breach of Confidence”.

22. Mr. Doughty submitted that the Court must also consider the countervailing interest of preventing disclosure of “information received in confidence”. Further, that although Mr. Tamine claimed the information in the ET 2020 Affidavit was imparted in confidence, he noted that: (a) we have not seen the Order of the Court which he claims seals the ET 2020 Affidavit; (b) there is nothing in the ET 2020 Affidavit which suggests that it was imparted on the understanding that it would remain confidential; (c) it is understood that Mr. Tamine is co-operating with the DOJ which presumably means that he will testify and/or be cross-examined on much, if not all of the information contained in the ET 2020 Affidavit; and (d) given its present availability to the public, any quality of confidence which may have previously attached to the ET 2020 Affidavit disappeared long ago.

23. Mr. Doughty submitted that several issues were raised: (a) the defence of there being “no confidence in iniquity” for BPHL; (b) the public’s interest in understanding how it is that the DOJ claims an unlawful tax evasion scheme was being run in Bermuda and how an old Bermuda house nearly became the headquarters for a large part of that operation; and (c) how the weight of the “Pandora Papers” now adds the currency of the RG’s past and future reporting on this matter.
24. Mr. Doughty further submitted that another countervailing interest which must be considered by the Court is the maintenance of the authority and independence of the Court. This is with respect to the claim by Mr. Tamine that the ET 2020 Affidavit was sealed by the Court and that reference to it by the RG, not only constitutes a breach of confidentiality but also amounts to a contempt of court. However, Mr. Doughty submitted that the Court itself is also bound by Section 9 of the Constitution and may only impose orders that are reasonably required and/or justified in a democratic society. On that basis, Mr. Doughty submitted that the Court should consider whether the information contained in the ET 2020 Affidavit should be further restrained by considering the matter through the prism of the *DeFreitas* test as set out in *Defreitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*⁸.
25. Mr. Doughty submitted that in applying that test, the Court will need to ask: (a) is there a pressing social need, which the order that sealed the ET 2020 Affidavit and subsequent injunction seek to address? (b) if so, is the sealing of the ET 2020 Affidavit and subsequent injunction rationally connected to that aim?; and (c) if so, has the sealing the 2020 ET Affidavit and the subsequent injunction minimally impaired the RG’s right to freedom of expression. Mr. Doughty submitted the appropriate answers are: (a) there may be a pressing social need to ensure that the Court’s order are followed, but this is arguable given the lack of evidence that non-compliance with court orders presents a danger to the public interest; (b) as the ET 2020 Affidavit remains in the public domain, there is no rational connection between the injunction against BPHL and the objective of enforcing the Court’s prior sealing order; and (c) the *Ex Parte* Order does not minimally impair BPHL’s right to

⁸ [1999] 1 AC 69 (PC) at para 80

freedom of expression as it is overly broad and prevents RG from relying on information presented in the ET 2020 Affidavit which is clearly within the public interest.

26. Mr. Doughty asked the Court to discharge the *Ex Parte* Order in that: (a) Mr. Tamine failed in his duty of candour to advise the Court that his application to seal the ET 20220 Affidavit was rejected by the Houston Court; (b) there is no serious issue to be tried in that the information contained in the ET 2020 Affidavit is no longer confidential given its accessibility on an official US Government website; (c) Mr. Tamine accepted \$190,000 from *The Sydney Morning Herald* in settlement of similar allegations which contradicts his assertions that he will suffer damage that cannot be compensated for in monetary damages; (d) Mr. Tamine failed to specify the damage that he will suffer if the injunction is not granted; (e) in assessing the balance of convenience, what information in the ET 2020 Affidavit is Mr. Tamine wishing to keep secret, as he claims he is a co-operating witness with the DOJ in the prosecution of Mr. Brockman; and (f) in assessing the balance of convenience the public interest outweighs that of Mr. Tamine attempting to suppress coverage of his actions while working for Mr. Brockman.

Continuation hearing on 26 October 2021

27. At the end of the hearing on 13 October 2021 I adjourned the matter to continue on 26 October 2021 when Mr. Doughty filed and argued further submission on the basis that he had now had a chance to review further material provided for the hearing on 13 October 2021.
28. Mr. Doughty submitted that counsel for the Plaintiff, in reliance on the Ruling⁹ of Subair Williams J in the Trust Matter (the “**Redacted Ruling**”), made submissions with which he disagreed. He submitted that reading the Redacted Ruling, Subair Williams J had made the confidentiality order as the proceeding was about the internal management of the trust and to protect the identity of the parties which did not include Mr. Tamine. Mr. Doughty submitted that it was also clear that Subair Williams J:

⁹ In the Matter of the B Trust [2020] SC (Bda) 30 Comm (23 July 2020)

- (a) had identified Mr. Tamine by name on 37 occasions which clearly indicated that she had not intended to keep his name a secret;
- (b) had stated that she had read a draft writ against Mr. Tamine which claimed conversion, breach of confidence, misuse of confidential information and property held on constructive trusts; and
- (c) quoted the prayer for relief of the writ which sought:
 - i) Inquiries;
 - ii) Accountings;
 - iii) Declaratory relief;
 - iv) Delivery of assets;
 - v) An injunction against Mr. Tamine to return all documents and a permanent injunction to delete or destroy copies of such documents;
 - vi) An injunction restraining Mr. Tamine from disclosing confidential information to any person;
 - vii) An inquiry into any unauthorized disclosures of confidential information; and
 - viii) Equitable compensation to be assessed for breach of confidence, misuse of confidential information and trust monies or assets that had been dissipated.

29. Mr. Doughty pointed out a number of other matters addressed by Subair Williams J in the Redacted Ruling which touched on trust assets, Mr. Tamine's assets, accusations that Mr. Tamine was attempting to derail litigation against him, search warrants executed by the Bermuda Police to search Mr. Tamine's home address in Bermuda, the grant of immunity to Mr. Tamine from prosecution in the US and that he gave evidence before a US Grand Jury.

30. Mr. Doughty further submitted that there was no merit in Mr. Tamine's claim that his ET 2020 Affidavit was sealed as Subair Williams J expressly stated:

- a) That she made the confidentiality order for the purpose of concealing the names of the parties to the Trust Matter;

- b) Did not anonymize Mr. Tamine's name throughout her Redacted Ruling;
- c) Referred to Mr. Tamine by name and cited his argument when referring to the confidential proceedings before her;
- d) Rejected Mr. Tamine's application to be joined as a party to the proceedings which was why Mr. Tamine filed the ET 20220 Affidavit in the first place;
- e) Expressly stated that she accepted no further submissions or evidence past 19 June 2020; and
- f) The ET 2020 Affidavit was sworn on 4 July 2020.

Mr. Doughty submitted that in the absence of any further evidence that the ET 2020 Affidavit was under seal, then the entire claim should be dismissed.

Issue of Law - Whether reporting should be allowed on the content of the ET 2020 Affidavit

31. Mr. Doughty submitted that counsel for the Plaintiff had stated that the *Ex Parte* Order was sought only to restrict reporting on the content of the ET 2020 Affidavit. However, Mr. Doughty submitted that such contention ignored the fact of the local and international public interest in the Pandora Papers and the alleged use of the Brockman trust as a tax evasion vehicle requiring the publication of the ET 2020 Affidavit when coupled with BPHL's right to freedom of expression. He highlighted that two key issues in the present case are:

- a) does the "public interest" create an effective bar to Mr. Tamine's action so as to render his claim hopeless; and
- b) what effect, if any, does Mr. Tamine's pleaded cause of action have on these proceedings.

32. Mr. Doughty submitted that the law has developed around privacy torts, namely "misuse of confidential information" and "invasion of privacy". He contended the following:

- a. "privacy" interests and "confidentiality" interests are similar but distinct concepts that may arise from the same information and which may, at times, overlap. He

relied on the case of *PJS v Newsgroup Newspaper Ltd*¹⁰ where Lord Mance spoke of the distinction between confidence rights and privacy rights;

- b. “privacy” refers to personal information about an individual¹¹ which may have a special quality or require special protection if the individual in question is vulnerable as was demonstrated in the case of *Green Corns Ltd. v CLA Verely Group*¹² where Tugendhat J made references to the cases of *A v M (Family Proceedings : Publicity)*¹³ where Charles J held that children would be likely to suffer harm if allegations already made public were repeated and *Venables and Thomson v News Group International*¹⁴ where Butler Sloss P added a *proviso* to the public domain exception which would protect the special quality of the new identity, appearance and addresses of the claimants or information leading to that identification, even after that information had entered the public domain by being published on the internet or elsewhere outside the UK;
- c. “confidence” more properly refers to the information that is imparted in circumstances which render that information a secret. He relied on *PJS v Newsgroup Newspaper Ltd* at paragraph 57 where Lord Neuberger stated “*However, there comes a point where it is simply unrealistic for a court to stop a story being published in a national newspaper on the ground of confidentiality, and, on the current state of evidence, I would, I think, accept that, if one was solely concerned with confidentiality, that point had indeed been passed in this case.*”
- d. The defence of “public interest” may be raised in relation to both torts;
- e. The public interest is properly engaged if:
 - i. There is a real public interest in communicating and receiving the information with there being a real interest in having this information in the public domain. He relied on *Jameel v Wall Street Journal*¹⁵ where Baroness

¹⁰ [2016] 4 ALL ER 554 (UKSC)

¹¹ Mr. Doughty relied on a case *Von Hannover v Germany (Application 59320/00)* where the ECHR held that concepts of private life extended to aspects relating to personal identity, such as a person’s name, picture and includes a person’s physical and psychological integrity.

¹² [2005] EWHC 958 (QB)

¹³ [2000] 1 FLR 552 as referred to in *Green Corns Ltd. v CLA Verely Group*

¹⁴ [2001] Fam 430 also referred to in *Green Corns Ltd. v CLA Verely Group*

¹⁵ [2006] 4 All ER 1279 (HL)

Hale, speaking of the ‘*Reynold’s*¹⁶ privilege’ being a defence of publication in the public interest, stated:

“If ever there was a story which met the test, it must be this one. In the immediate aftermath of 9/11, it was in the interests of the whole world that the sources of funds for such atrocities be identified and if possible stopped. There was and should have been a lively public debate about this. Given the nationalities of the hi-jackers, this focussed particularly upon the efforts of the Saudi Arabian authorities. Anti-Saudi feeling was running high in some places. Information that the Saudis were actively co-operating, not only with the United Nations, but also with the United States was of great importance to that debate. This was, in effect, a pro-Saudi story, but one which, for internal reasons, the Saudi authorities were bound to deny. Without names, its impact would be much reduced.”

- ii. The publisher must have taken care that a responsible publisher would take to verify the information published. He again relied on *Jameel v Wall Street Journal* where Baroness Hale stated:

“Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. But one would normally expect that the source or sources were ones which the publisher had good reason to think reliable, that the publisher himself believed the information to be true, and that he had done what he could to check it.”

- b. In claims of both “breach of confidence” on the one hand and “misuse of private information” and/or “invasion of privacy” on the other hand, a balancing exercise is called for in weighing the competing interest of the plaintiff and the defendant. He relied on the case of *Commissioner of Police v Bermuda Broadcasting Co. Ltd.*¹⁷ where Lord Scott stated:

¹⁶ *Reynolds v Times newspapers Ltd* [1999] 4 All ER 609

¹⁷ [2008] UKPC 5 (23 January 2008) at para 9

“It is right that the interests of those against whom the allegations are made should be placed in the balance, and the Chief Justice did so, but the critical issue is whether the public interest that can be asserted by the Bermuda Police Service in preserving the confidentiality of their investigative material should trump the public interest in the freedom of the press to place before the public of Bermuda material of the sort disclosed in the broadcasts and publications that led to this litigation. This was perceived by the Chief Justice to be the critical issue and their Lordships are in respectful agreement.”;

- c. “confidential information” may lose its quality of confidence through publication, in which case, a reviewing court may properly hold that an injunction should not be applied in relation to that information. He relied on the principles set out in the *Spycatcher* case.
 - d. A privacy interest in information being distinct from a confidentiality interest may be deserving of greater protection.
33. Mr. Doughty submitted that as Mr. Tamine had only pleaded breach of confidence at this stage, there was nothing in the ET 2020 Affidavit which would properly engage a privacy interest that would not be defeated by the public interest in any event.
34. Mr. Doughty then submitted that some other minor issues of law arose also. First, he referred to Mr. Tamine’s argument that the fact that the information has been leaked by the US Government does not excuse an act of breaching the confidentiality of this Court. Mr. Doughty countered that such argument ignores what has taken place in that the information is in the public domain based on a server in a foreign jurisdiction and that it will not be removed. Therefore, this is a factor the Court must take into account in determining whether the ET 2020 Affidavit has lost its quality of confidence.
35. Second, Mr. Tamine has argued that *PJS v Newsgroup Newspapers Ltd.* is persuasive authority for the proposition that information published in a foreign jurisdiction may still be enjoined. Mr. Doughty countered that *PJS v Newsgroup Newspapers Ltd.* was a claim for invasion of privacy, not breach of confidence.

36. Third, Mr. Tamine argued that a continuation of the temporary injunction in the present case would serve a useful purpose. Mr. Doughty submitted however that there was no evidence before the Court to support that claim.
37. Fourth, Mr. Tamine had argued that trust proceedings do not attract a legitimate public interest. Mr. Doughty submitted however, that public interest does arise in trust cases as in *In the Matter of the G Trust*¹⁸ it was stated that in trust cases in certain circumstances like criminal or tax investigations, it was an implicit understanding that confidentiality orders would be set aside.
38. Fifth, Mr. Tamine had claimed that his family’s personal information was deserving of protection. Mr. Doughty submitted that there was no evidence that the RG provided personal information about Mr. Tamine’s family members.
39. Sixth, Mr. Tamine had claimed that the Court should warn the public that information given to the Court in confidence may make it into the public domain. Mr. Doughty countered that as Bermuda is an open justice jurisdiction, there is such duty on the Court.
40. Seventh, Mr. Tamine had claimed that the public interest was outweighed by maintaining the confidentiality of the proceeding and that if the ET 2020 Affidavit was reported out of context, it could undermine the trust proceedings. Mr. Doughty countered that no real evidence had been provided by Mr. Tamine to engage the Court in a meaningful balancing exercise and that bald statements of principle which invite the Court to speculate do not equal evidence.
41. Eighth, Mr. Tamine had claimed that the present circumstances was an analogy of the “implied undertaking” rule that a party will not use information received as a result of the discovery process as evidence in the proceedings of another matter. Mr. Doughty however submitted that the implied undertaking rule only applied to documents that are disclosed

¹⁸ [2017] SC (Bda) 50 Com

involuntarily but ET 2020 Affidavit was disclosed voluntarily in support of his application to intervene in proceedings.

Mr. Tamine's response to the application to Set Aside

42. Mr. Harshaw maintained that the injunction should not be set aside for several reasons. First he highlighted that the injunction was only about the ET 2020 Affidavit and was not about the Paradise Papers or the RG's ability to report on Mr. Brockman. He pointed out that Mr. Tamine set out in the ET 2020 Affidavit paragraph 4 the reason why he was filing the affidavit, namely to be joined to the proceedings for the purpose of setting aside the adverse findings made against him and for access to the Court file.
43. Second, Mr. Harshaw submitted on the basis that the GI Writ had just been issued and could be amended, it was not helpful at this stage to attach labels such as misuse of private information, invasion of privacy or breach of confidence. He submitted that the GI Writ had not yet been served and that it could be amended without leave at any time until the GI Writ has been served. Further, no Statement of Claim had been served. Therefore, the pleadings points carry little weight.
44. Third, Mr. Harshaw submitted that the ET 2020 Affidavit was not necessarily in the public domain as just being available on the internet does not necessarily put a document in the public domain. The ET 2020 Affidavit has not been widely circulated even though it is available on the DOJ website and Mr. Tamine is not so well known as the applicants in the celebrity cases, the RG itself describing him as a "nobody", thus his privacy as a litigant is still worthy of protection. He also relied on the case of *Green Corns Ltd. v CLA Verley Group Ltd.*¹⁹ in particular paragraphs 78 and 79, which were specifically approved by Lord Mance in *PJS v Newsgroup Newspapers Ltd.* where the judgment spoke about personal information and cases involving the vulnerable especially children and where Tugendhat J said "*information theoretically available from general public sources was not in the public*

¹⁹ [2005] EWHC 958 (QB)

domain". Mr. Harshaw submitted that the question for the Court is not whether information was generally accessible, but rather whether an injunction would serve a useful purpose.

45. Unsurprisingly, Mr. Harshaw submitted that it would as:

- (a) Subair Williams J considered the interests of justice were best served by the maintaining of confidentiality which outweighed any general public interest in the Trust Matter proceedings being available to the public, thus this Court should uphold the decision of a fellow judge of the Court;
- (b) The Plaintiff placed reliance on this in that he felt compelled to file the affidavit giving full and frank disclosure of personal details to assist the Court in the Trust Matter;
- (c) As the Bermuda Court regularly makes confidentiality orders in trust matters, there is a strong public interest reason for litigants to know that sealed court files would remain sealed unless the Court determines otherwise;
- (d) The integrity of the underlying trust litigation must be considered;
- (e) In equity, BPHL does not come to the Court with "clean hands", having defied the Court's order and it would be unconscionable for the Court to allow the RG's application to set aside the injunction;
- (f) The law in Bermuda is stronger than the English common law or as supplemented by the ECHR and UK Human Rights Act 1998 in that there is the constitutional right to the protection of the private lives of persons concerned in legal proceedings;
- (g) Section 9(2)(ii) of the Bermuda Constitution expressly provided for the independence of the Court and BPHL has challenged that authority of the Court when there is a pressing social need that Court orders be followed which is a fundamental principle of the rule of law. Thus the sealing of a Court file is a determination for the Bermuda Supreme Court to make, not a US Court or BPHL; and
- (h) Maintaining the injunction will ensure that the entire sealing of the case file is not undermined.

46. Fourth, Mr. Harshaw submitted that BPHL was seeking to relate the ET 2020 Affidavit with the Redacted Ruling but that there was no correlation. After giving some background to that litigation, Mr. Harshaw submitted that the purpose of the ET 2020 Affidavit was to be joined as a party to the Trust Matter proceedings for the purpose of setting aside the seriously adverse findings apparently made against him which resulted in that Court making the recitals it did in the order of 19 December 2019. He conceded that this Court and BPHL did not have sight of the confidentiality orders as they cannot be disclosed in these proceedings but paragraph 19 of the Redacted Ruling gives some light on the nature of the confidentiality order as it states “*On 5 November 2018, I granted the terms prayed on Plaintiff SJTC-JG’s ex parte summons for the Court file to be sealed and for these proceedings to be heard in camera. Additionally, I ordered that any judgment in this matter be anonymized to protect the identity of the parties. I shall refer to this as “the Confidentiality Order.”*” However, the bottom line was that the ET 2020 Affidavit was filed in the Trust Matter proceedings and it is on the Court file in those proceedings and that file is sealed. When the RG ran the story, it said plainly that it knew that it was a sealed affidavit.

47. Fifth, Mr. Harshaw submitted that Mr. Doughty was incorrect to submit that the European Convention on Human Rights trumps Article 8. Mr. Harshaw then relied on *PJS v Newsgroup Newspaper Ltd* where it stated in the headnote that even at an interlocutory stage, neither Article 8 nor Article 10 of the Convention had preference over the other. Mr. Harshaw then submitted that where the values of Article 8 and Article 10 appear to conflict, an intense focus was required on the comparative importance of the rights being claimed in the individual case, justifications for interfering or restricting each right being taken into account and a proportionality test applied. In respect of the public interest, Mr. Harshaw queried what is the public interest in the life of Mr. Tamine, as opposed to the public interest in the alleged tax evasion of Mr. Brockman. This was on the basis that the ET 2020 Affidavit was about Mr. Tamine’s employment over the past 15 years and not about any tax avoidance scheme.

48. Sixth, Mr. Harshaw submitted that in respect of the damages that Mr. Tamine received in settlement for the Australian matter, people settle for a variety of reasons but it does not

mean that the harm caused to a person is therefore quantifiable. In the present case, he submitted that Mr. Tamine cannot be compensated by damages as in Australia he had also required the withdrawal of the articles and an apology.

49. Seventh, Mr. Harshaw submitted that the Court is being asked to protect the integrity of its own process, that is, the affidavit which was sworn in sealed court proceedings which the RG knew and it did not matter how the RG obtained it. Further, the law must be applied equally no matter whether the exposing of a confidential document is done innocently, negligently or maliciously.

50. Eighth, in respect of the Redacted Ruling, Mr. Harshaw submitted that by the time that Ruling was delivered on 23 July 2020, there was no further purpose in preserving the anonymity of the parties given the public judgments delivered on 26 March 2020²⁰. Further, if the Trust Matter file is not sealed then the Court must say so, but the Court cannot pick and choose what is confidential within the Trust Matter proceedings.

Analysis of the Arguments

51. In my view, BPHL's application to set aside the interlocutory injunction should be denied for several reasons when considered against the criteria set out in *American Cyanamid Co. v Ethicon Ltd.*

Whether there is still a serious issue to be tried

52. First, I am of the view that there is still a serious issue to be tried despite the publication of the ET 2020 Affidavit that has taken place. By the agreed facts, the ET 2020 Affidavit was available on the DOJ website from where it was downloaded. It is without dispute, that for a small cost of downloading it, RG did download and hosted it on a related website. The enterprising journalism of Ms. Strangeways reveals her efforts to obtain the ET 2020 Affidavit.

²⁰ *St. John's Trust Company (PVT) Ltd. v Watlington* [2020] SC (Bda) 19 Civ and *Medlands (PTC) Ltd. v Commissioner of Police* [2020] SC Bda 20 Civ

53. However, in my view of the evidence, the ET 2020 Affidavit has not been widely available and Mr. Tamine is not a widely known person, certainly not of celebrity status. I take the view that this case is significantly different from the *Spycatcher* case where the book was available in countries other than the UK, UK people were bringing it back to the UK and various UK national newspapers were printing excerpts from it or from other newspapers about it. It seems to me on the evidence that: (a) there has not been much ado about the ET 2020 Affidavit in any event such that hordes of newspapers are trying to print it; (b) there has been no evidence for example that it has been widely circulated or making its rounds on social media; and (c) anecdotal evidence, if it exists, shows a wide readership when it was available. I also distinguish the present case from the *Attorney General v Bermuda Press Holdings Limited et al* where Bell J had relied on the fact of the cabinet memorandum in question being broadly in the public domain by virtue of it being featured on the evening news. To that point, in applying the principle set out in *PJS v Newsgroup Newspaper Ltd*, I do not think on the evidence in this case that the point has been reached or passed where it is unrealistic for this Court to continue the *Ex Parte* Order.

54. In light of those reasons, I am not satisfied that the confidentiality of the ET 2020 Affidavit has been lost by virtue of the rather limited publication. I have also considered the fact that the ET 2020 Affidavit remains available on an official US Government website for downloading for a small fee. This circumstance has not shifted me from my view that there is limited publication and that the confidentiality has not been lost as it seems to me that an ordinary reader would have to go to some lengths to access the version available on the official US Government website as it is not widely available on other sources. Therefore, whilst there has been some limited publication of the ET 2020 Affidavit to date, in my view, there is still a serious issue to be tried. To that point, it follows for me that the *Ex Parte* Order serves a useful purpose.

Whether Mr. Tamine will suffer irreparable harm that cannot be compensated for in damages

55. Second, in my view, Mr. Tamine has demonstrated to the Court that he will suffer harm that cannot be compensated by an award of damages. I note that Mr. Doughty relied on the test as referred to by Hargun CJ in *Brewster et al v Premier of Bermuda et al (No. 1)* in respect of it being a high bar established through evidence at a convincing level of particularity and demonstrating a high likelihood that harm will occur, not that it is merely possible. His point was that Mr. Tamine had failed this test. However, in that case, Hargun CJ was dealing with a constitutional application and had accepted that the relevant test in such cases was that established by the Privy Council decision in *Seepersad (a minor) v Ayers-Caesar* [2019] UKPC 7.

56. In respect of the test of whether an award of damages would be an adequate remedy, in *American Cyanamid Co v Ethicon Ltd* Lord Diplock referred to the “governing principle” as follows:

“the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.”

57. Mr. Tamine has given evidence that he received a settlement from *The Sydney Morning Herald* which was a monetary award but he also received a retraction of the stories and an apology. I am drawn to the initial reason why Mr. Tamine made an application to join the Trust Matter in the first place, which was because he wanted to address the adverse finds that were apparently made about him in those proceedings. Therefore, he took the position that he would give a full and frank account to the Court to establish his right to be joined

to the proceedings. In my view that was his duty to those Court proceedings once he decided to make his application.

58. I note that the RG has stated that personal details about Mr. Tamine’s family were not published. However, in the RG articles published 16 September 2021 (Exhibit “SS-1”), Ms. Strangeways wrote that Mr. Tamine was married to his Bermudian wife, lawyer Sophie Tod, and gave the name and addresses for their home where they lived with their children and another property owned by Ms. Tod. One article includes a picture of the home with a caption referencing the address. I have considered that Mr. Tamine makes various assertions about harm in Tamine 1 as follows:

- a. At para 9 that “... *but it is impossible to believe that anyone reading paragraph 205 through 215 of my 4 July Affidavit could be unaware of my Bermudian wife and her Bermudian family*”;
- b. At para 15 “*Given the serious ramifications and potential damage to my wife and children should an inaccurate report be published in Bermuda and online elsewhere, I instructed ... a London firm, to act on my behalf.*”;
- c. At para 26 “*Few publications understand the litigation; what they can understand are the malicious (I say) assertions made by the Plaintiffs which are yet to be adjudicated upon and which are highly damaging to me and my family*”; and
- d. At para 28 “*Should the Court decide that such personal information as my home address, my wife’s family details and other such private information is appropriate to be published in Bermuda.... Certainly, I will not be disclosing such information, as to do so might well put my wife and young daughters at risk.*”.

59. I am inclined to agree with Mr. Harshaw when he stressed that people settle for a variety of reasons but it does not mean that that the harm caused to a person is therefore quantifiable. In my view, in applying the governing principle, there is harm to Mr. Tamine, his wife and his children that cannot be cured by a monetary award, such harm including reputational damage to him as well as to his wife and children. If Mr. Tamine were successful at trial his remedies would likely be on similar lines as to *The Sydney Morning Herald* settlement.

Balance of convenience

60. Third, in my view, the balance of convenience favours Mr. Tamine. As a starting point, I accept Mr. Harshaw's submission about the pleadings. Mr. Tamine has the right at this stage to amend the pleadings without leave and can further amend with leave as the litigation progresses. On that basis, more causes of action can be added to the pleadings based on the current evidence. I am urged by Mr. Harshaw that I should not attach too much significance to the fine distinctions between breach of confidence and breach of privacy as set out by Mr. Doughty in stressing that only breach of confidence has been pleaded. On that basis, in my view, I am not inclined to attach much significance to the argument that Mr. Tamine has only pleaded breach of confidence at this early interlocutory stage. However, at the trial of this matter all the firepower unleashed by Mr. Doughty in this application can be deployed in arguing the final determination of the pleaded causes.
61. I have also considered whether the confidentiality order covers the ET 2020 Affidavit. Having considered the evidence before me at this stage, I am at this point sceptical about whether it does or does not. Clearly, there has been no agreement between the parties on this point. Although, Mr. Doughty forcefully listed a number of factors about the application of the confidentiality order to the ET 2020 Affidavit, in my view, that point remains to be determined at trial after further evidence and relevant disclosure. Putting aside public interests arguments for a moment, it would serve no useful purpose now to set aside the injunction only to find at trial that the ET 2020 Affidavit was covered by the confidentiality order. Of course, the counter argument can be made, however, in my view the balance tips to Mr. Tamine on this point.
62. I have considered the independence and integrity of this Court in that orders of the Court must be followed. I agree with Mr. Harshaw that there is a public interest in ensuring that the Courts are respected and that the rule of law prevails. In my view, if the ET 2020 Affidavit was indeed subject to the confidentiality order in the Trust Matter, then this Court should give full consideration at trial to ensure that its own integrity is respected, taking into account how the ET 2020 Affidavit got into the hands of the DOJ and that it has been published in a foreign jurisdiction.

63. I also recognise that the Court deals with trust matters on a routine basis, many of which attract confidentiality orders on a routine basis. Such orders are granted for a variety of reasons including protecting the identity of the parties, protecting minors who are affected by trust issues and protecting the facts about trust assets. Therefore, there is a public interest in ensuring that the orders of the Court in respect of trust matters remain confidential where confidentiality orders are issued. However, this case is slightly off that target in the respect that the ET 2020 Affidavit was filed in support of Mr. Tamine's application to join the Trust Matter, which was declined. The question begs whether the publication of the ET 2020 Affidavit undermines trust proceedings in general in Bermuda. In my view, this is not a matter for consideration at this interlocutory stage but one that can be addressed and resolved at trial.

64. I have considered that Mr. Tamine has constitutional protections and I have given full consideration to the position that BPHL has constitutional rights in freedom of expression. I recognise BPHL's main argument that the ET 2020 Affidavit is on a publicly accessed DOJ website and they have a right to access it legitimately and they have a constitutional right to publish it as they see fit, especially as it has lost its confidentiality. I have already ruled that in my view on the evidence it is not so widely circulated. Mr. Doughty argued that Mr. Tamine's application for an interlocutory injunction is a direct assault on the RG's right to freedom of expression. I do not agree in this case as Mr. Doughty also rightly acknowledged that freedom of expression is not an absolute right and the Court must take into account the balance of a number of other factors. In my view, at the interlocutory stage, the balance falls to Mr. Tamine as I am bound to give consideration to Mr. Tamine's reputation, his private life and that of his family in the various legal proceedings, preventing information which may be subject to a confidentiality order and maintaining the independence of this Court.

65. Mr. Doughty also forcefully argued that it was in the public interest that the nature of the unlawful tax evasion scheme was being run from Bermuda and how an old Bermuda house nearly became the headquarters for such a scheme. In my view, this is indeed a matter that supports the full publication of the events so that the Bermuda public and beyond could be

informed and understand how the various parties operated in Bermuda in the scheme. However, at this interlocutory stage, in applying the principles of *Commissioner of Police v Bermuda Broadcasting Co. Ltd* Mr. Tamine's interests trumps BPHL's interest in the freedom of the press to place the ET 2020 Affidavit before the Bermuda public. Thus, my initial view in this paragraph is dialled back such that balance falls to Mr. Tamine to keep the injunction in place until all the relevant issues are resolved at trial.

66. I have also considered the test as set out in *Defreitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*. In my view, and in answering the questions as posed by Mr. Doughty, first there is indeed a pressing social need to ensure that the orders of the Court are followed. I disagree with the answer posed by Mr. Doughty that this point is arguable given the lack of evidence that non-compliance with court orders presents a danger to the public interest. Lord Clyde in *Defreitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* stated that civil servants enjoyed a special position in a democratic society which was recognised by the existence of a special chapter in the constitution of Antigua and Barbuda underscoring the importance of the civil service in the preservation of public confidence in the conduct of public affairs. Likewise, in my view, the same can be said of the Judiciary in any country and their court orders. In Bermuda, the Constitution provides a chapter on the Judiciary and it follows that adherence to the orders of the Court is a bedrock of the rule of law in a democratic society. Second, in my view, maintaining the *Ex Parte* Order at this stage is rationally connected to that aim. Simply put, if the ET 2020 Affidavit is subject to the confidentiality order, an answer which can be determined at trial, then the *Ex Parte* Order should remain in place until such determination and further consideration at trial of the public interest. Third, in my view, the *Ex Parte* Order at this stage minimally impairs the RG's right to freedom of expression. I disagree that it is overly broad as it is directed at the contents of the ET 2020 Affidavit not the entire investigation into Mr. Brockman.

67. Fourth, Mr. Doughty submitted a number of other issues which he described as minor issues of law. I have given considerations to those minor issues and I am not satisfied to be moved from my current finding that the *Ex Parte* Order should remain in place until the trial of this matter.

68. In light of the above reasons, I am of the view that there still remains a serious issue to be tried, that there is a likelihood that Mr. Tamine will suffer irreparable harm that cannot be compensated for in damages and the balance of convenience falls in Mr. Tamine's favour at this interlocutory stage for the *Ex Parte* Order to remain in place.

Conclusion

69. For the reasons above, I decline to set aside the *Ex Parte* Order.

70. I further order that this Ruling not be published until further order subject to the views of counsel. Counsel's views were sought on 24 January 2022 and this Redacted Ruling dated 24 January 2022 is approved for publishing.

71. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis, to be taxed by the Registrar if not agreed.

Dated this 24th day of January 2022

**THE HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**