A3/2006/0168

Neutral Citation Number: [2006] EWCA Civ 294
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION
(MR JUSTICE WARREN)

Royal Courts of Justice
Strand
London, WC2

Wednesday, 22nd February 2006

B E F O R E:

LORD JUSTICE CHADWICK

LORD JUSTICE MOORE-BICK

MR JUSTICE LAWRENCE COLLINS

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HARRODS LTD

CLAIMANT/APPELLANT

- v -

TIMES NEWSPAPER LTD & ORS

DEFENDANT/RESPONDENT

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MR J PRICE QC & MR D PRICE (instructed by Messrs David Price, LONDON EC4Y 1AA) appeared on behalf of the Appellant.
MR A WHITE QC & MS H ROGERS (instructed by Messrs Finers Stephen Innocent, LONDON W1W 5LS) appeared on behalf of the Respondent.

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Judgment

1. LORD JUSTICE CHADWICK: This is an appeal from an interlocutory order made on 23 January 2006 by Warren J on an application made in proceedings brought by Harrods Limited. The trial is fixed to commence on 6 March 2006, with a time estimate of five to seven days. It is of obvious importance for the parties – and to the orderly conduct of business within the Chancery Division of the High Court – that the trial date should not be lost. The appeal has been brought on in this court with expedition.

2. The claim in the proceedings is for damages for breach of confidence. The breach alleged is the publication of information relating to Harrods' employment practices in the context of critical articles which appeared in the Sunday Times on 13 and 20 January 2005. The defendants are Times Newspapers Limited, which is the publisher of the Sunday Times, the journalist who wrote the articles and the editor of the newspaper.

3. The thrust of the articles was that Harrods, under the control of its chairman, Mr Mohamed Al Fayed, had treated its senior executives in a manner which was unacceptable. The defendants assert (among other defences) that publication of the information (if confidential, which is denied) was in the public interest. In particular, it is said that publication was justified in the public interest in that the information (i) corrected a false public image which Harrods had sought to foster; (ii) corrected false denials made by Harrods as to the circumstances in which senior executives had left its employment; and (iii) disclosed unlawful treatment by Harrods of its employees and its failure to follow good employment practices.

The application for disclosure

4. By a notice issued on 15 September 2005 the defendants applied for further disclosure of documents falling within six main categories. In the present context it is necessary to refer only to two of those categories. Category 2 comprises "Documents relating to the termination and cessation of the employment of directors or senior executives of claimant since 1990". Particulars of the documents sought were given under 12 sub-categories. Category 3 is "Documents relating to Richard Simonin: claim against the Claimant and its Chairman".

5. The application came before Master Price on 25 November 2005. The claimant took the point (amongst other points) that a defence based on public interest justification must be based on material which had been in the public domain at the time of publication. As it was put in the skeleton argument prepared on behalf of the claimant for use at that hearing:

> "It is not justifiable for person A to disclose confidential information regarding person B where information in the public domain does not of itself provide a public interest justification but person A nevertheless speculates that, if it was able to look through all person B's confidential information, the public interest justification might be found."

The Master took the view that that issue should be adjourned to a judge in the High Court.

6. The judge determined that issue against the claimant. It was on that basis that he ordered disclosure of documents set out in Schedule 1 to his order of 23 January 2006. Those are documents in ten of the twelve sub-categories under category 2, but restricted to documents relating to certain named individuals, the documents in category 3 and documents in one sub-category of category 6. There is no longer any dispute in relation to the category 6 documents.

7. The judge gave permission to appeal from his order; but limited that permission to an appeal on the single issue:

> "whether a defendant in a breach of confidence action is entitled to rely in support of a public interest defence upon information which was not known to the defendant at the time of alleged breach of confidence."

The appellant's notice, filed on 30 January 2006, seeks to raise two further grounds, which are closely allied to that issue. The appeal has been listed with an application for permission to appeal on those further grounds. In the event it was convenient to hear full argument on all the grounds in the appellant's notice.

The judge's reasons

8. The judge directed himself at paragraph 11 of his judgment – correctly in my view – that he should approach the application for further disclosure on the basis that the underlying question was what evidence would be admissible at the trial. He pointed out that:

> "… if evidence is admissible on the basis that you can rely only on matters that were known to you when you published material, there cannot be an obligation to make further disclosure. Conversely, if the evidence is admissible, a document which falls within the criteria for standard disclosure, or for specific disclosure if that is thought appropriate by the court, must be disclosed …"

9. After referring to passages in the speech of Bingham LJ in this Court in Attorney-General v Guardian Newspapers [1990] 1 AC 109, (the "*Spycatcher*" case), at page 222, the judge expressed his conclusion at paragraph 15 of his judgment:

> "As a matter of principle it seems to me that evidence, and therefore the obligation of disclosure, should not be limited as Mr Price suggests. The defence surely is a reflection of the policy that the public interest in knowing of iniquity or indulging in the same principle, as I have said, erecting a false public image, is capable of outweighing the private interest in confidence. It cannot affect that essentially objective balance whether the publicist actually knew all of the relevant facts to establish that balance

> – whether he knew it and revealed it all, whether he knew it and revealed some of it; or whether he did not know it all but discovered later. I can see no distinction between those three cases in terms of what it is in the public interest to know."

10. The judge went on to emphasise that the evidence (to be admissible) – and the disclosure sought – must be relevant to the defence that was advanced. So, for example, if the defence advanced was the public interest in correcting a particular image fostered by the claimant, the evidence (and the disclosure) must be relevant to that particular image. It would not be enough that it might, more generally, portray the claimant in a bad light.

11. With that approach in mind, the judge analysed the pleaded defence. He reached the conclusion (at paragraph 29 of his judgment) that the questions in issue in the action included (i) the circumstances surrounding the departure of the two senior executives named in the articles of 13 and 30 February 2005 – Mr Simonin and Mr Decouvelaere – (ii) whether the rate of departures amongst senior executives was exceptional, (iii) whether there was "a culture of fear" amongst senior executives at Harrods, and (iv) the circumstances surrounding the departure of other senior executives and senior employees named (by reference to a schedule) in paragraph 3 of the amended defence. The order for disclosure which he made on 23 January 2006 reflects that conclusion.

The issues defined by the pleadings

12. In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first, to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents relevant to those issues. And, in seeking to identify the factual issues which would arise for decision at the trial, the judge was plainly correct to analyse the pleadings. The purpose of the pleadings is to identify those factual issues which are in dispute and in relation to which evidence can properly be adduced. It is necessary, therefore, to have in mind the issues as they emerge from the pleadings and are relevant in the present context.

13. Paragraph 1 of the particulars of claim served and filed on 24 May 2005 contains allegations that the claimant, Harrods Limited, owns and operates the well known department store in Knightsbridge and that Mr Mohamed Al Fayed is the chairman of the claimant. That is not in issue. The defence, served on 18 April 2005, goes further. It is asserted that Mr Al Fayed is the beneficial owner and/or controller of the claimant company. The substance of that allegation was admitted in a schedule of admissions served on behalf of the claimant on 23 November 2005.

14. Paragraphs 1.5 and 1.6 of the defence are in these terms:

> "1.5 Mohamed Al Fayed is a man who has courted media attention. He is a figure in the public eye. He has portrayed himself through innumerable statements and interviews made and given to the media by him and on his behalf as an honourable man wrongfully and unfairly shunned by the

> establishment. In seeking to foster this image he has held out his ownership of Harrods and in particular his benevolence towards, and general approach to, the many people he employs at Harrods as creditable aspects of his life.
>
> 1.6 Further, Mohamed Al Fayed has repeatedly asserted to and through the media that the employees of Harrods are privileged to work there and are well-treated by him and content."

Particulars of those allegations are given, by reference to published material. The substance of those allegations is admitted; in particular it is admitted that the material on which the defence relies was published.

15. The allegations in paragraphs 1.5 and 1.6 provide the foundation for paragraph 2 of the defence:

> "2. By reason of the matters set out in paragraphs 1.5 and 1.6 above, the Claimant, acting, in particular, through Mohamed Al Fayed has fostered the public image that Harrods is a benevolent employer of fortunate, well-treated and contented employees."

That is not admitted. Whether or not the allegation can be made good will be for decision at the trial. But it cannot be said that the documents of which disclosure is sought are material in that context.

16. Paragraph 3 of the defence contains the allegation that:

> "In relation to at least senior executive employees of the Claimant the public image the Claimant has fostered is a false one."

It is alleged that the claimant has, in recent years, experienced an extraordinarily high rate of turnover of senior employees:

> "Since the early 1990s an unusually large number of directors and/or senior executive employees have ceased working for the Claimant as a result of dismissals, constructive dismissals and resignations."

Particulars of those senior executives are given in a schedule to which I have referred. Particulars of what is said to be an unprecedented, or at least highly unusual, rate of turnover of managing directors or chief executive officers are given in paragraph 4 of the defence. In response to those allegations the claimant has served a schedule of departing directors and/or senior executive employees, with the dates of their departure. There are some differences (but not many differences) between that schedule and the schedule annexed to the defence. It seems unlikely that there will be any real dispute, at trial, as to the identity of those who have left Harrods' employment in the past five years, or when they left. There may be an issue whether the number is "unusually large" or whether the

rate of turnover of managing directors or chief executive officers is "unprecedented or at least highly unusual". But that is not an issue in relation to which the documents sought are likely to be material.

17. The documents sought are likely to be material, however, to an investigation of the circumstances in which senior executives left the claimant's employment. In particular, whether they did so as a result of dismissal, constructive dismissal or resignation. And that investigation is likely to be relevant to the allegation in the first sentence of paragraph 3 of the defence: that, in relation to senior executive employees (at least), the public interest of Harrods as "a benevolent employer of fortunate, well-treated and contented employees" is false.

18. Paragraphs 5 and 6 of the defence are in these terms (so far as material):

> "5. Mohamed Al Fayed and the Claimant acting by Mohamed Al Fayed have provided explanations to and through the media to the public for the extraordinarily high rate of turnover of senior executive employees at Harrods, denying that there is anything unusual or untoward about the rate of departure of such employees.
>
> "6. By reasons of the matters set out in paragraph 5 above Mohamed Al Fayed and the Claimant acting by Mohamed Al Fayed have publicly denied that there is anything unusual or untoward about the rate of departure of the claimant's senior executive employees. Those denials were false."

Particulars of the statements relied upon in support of the allegation in paragraph 5 of the defence are given. It is submitted that those statements were made.

19. Whether or not the public statements made by Mr Al Fayed are to be taken as a denial that there is anything unusual or untoward about the rate of departure of the claimant's senior executive employees turns on the contents of those statements. There is no reason to think that the documents of which disclosure is sought will be material to that issue. But it is, at the least, likely that documents which reveal circumstances in which senior executives left the claimant's employment will be relevant to the issue whether (if made) "those denials were false".

20. Paragraph 7 of the defence refers to employment legislation; in particular to the statutory right not to be unfairly dismissed and the obligation on an employer to comply with good employment practice and to establish and follow fair procedures in relation to the termination of the employment of its employees. That is not in issue. But the paragraph goes on to allege:

> "The manner and circumstances of the dismissals of Richard Simonin (Chief Executive Officer) and Eric Decouvelaere (Retail Director) described in the articles complained of … were obviously unfair and,

> accordingly, those dismissals were unlawful and were not in accordance with good employment practice."

Documents which reveal the manner and circumstances in which Mr Simonin and Mr Decouvelaere were dismissed are, plainly, relevant to the question whether those dismissals were unfair (and so unlawful) and not in accordance with good employment practice.

21. Paragraph 8 of the defence asserts that the claimant gave to its employees a duty to treat them fairly, to respect their dignity and not to use foul or abusive language towards them. The duty not to engage in conduct likely to undermine trust and confidence is admitted. The paragraph goes on:

> "The treatment by Mohamed Al Fayed of the Claimant's employees, the culture dominated by fear and insecurity, and in particular the sending by Mohamed Al Fayed of the memorandum to Richard Simonin and Henk Cohen in July 2003, as described in the articles complained of … involved breaches by the Claimant of this duty."

The documents of which disclosure is sought are likely to be relevant to an investigation of "the treatment by Mohamed Al Fayed of the Claimant's employees" – and, perhaps, also to the existence, or otherwise, of a "culture dominated by fear and insecurity".

22. Paragraph 9 of the defence refers to statutory disciplinary and grievance procedures which, as it asserts, were not followed in relation to the dismissal of Mr Simonin and Mr Decouvelaere. The existence of statutory disciplinary and grievance procedures – which, it is said, reflect pre-existing good employment practice – is admitted. In the present context, paragraph 9 of the defence adds little to paragraph 7.

23. Paragraph 10 of the defence is in these terms:

> "The identities of the senior executives responsible for the running of Harrods, the extremely high rate of turnover of senior executive employees at Harrods, the treatment by the chairman and Mohamed Al Fayed of Harrods employees, and the compliance by the Claimant and Mohamed Al Fayed with employment law and good employment practice, are all matters of public interest."

24. I return to the particulars of claim. Paragraph 2 pleads that the first and third defendants are respectively publisher and editor of the Sunday Times and that the second defendant is a journalist who works for the first defendant. None of that is in issue. Paragraph 3 asserts that, on a date unknown to the claimant, the defendants were provided with confidential information about the claimant by current or former employees of the claimant. Particulars of that information ("the Confidential Information") are given. It is said to comprise:

"3.1 Extracts from an internal memorandum sent by Mohamed Al Fayed to Richard Simonin and Henk Cohen;

"3.2 The proceedings of an extended board meeting which took place on 28 January 2005 – including information about the attendees and an announcement made by Mohamed Al Fayed;

"3.3 The manner and circumstances of Richard Simonin's departure from the Claimant;

"3.4 The manner and circumstances of Eric Decouvelaere's departure from the claimant;

"3.5 The contents and various internal memorandums sent by Mohamed Al Fayed to employees in recent months;

"3.6 The contents of an internal memorandum sent by Mohamed Al Fayed to a member of the Claimant's human resources department;

"3.7 The contents of an internal memorandum sent by Mohamed Al Fayed to the IT department and to directors of the Claimant – including the issues surrounding the Claimant's cash till problems and the quality of the claimant's IT systems;

"3.8 The amount of money spent on security for Harrods;

"3.9 Named directors of the Claimant being paid over the market rate;

"3.10 The approach to Vittorio Radice as a replacement for Richard Simonin."

It is important to keep in mind that it is the publication of that information that is the subject matter of the claim in these proceedings.

25. Paragraph 4 of the particulars of claim contains the allegation that the defendants knew or ought to have known that the information was confidential and "in consequence were under a duty of confidence to the claimant not to publish the information." Particulars of the confidential nature of the information and the defendant's knowledge of that confidentiality are given. Paragraphs 5, 6 and 7 contain particulars of the publications complained of: the first and second in two articles in the 13 February 2005 edition of the Sunday Times and the third in the edition of 20 February 2005. Paragraph 8 is in these terms:

> "The articles disclosed the Confidential Information and were published in breach of confidentiality owed by the Defendants to the Claimant."

Paragraph 9 asserts that, in consequence of the publication of the confidential information, the claimant has suffered loss and damage. No particulars of special damage are given; and on the face of this pleading special damage is not alleged. We were told by counsel that the claimant is concerned to establish a principle rather than to recover substantive damages. Paragraph 11 contains the assertion that, unless restrained by injunction, the defendants will publish or cause or authorise to be published the same or similar breaches of confidence.

26. Publication is admitted in paragraph 11 of the defence. It is admitted that the defendants obtained the information published in the articles complained of; but it is not admitted that the information was confidential. That is an issue which will have to be resolved at trial; but it is not an issue which is material to any question before this Court on this appeal.

27. Paragraph 13 of the defence is expressed to be in answer to the allegation of paragraph 4 of the particulars of claim that the defendants were under a duty not to publish the confidential information. Paragraph 13.1 contains the general denial that the defendants were under any duty of confidence to the claimant not to publish the information contained in the articles of 13 and 20 February 2005. Paragraph 13.2 is of particular importance in the context of this appeal:

> "If, which is denied, any of the information published in the article as complained of was confidential, the Defendants were entitled, in the exercise of their rights of free expression under Article 10 of the Convention, to publish the same:-
>
> "13.2.1 to correct the false public image fostered by the Claimant acting by Mohamed Al Fayed referred to in paragraphs 1.5, 1.6 and 2 - 4 above; and/or
>
> "13.2.2 to correct the false denials that there was anything unusual or untoward about the rate of departure of the Claimant's senior executive employees referred to in paragraphs 5 - 6 above; and/or
>
> "13.2.3 to disclose the unlawful treatment by the Claimant of its employees and/or the failure by the Claimant to follow good employment practices, referred to in paragraphs 7 - 9 above; and/or
>
> "13.2.4 in the public interest."

It is not clear – at least to me – what, if anything, sub-paragraph 13.2.4 adds to the three sub-paragraphs which have gone before; save, perhaps, to emphasise that it is the defendants' case that publication for the purposes set out in those three sub-paragraphs is in the public interest.

This appeal

28. The appellant's notice, filed on 30 January 2006, seeks to rely on three grounds of appeal. These are set out in section 7:

> "1. The learned Judge wrongly held that a defendant in a breach of confidence action is entitled to rely in support of a public interest defence on matters not known to the defendant at the time of the disclosure which is alleged to have been made in breach of an obligation of confidence binding on the defendant.
>
> "2. The matters, in relation to which disclosure of documents was ordered by the order appealed against, that is, primarily the circumstances in which some 60 directors or senior executives left the Claimant's employment between 1990 and 2005, are not relevant to the public interest defence, because
>
> (a) those matters were not known to the Defendants at the time they published the confidential information which is the subject of this action and/or
>
> (b) those matters are not relevant to the truth or falsity of the confidential information allegedly disclosed by the Defendants in breach of an obligation of confidence, which was known to them at the date of publication, and in any event, the truth or falsity of confidential information which is the subject of the action is not in issue.
>
> "3. The learned judge wrongly proceeded on the basis that it is a material issue in the action whether the Defendants' general thesis, that the Claimant has for years failed to comply with employment law and good employment practice, and has fostered a false public image in that regard, is true or false. That is not an issue, because the claimant has not complained of publication of that general thesis. The complaint relates to precisely defined items of confidential information, principally contained in internal memoranda, as to which (a) disclosure of documents has been given, and (b) there is no issue as to truth of falsity."

29. The permission to appeal granted by the judge is limited to ground 1. Ground 2(a) seems to add nothing to ground 1. It is, I think, common ground that the circumstances in which some 60 directors or senior executives left the claimant's employment between 1990 and 2005 were not known to the defendants at the time they published the confidential information which is the subject of this action; and, if not known, then (if ground 1 is made out) those circumstances will not be relevant to the public interest defence. Nor, as it seems to me, is ground 2(b) of any relevance. It is true that the circumstances in which some 60 directors or senior executives left the claimant's

employment between 1990 and 2005 is of no relevance to the truth or falsity of the information published (so far as that is the information which is the subject of the claim to breach of confidence). And it is true that the truth of that information is not in issue. But the judge did not order disclosure on the basis that the information sought was needed to assist in establishing the truth of the information published. So I would not, myself, give permission to appeal on ground 2.

30. Ground 3 is, I think, of substance. The appellant is correct to identify that it is "the defendants' general thesis" that "the Claimant has for years failed to comply with employment law and good employment practice, and has fostered a false public image in that regard". That is made explicit in the first sentence of paragraph 3 of the defence – "In relation at least to senior executive employees of the Claimant, the public image the Claimant has fostered is a false one" – and in the second sentence of paragraph 6 – "Those denials were false". The allegations of falsehood made in those sentences are reflected in the points of defence pleaded in paragraph 13.2.1 – "to correct the false public image fostered by the Claimant" – and in paragraph 13.2.2 – "to correct the false denials that there was anything unusual … about the rate of departure of the Claimant's senior executive employees". The appellant is correct, also, to assert that the judge proceeded on the basis that it was a material issue in the action whether the defendants' general thesis was true or false. But the judge cannot be criticised for that. In the absence of any pleaded reply, that was an issue on the pleadings. There had been no application to strike out the allegations of falsehood on the basis that they were unnecessary and so likely to distort or prejudice the proceedings at trial.

31. The point now taken – that the claimant has not complained, in these proceedings at least, of the general thesis – was not taken before the judge; or, if it were, it was taken in terms which led the judge to address it. But it is taken in the grounds of appeal (subject to permission being granted). It is put succinctly in the appellant's skeleton argument:

> "It is critically important to notice that there cannot be an issue in this action as to the truth of the general thesis advanced in the *Sunday Times* articles or in the Defence. Subject to the laws of libel, the Defendants are quite entitled to publish such a thesis, and [the Claimant] has not complained that publication of that thesis is a breach of the obligation of confidence, nor could it."
> …
>
> So far as concerns the alleged public interest in exposing the [Claimant's] alleged conduct in fostering a false public image, the public image defence is as straightforward as could be: the court will have to look at the public statements made by the [Claimant] or on its behalf, and at the material in which confidence is claimed, and judge whether the confidential material contradicts the public statements, and should for that reason be published in the public interest …"

There is, as it seems to me, much force in that point.

32. The respondents, through their counsel, were invited to consider whether they did need to pursue the allegation of falsity pleaded in relation to the public image and the denials; on the basis that, if they could otherwise succeed in their public interest defence, they could succeed without needing to establish that additional element. Counsel declined to amend the pleaded case. He was concerned, I think, that it might be necessary to prove the falsity of the public image – and of the denials – in the light of the observation of Lord Nichols of Birkenhead in Campbell v MGN Limited [2004] UKHL 22, [24], [2004] 2 AC 457, 467*D* that:

> "As the Court of Appeal noted, where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight."

It is pertinent to have in mind, however, that the question whether or not the image presented by the claimant in Campbell was false was not in issue before the Court of Appeal or in the House of Lords. The claimant, in that case, accepted that it was.

33. It is ironic that, on this appeal, counsel for the defendant newspaper is anxious to persuade the Court that he will need to establish at trial that his client's general thesis is correct – so accepting, in effect, the burden of a "justification" defence – while counsel for the claimant contends that the defendant can succeed without the need for the defendant to shoulder that burden. In the event it is unnecessary for this Court to determine which view is correct. Counsel for the claimant undertook on behalf of his client that the claimant (without making any admission that the allegations of falsity contained in the first sentence of paragraph 3 of the defence, the second sentence of paragraph 6 and in paragraphs 13.2.1 and 13.2.2 were or could be established) would not require those allegations to be proved at trial. We are content to proceed with the appeal on that basis. The undertaking is to be recorded in the order which this Court will make.

34. On the basis that the truth or falsity of what has been described as the defendants' general thesis will not be in issue at the trial, the order for disclosure which the judge made can no longer be supported on the ground that disclosure was necessary or relevant in that context. I should make it clear, however, that (subject to the question whether the defendants are confined to what they knew at the time of publication) I am not persuaded that the judge was wrong to make the order that he did on the case that was presented to him. The case has been altered in this Court by the undertaking that the claimant is now prepared to give.

35. It remains necessary to consider whether an order for disclosure is appropriate in the context of the third limb of the public interest defence – that of disclosing iniquity in relation to the requirements of employment law.

36. The foundation of this defence is to be found in the observation of Sir William Page Wood, Vice-Chancellor, in Gartside v Outram [1856] 26 LJ Ch 113, 114, that:

> "The true doctrine is, that there is no confidence as to the disclosure of iniquity."

The plaintiffs in that case were wool brokers. They sought an injunction against the defendant, their former sales clerk, to restrain him from disclosing to others extracts which he had copied from their books. His defence was that the plaintiff's business was conducted in a fraudulent manner – in that they took a secret profit on consignments which they received from their customers. The defendant had disclosed the practice to one customer, Messrs Rathbone, who – on the strength of the defendant's evidence – had obtained an arbitration award of £1,500 against the plaintiffs. The object of the injunction was to prevent disclosure to other customers. The defendant sought to administer interrogatories, seeking answers which would support his defence of fraudulent practice.

37. The Vice-Chancellor said this, at pages 114 - 115:

> "It is not a general, wild and roving case. He says, he has given information to some parties who have by legal proceedings recovered in respect of it … He says, in consequence of my communications made as to these frauds, Messrs Rathbone, in that arbitration which took place, got £1,500 awarded against you as the amount of the frauds you so committed; and that sum was recovered by Messrs Rathbone, upon my evidence and my disclosures, and there are numerous other cases of the same character.
>
> …
>
> Now, the question is whether, supposing the case so averred by the answer, definite and precise in all particulars, to be proved or admitted, the plaintiffs are entitled to say that there shall be an injunction to restrain the defendant from making a disclosure which may enable others to recover, as Messrs Rathbone have done? I hold that it is a good defence if those facts are made out; and if that is a complete defence, it follows as a necessary consequence that he is entitled, in support of his defence, to extract from the plaintiffs that information which may enable him to make out a case so averred and so definitely propounded."

And he concluded at page 115:

> "There is the property of the employer in those secrets of his business which he is obliged to communicate to others, and which are not to be trifled with. It is a sacred and solemn deposit, but there is no property in these transactions with this gentleman which were of the character I have been describing, and in his answer he has made no disclosures except as to these fraudulent transactions. If he makes out that case set forth by his answer he will make out a very good case for resisting this injunction, and therefore the plaintiffs must enable him, as far as they can by any

knowledge in their possession, to arrive at the discovery."

38. The respondents rely on that case. They are right to do so, but it is important to understand what the Vice-Chancellor decided. First he decided that equity would not protect a right of confidence where confidence was invoked to shield iniquity. Second, he decided that the defendant had shown solid grounds to support his assertion that the confidence which the plaintiffs sought to invoke – in a suit to restrain him from publishing information – was a confidence invoked to shield iniquity. And, third, he decided that the defendant was entitled to disclosure (in the form of answers to interrogatories in that case) in order to make good that case at a trial. But he did not decide that the defendant was entitled to a roving enquiry into the plaintiff's business practices. The inquiry was linked to the relief which was sought against him. The width of the inquiry reflected the width of the relief sought by injunction.

39. In my view the judge was entitled to make the order for discovery which he did make in the present case in the circumstances that the relief sought against the defendants included an injunction to restrain them from publishing, in the future, "the same or similar breaches of confidence". The basis for that order, as it seems to me, is that defendants are not to be restrained from publishing information in the future – which, as they contend, will not be protected by confidence because confidence cannot be invoked to shield iniquity – without first having the opportunity to establish (through the process of discovery in litigation) that they would be able to make good that defence at a trial. That, as it seems to me, is consistent with the approach of Vice-Chancellor Page Wood in Gartside v Outram.

40. Faced with that difficulty, the claimant seeks to limit the relief sought by injunction. It seeks to amend the prayer for relief so as to claim only an injunction to restrain publication of the same confidential information.

41. Although we have heard no argument on the point, it seems to me that an injunction to restrain future publication of the same information – that is to say, information which is already in the public domain by reason of the publication which has taken place – can serve no useful purpose. I find it difficult to see circumstances in which a court would think it appropriate to grant such an injunction in the present case.

42. Be that as it may. If the claim to restrain future publication of information other than that which has already been published is abandoned, I can see no need for disclosure of documents beyond those relevant to establish the defence to the injunctive relieve now sought; that, to invoke the protection of confidence in relation to the information which has already been disclosed (the information set out in paragraph 3 of the particulars of claim), would be to invoke that protection to shield from public view the iniquity pleaded in paragraph 13.2.3 of the defence. In my view, that purpose can be served by restricting the documents to be disclosed to those relating to Mr Simonin and Mr Decouvelaere.

43. It is on that basis that I would allow the appeal and vary the order of 23 January 2006 accordingly.

44. LORD JUSTICE MOORE-BICK: I agree that the judge's order should be varied in the manner indicated by my Lord Chadwick LJ for the reasons that he has given.

45. MR JUSTICE LAWRENCE COLLINS: I also agree and I would only add that this case illustrates the importance of defining the real issues at the earliest possible stage and the consequences of failure to do so.

Order: Appeal allowed.