Neutral Citation Number: [2023] CA (Bda) 28 Civ

Civil Appeal No. 50 of 2022

IN THE COURT OF APPEAL OF BERMUDA (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING
IN ITS CIVIL JURISDICTION
BEFORE THE HON. MR JUSTICE MUSSENDEN
CASE NUMBER 2021: NO. 303

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

BERMUDA PRESS (HOLDINGS) LIMITED

Appellant

-v-

EVATT TAMINE

Respondent

Ms Heather Rogers KC, Mr. Allan Doughty and Ms Safia Gardner of MJM Limited for the Appellant

Mr Adam Speker KC, Mr. Paul Harshaw of Canterbury Law Limited for the Respondent

Hearing dates: 6 and 7 June 2023
Date of Judgment: 13 December 2023

APPROVED JUDGMENT

CLARKE, P

1. Mr Robert Brockman ("Mr Brockman") was, at the time when the orders at issue in this case were made, a man in his eighties (he died on 5 August 2022), who stood accused in the United States of what the prosecution claimed was a "*decades long scheme*" to conceal about US $ 2 billion from the US Internal Revenue Service. In October 2020 a Grand Jury returned a 39-count indictment against him, including charges of tax evasion, wire fraud, money laundering and other offences. On 15 October 2020 he entered a plea of not guilty. He is alleged to have set up secret bank accounts in Bermuda and Switzerland with estimated assets of over $ 6 billion. The prosecution described the case as the "*largest ever charge against an individual in the United States*". Mr Brockman and his alleged fraud were a matter of public interest and widely reported.

2. Mr Evatt Tamine, the respondent ("Mr Tamine"), is an Australian, who was called to the Bermuda Bar. He worked for Mr Brockman in respect of the A. Eugene Brockman Charitable Trust ("the Brockman Trust"), and various other structures connected with Mr Brockman, from 2001 until September 2018. The Brockman Trust was a trust set up by Mr Brockman in May 1981. The beneficiaries of the Trust were Mr Brockman and other members of his family and "*any organization qualifying as a charitable organisation under the laws of Bermuda, the United States or Great Britain*". It appears that significant distributions have only been made in furtherance of charitable activities.

3. In 2003, with a view to obtaining a work permit, Mr Tamine set up Tangarra Consultants Limited ("Tangarra"), a Bermuda company, which employed him. He moved to Bermuda in January 2004 formally to begin his new role working for Mr Brockman. In around October 2020 Mr Tamine gave evidence in support of the prosecution case before a Grand Jury in the United States.

4. Bermuda Press (Holdings) Limited is the publisher of the Royal Gazette newspaper. I shall refer to it hereafter as "the Gazette". On **16 September 2021** the Gazette published four articles ("the Articles") in both its online and print editions. The two most significant articles were entitled *"Secretive billionaire accused of one of biggest tax crimes in US history – and the 'nobody' he employed*" and "*Lawyer is key witness in largest ever US*

tax evasion case". These provided some previously unreported details concerning Mr Tamine's dealings with Mr Brockman. The Articles in part summarised some of the contents of an affidavit (hereafter referred to as "the Tamine Affidavit") which Mr Tamine had sworn on **4 July 2020** in certain confidential Trust proceedings (referred to as the "Administration Proceedings") in the Supreme Court of Bermuda entitled "*In the matter of the B Trust*", which were started on **2 November 2018**, in which the judge had ordered the court file to be sealed.

5. We do not have a copy of the sealing order but it appears from what Subair Williams J stated at [19]-[20] of her judgment of 23 July 2020 in *Medlands (PTC) Ltd v The Attorney General, RTB & Ors* [2020] SC (Bda) in Action 2018 /376 that on **5 November 2018** she ordered that the Court file be sealed and that the proceedings be heard in camera. She also ordered that any judgment be anonymized to protect the identity of the parties. She referred to this as "*the Confidentiality Order*". The effect of such an order is that information cannot, without further order, be obtained from the file of the court in that case. There is an issue as to the impact, if any, of that order in respect of the Tamine Affidavit.

6. Subair Williams J also made an order authorising proceedings in Bermuda against Mr Tamine and Tangarra for the delivery of trust documents and the recovery of trust assets. An action was commenced in England soon afterwards. In June 2019 the Bermuda court sanctioned the co-prosecution of the claim by Spanish Steps Holdings Ltd, an indirect subsidiary of SJTC [see below], for the recovery of US $ 16.8 million.

7. The proceedings in which the Tamine Affidavit was filed were originally entitled *St John's Trust Company (and another) v The Attorney General (and others)* and numbered 2018/376. St John's Trust Company ("SJTC") was then the Trustee of the Brockman Trust. SJTC is a company indirectly owned by Mr Tamine. From 2013 to 23 June 2017 Mr Tamine was its sole director. On 23 June 2017 Mr James Gilbert, a Grand Cayman resident, became a director also. On 28 September 2018 Mr Tamine resigned as a director.

8. The Tamine Affidavit was filed in support of an application made by Mr Tamine to be joined as a party to the proceedings in the Supreme Court, the purpose of which was said to be to set aside seriously adverse findings that had been made against him in the

proceedings, on the basis of allegations made against him in those proceedings, which he said were untrue. Mr Tamine also sought access to the Court file and to be joined as a party to SJTC's appeal against orders made on **1 November 2019** and **19 December 2019** removing SJTC as trustee, and replacing it with Medlands Limited, a company owned by Mr Gilbert[1].

9. The order of 19 December 2019 ("the December Order"), which resulted from these findings which had only been seen by Mr Tamine in redacted form, is referred to at paragraphs [38] - [40] of the judgment of 14 December 2020 of Chief Justice Hargun in *SJTC v Watlington & Ors* in Action 2019 No 446 as follows:

> *"38* Recital (3) records that: *"**And Upon** the Court being of the opinion that the Plaintiff [SJTC] is not, in the circumstances set out in the evidence (including in light of the issues arising in the proceedings 2019: No. 447 [the injunction proceedings]), a proper and appropriate candidate for appointment as trustee of the B Trust and that any new trustee should be an entity unrelated and unconnected to Mr Evatt Tamine..."*
>
> *39.* Paragraph 15 records that *SJTC was not validly appointed and acted as trustee de son tort:*
>
> > *"The Plaintiff, as trustee de son tort, had the standing to issue the July Summons and the December Summons and seek the relief set out therein (subject to recital (1) above."*
>
> *40.* Paragraph 18 appoints Medlands as successor trustee: *"Pursuant to section 31 of the Trustee Act 1975 and the inherent jurisdiction of the Court, the Fourth Defendant [HSBC Private Bank (C.I.) Limited, the last validly appointed trustee] is hereby discharged as a trustee of the B Trust and replaced as trustee by Medlands on the terms set out below."*

10. In the event the Court of Appeal dismissed the appeal by SJTC against these orders in a judgment handed down on **22 December 2021**, following an oral indication of the result on **2 February 2021**. Mr Tamine as the Intervening Respondent was represented at the hearing. The Court of Appeal ordered that Medlands should be discharged as Trustee and replaced by BCT Limited, with effect from a date and on such terms as might be directed by Subair Williams J.

---

[1] Justice Subair Williams appears, according to paragraph 61 of her judgment in *Medlands v The Attorney General & Ors* [2020]SC (Bda) 30 Com (23 July 2020), to have made a further direction in December 2019 that the Court file be sealed from public access, including access by SJTC.

11. In those circumstances Mr Tamine's application would appear, for all practical purposes, to be spent. In its judgment the Court of Appeal concluded that "*SJTC had been effectively removed as trustee of the Brockman Trust by the 19 December 2019 Order and had become a stranger to the Trust having no further right of audience or relief thereafter in the Administration Proceedings. SJTC could not therefore properly invoke the jurisdiction of this Court on an appeal from those proceedings for the vindication of personal rights to a fair hearing which it claims were breached in those proceedings for want of effective representation in them –a claim which, in any event, was found to have no basis in fact*" [73].

12. The Tamine Affidavit had been filed by the US Department of Justice ("DoJ") in the United States District Court for the Southern District of Houston. The Gazette had downloaded this affidavit from a US Government website which provides public access to Federal Court electronic records – the "docket" of documents filed in Court. Its name and address are publicly known and accessible to those who know of it.

13. The circumstances in which the Tamine Affidavit came to be filed in the District Court are as follows:

    (1) Tangarra – as noted above, a company established by Mr Tamine and of which he was shareholder – applied on **July 20 2021**[2] to strike all references to Tangarra from the indictment against Mr Brockman on the footing that it was not involved in the underlying allegations in the indictment. In its response to that application on **10 August 2021**[3] the DoJ deployed the Tamine Affidavit, which, it submitted, showed that Tangarra was closely aligned to Mr Brockman, was formed as an accommodation for him, and that Mr Brockman made all substantive decisions regarding Mr Tamine's management of Mr Brockman's offshore entities. Tangarra then requested that the US Court strike, or place under seal, the Tamine Affidavit[4]. The United States opposed[5] and Tangarra replied.[6] All these documents seem to

[2] ROA 2/23/422. References hereafter are to the tab and page number only.
[3] 14/190-196; 23/422.
[4] 21/411
[5] 23/422
[6] 24/437

have been filed on **17 September 2021**[7].

(2) On **23 August 2021**, lawyers acting for Mr Tamine (Canterbury Law Limited; Mr Paul Harshaw) wrote to the Department of Justice in the US Proceedings to ask that the Tamine Affidavit be "*removed from the public domain*" and that it be made a sealed appendix to the DoJ's opposition to the Tangarra application[8]. But it was not.

14. The proceedings before the US Court explain how the Tamine Affidavit came to be before it. It appears[9] that it was sent by Matt Herrington of Paul Hastings, an international law firm handling white collar crime, which was Counsel for SJTC, the then Trustee of Mr Brockman's Trust, to Mr Corey Smith, Senior Litigation Counsel in the Tax Division of the DoJ on **8 July 2020**. On **January 12 2021** Mr Herrington, when asked by Mr Smith whether the pleadings to replace the trustee (i.e. the 2018/376 proceedings) were under seal, replied that they were not.

15. On **16 September 2021** there was email correspondence between Mr Smith and Mr Herrington [10] in which Mr Smith reported that Mr Rauser, an attorney who claimed to act for Tangarra, had claimed that the Tamine Affidavit was sealed by the Court in Bermuda, but, Mr Smith said, he had found no evidence of that. Mr Smith said that he had repeatedly asked Paul Harshaw in Bermuda for evidence of an order or judgment showing that the Tamine affidavit was sealed by the Court in Bermuda. None had been provided; nor was there any indication in the petition in those proceedings or the Tamine Affidavit that it was sealed. And, when copies of the Tamine affidavit had been provided, there was no indication that it was sealed either. And on January 12 2021 he had (see above) specifically asked Mr Herrington if the proceedings were sealed to which the answer was "*not sealed*".

16. To this Mr Herrington replied that he had asked the wrong question of his Bermuda co-counsel, when responding to Mr Smith's email in January. He had asked whether "*this*

[7] 15/335 or 22/411
[8] 22/417-418.
[9] See 23/428
[10] 24/443

particular document" (presumably meaning the pleadings to replace the Trustee) was under seal while not being aware that the entire file was under seal. So, it would appear that the transfer of the Tamine Affidavit occurred in circumstances where the transferor – Mr Herrington -had failed to appreciate the existence of the Confidentiality Order.

17. Samantha Strangeways, a journalist working for the Gazette, obtained a copy of the Tamine Affidavit from the US Court Website on **4 September 2021**[11]. Ms Strangeways had been interested in the Brockman investigation in the USA, not least because of the connection with Bermuda. Before obtaining the Tamine Affidavit, she had interviewed Sophie Tod (Mr Tamine's wife) on **2 September 2021**. From **9 September 2021**, Ms Strangeways was in communication with Mr Tamine, mainly through his lawyers[12]. She outlined the questions she wished to ask him. In the event, no interview took place. Instead, on **13 September 2021** Canterbury Law Ltd on behalf of Mr Tamine wrote to the Gazette to say that they were instructed to seek an injunction against the Gazette to restrain it from publishing an article that was believed to contain defamatory accusations[13]. Ms Strangeways was the author of the Articles which were published on 16 September 2021.

18. The Gazette made the whole of the Tamine Affidavit available to the public by a hyperlink in the Articles to a website of the Gazette.

19. Mr Tamine contends that the Tamine Affidavit should never have been filed in the US Court. On **17 September 2021** (the day after publication of the Articles), Tangarra applied in the US Proceedings, by an emergency motion, to strike the Tamine Affidavit from the record or place it under seal[14]. The motion observed [15] that it was "*perhaps inevitably*" that a "*media outlet*" should have *"accessed the copy of the sealed affidavit filed on this Court's docket and reported on its contents"*. In his affidavit in support of his application for an injunction in Bermuda Mr Tamine referred to the application in Houston as "*pending*". The motion was resisted by the DoJ.

[11] Strangeways 1 at [11- 13] 9/117
[12] 4/21-45, 16/349-359
[13] 4/27.
[14] See Strangeways 2 at [4.1] 21/407; the motion is exhibited at SS-10 22/411-413.
[15] 22/41

20. On **23 September 2021**, the day before the hearing of Mr Tamine's application for injunctive relief against the Royal Gazette, Judge George Hanks Jr of the Houston Court denied the application to seal the Tamine Affidavit. His order notes that the motion to seal "*fails to establish any compelling need to deny public access to these pleadings*". That that had happened was not, however, something which the Bermuda Court was told on 24 September 2021. What the Court was told, by Mr Lynch for Mr Tamine, was that "*we are actively, through American lawyers seeking to have* [the Tamine Affidavit] *put under seal*".[16] Apparently Mr Tamine only found out about the order of the US Court after the injunction had been granted in Bermuda. That Judge Hanks' order, made on an application which Mr Tamine had brought, was not put before the judge in Bermuda was profoundly unsatisfactory.

21. In the afternoon of **24 September 2021**, the Honourable Mr Justice Mussenden (Mussenden J) heard an *ex parte* application on the part of Mr Tamine for an order requiring the Gazette;

(a) to remove from the Articles on the Gazette's website the hyperlinks that accessed the Gazette's website hosting the Tamine Affidavit; and

(b) to remove from the Articles all the content taken from the Tamine Affidavit.

The judge granted that order with liberty to the Respondent to apply. Following service of the injunction the Articles were taken down by the Gazette.

22. The Writ of Summons, issued on or about **24 September 2021**, was endorsed with Particulars of Claim which referred to the fact that the Tamine Affidavit was filed in proceedings where the Court file was sealed and pleaded that the Gazette :

> *"knew at all material times that the material it was publishing was taken from confidential evidence filed in proceedings in Bermuda in which the court file was sealed but nevertheless not only caused the confidential information to be published but also exposed hyperlinks so that members of the public could access the entire affidavit in defiance of Court orders that the Court file should be sealed*".

[16] 55/754-5

No other cause of action was pleaded. No attempt has been made thereafter to amend the writ or the Particulars of Claim.

23. On **6 October 2021** the Gazette entered an appearance.

24. Since then, the Gazette has applied twice to discharge the interim injunction. Its first application was made on **7 October 2021**, supported by Mr Tamine's affidavit of that date[17], to which the Tamine Affidavit was attached as a confidential exhibit. The application was heard on **13** and **26 October 2021** and a judgment was handed down on **19 January 2022** (Ruling 1). The application to discharge the order was dismissed.

25. The second application was made on **7 March 2022**, heard on **10 May 2022** and **13 June 2022,** and judgment was handed down on **22 August 2022** (Ruling 2). The application to discharge was again dismissed and the judge ordered that his ruling of 22 August 2022 was not to be published until further order of the Court.

Ruling 1

26. In his ruling on the first application the judge, after summarising the arguments of the parties, found the following:

(a) the Tamine Affidavit had not been widely available; publication was rather limited and there was, notwithstanding the continued availability of the Tamine Affidavit on an official US Government website for a small fee, which an ordinary reader would have to go to some lengths to access, still a serious issue to be tried as to whether confidentiality in its contents had been lost: the point had not been reached or passed where it was unrealistic for the Court to continue the *ex parte* order: [52]-[54];

[17] [3/10-18]

(b) absent the continuation of the injunction, harm would be caused, including reputational damage to Mr Tamine and his wife and children which could not be compensated by an award of damages: [55]-[59];

(c) having given full consideration to the Appellant's constitutional rights of freedom of expression, the balance of convenience favoured the Respondent at the interim stage, in particular, having regard to the importance of respecting court orders and resolving the issue of whether the Tamine Affidavit was subject to a court order: [60]-[64]; the judge was "*at this point sceptical*" about whether the confidentiality order applied to the Tamine Affidavit but thought that the balance tipped to Mr Tamine at this point;

(d) the public interest in exposing tax evasion did not support publication of the Tamine Affidavit at this stage: [65];

(e) there was a pressing need to ensure that the orders of the court were followed; the order did not preclude the appellant reporting upon the Brockman investigation, simply the contents of the Tamine Affidavit and therefore was not '*overly broad*': [66]. On the contrary it minimally impaired the Gazette's rights of freedom of expression, which were not absolute.

The second application

27. The genesis of the second application to discharge the injunction was the fact that on **16 February 2022** Mr Howes, the CEO of the Gazette, discovered that the Miami based news organisation, Offshore Alert, had republished the Tamine Affidavit on its subscription based website, which stated that the public could download the Tamine Affidavit free of charge. A note on the website referred to the fact that Mussenden J had ruled that the confidentiality of the Tamine Affidavit had not been lost by its limited publication on the US Court's website and *"to eliminate that as a credible argument Offshore Alert has today not only published the contentious document but made it available to everyone for free (both subscribers and non-subscribers)*". The Gazette said that this republication of the Tamine Affidavit could easily be found on the Google search engine and was presently the second "hit" that would be found after entering the term

"*Evatt Tamine Affidavit*". This was relied on as a material change of circumstance which justified a renewal of the application to set aside the order.

28. After the hearing on **10 May 2022** Mr Doughty, for the Gazette, became aware that the Chief Justice had on **6 May 2022** issued a judgment ("the BCT judgment") in the matter named *BCT Limited v Evatt Tamine* [2022] SC (Bda) 29 Com, which was then placed on the website of the Supreme Court. In reaching his decision the Chief Justice had relied on an affidavit of Mr Tamine of **4 January 2021** (Tamine 3), filed in those proceedings, which, it was submitted, contained much of the same information as was contained in the Tamine Affidavit. Tamine 3 had not been drawn to the Court's attention on or before 10 May 2022; nor had the Gazette sought any form of order for its production, although they had asked for a copy of it.

29. In respect of the second application, the judge found as follows:

(i) there was nothing of relevance within the Second Affidavit of Mr Tamine or the First Affidavit of Mr Simon Brown.

(ii) the original reasons for Ruling 1 still stood. The fact that the Tamine Affidavit had, additionally, become available on the Offshore Alert website was not a material change of circumstances warranting a discharge of the original order. Reliance was placed on the line of cases set out in *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB) for the proposition that even though information may be widely available that does not necessarily undermine its confidentiality: [22]. The Tamine Affidavit was in the public domain, but Lord Goff's statement in *Spycatcher* – as to which see [36] below - cannot be so rigidly applied where the issue pertains to private information: [25].

(iii) The evidence from Mr Marchant was that the Offshore Alert website was a subscription based service[18]which, however, allowed its users to search its

[18] The subscription appears to be US $90 per month, $ 255 per quarter and $ 970 per year: see [6] of the affidavit of Simon Brown (44/689). The same affidavit contained calculations suggesting that the page first published on Offshore Alert on 10 August 2021 entitled "*USA v Robert Brockman: USA's Opposition to Tangarra's motion to*

database free of charge[19], and then leave the site without paying anything. Google Analytics statistics showed that there were visits to the site from various countries including Bermuda, and to the relevant website page containing the DoJ's Opposition Filing which contained the Tamine Affidavit. There were 128 unique page views[20] most of which resulted in the downloading of that filing. There was no specific evidence as to whether and, if so, how many times the Tamine Affidavit was actually downloaded or accessed [23];

(iv) the judge remained of the view that the Tamine Affidavit had not been widely circulated and that the point had not been reached where it was unrealistic to continue the *ex parte* order. Nor was he satisfied that the confidentiality of the Tamine Affidavit had been lost by virtue of the rather limited further publication. The ordinary reader still had to go through some lengths to access the DoJ PACER (Public Access to Court Electronic Records) website or the Offshore Alert version. The *ex parte* order still served a useful purpose[24];

(v) the Court is duty bound to protect its own process and should not abandon the protection given to Mr Tamine by the previous orders in light of the re-publication of the Tamine Affidavit: reliance was placed on the reasons stated by Eady J in *CTB v News Group Newspapers Ltd* [2011] EWHC 1326.

(vi) whilst some of the information in the Tamine Affidavit appeared in the BCT Ruling that did not mean the injunction had to be discharged. If information in the Tamine Affidavit was obtainable from other sources then it was available for publication [35].

(vii) The BCT Ruling and Tamine 3 did not alter the judge's view that the *ex parte* order continued to serve a useful purpose [38].

Strike" , which had a link to the US Opposition to the motion to strike the Tamine Affidavit, had an estimated 5,467 readers.

[19] This appears to be a database of documents publicly available which Offshore Alert had founded. Most of the articles on the site are behind a paywall.

[20] Between 16 February 2022, the date of publication of the DoJ's Opposition filing and 19 April 2022.

30. In relation to the issue described at (vi) in the preceding paragraph, Mr Alan Doughty for the Gazette had submitted to the judge that there was information cited by the Chief Justice in the BCT Ruling (the "Transposed Information") that was within the Tamine Affidavit and currently enjoined. In [27] of Ruling 2 the judge summarised the Transposed Information referred to by Mr Doughty under 13 headings. Further details of that information may be found in paragraph 2.1of the Gazette's supplemental submissions of 8 June 2022[21]. Mr Doughty had submitted that the Transposed Information was in the public domain; that most of the information that Mr Tamine sought to keep confidential was now available for anyone to access through the DoJ Pacer website, the Offshore Alert website and the Supreme Court website including Mr Tamine's home address, his wife's identity and his purchase of Bewdley from his wife's family trust [30].

31. In addition, Mr Doughty submitted, Tamine 3 had been sworn on 4 January 2021, some nine months prior to the commencement of these proceedings; Mr Tamine had failed to inform the court that Tamine 3 contained information that was substantially the same as what was recorded in the Tamine Affidavit, in breach of his duty of full and frank disclosure. [31]. At the hearing on 10 May 2022 counsel had made no mention of the BCT Ruling delivered on 6 May 2022 and maintained that the Tamine Affidavit had not lost its confidentiality based on the publication on Offshore Alert's website. That was misleading and a breach of the Barrister's Code of Professional Conduct [32].

32. Mr Harshaw for Mr Tamine submitted that the issue of the BCT Ruling and Tamine 3 was a distraction from the issues in the case. The duty of full and frank disclosure did not continue to the *inter partes* hearing; and the BCT Ruling had nothing to do with the case since the order which was sought to be discharged was concerned with information obtained solely from the Tamine Affidavit; information available from other sources could be published even if it was also in the Tamine Affidavit [34] – a submission which, as appears from 29 (vi) above, the judge accepted. The judge took the view that if reference had been made to Tamine 3 or the BCT Ruling there would be no difference as the issue in the case was about (i) the Tamine Affidavit which was filed in "*allegedly sealed proceedings*" and (ii) the Court protecting its own process in respect of the

confidential information [36]. He said that his focus "*remained steadfast*" on the fact that the Tamine Affidavit was filed in what were said to be sealed proceedings.

33. In the following paragraphs I summarise the submissions to us of the parties, often in the terms in which they were made. I do so because the submissions on each side were of high quality and form an important foundation for the analysis and conclusions which I shall make in later paragraphs.

The submissions of the parties

The Gazette

34. The Gazette was represented by the late Ms Heather Rogers KC, Mr Allan Doughty and Ms Safia Gardner. The Gazette's central submission is that the Tamine Affidavit did not, as at 24 September 2021, and *a fortiori* after the Offshore Alert publication, have the "*necessary quality of confidence*", which had irretrievably been lost, which loss meant that the claim for an injunction could not get off the ground. Further the Gazette was entitled to the protection afforded by section 9 of the Constitution of Bermuda to freedom of expression and any restriction on its right to communicate information to the public, or on the public's right to receive information, must be "*reasonably required*" for one or more of the purposes identified in section 9 (2), which include "*protecting the rights of others*" and limited in scope to what was "*reasonably justifiable in a democratic society*". In the present case there was no right of confidentiality to be protected. The relevant document was on the public record, on a Court website, accessible by anyone, including in particular journalists whose research into public sources is the lifeblood of journalism. The injunction was neither reasonably required nor justifiable in a democratic society. In support of these submissions the Gazette relied on a series of legal principles, the articulation of which I shall summarise in the following paragraphs.

Breach of confidence

35. The cause of action for breach of confidence (an equitable claim) has three essential requirements:

(i) that the information has the *"necessary quality of confidence about it"*;

(ii) that it has been imparted in circumstances importing a duty of confidence; and

(iii) it had been (or was to be) used to the detriment of the party communicating it: *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, [1969] RPC 41[22]; *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116 [67]–[71][23].

36. In relation to (i) reliance was placed on the well-known dicta of Lord Goff in *Attorney-General v The Observer (No 2)* [1990] 1 AC 109 (HL) at 281-282:

> *"I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others....*
>
> *..the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it."*

37. Mr Adam Speker, KC for Mr Tamine, accepted the relevance of these principles, which, as he observed, were recently summarised by Arnold LJ in the Court of Appeal of England & Wales in *Racing Partnership Limited v Sports Information Services* [2020] EWCA Civ 1300 at [44]-[46]. In that judgment Arnold LJ pointed out at [48] that, as the analysis by the authors of *Gurry* on Breach of Confidence made clear, issue (i) is necessarily "*context- and fact-sensitive and confidentiality is a relative and not an absolute concept ... the basic attribute which information must possess before it can be considered confidential... being inaccessibility*".

[22] In which Megarry J reserved for further consideration whether there might be some cases where detriment to the claimant might not be required.

[23] I have not detected any consideration in the paragraphs cited of the question of detriment.

Obligation of confidence

38. As to when an obligation of confidence exists, the test is conveniently restated by Arnold LJ in *Travel Counsellors Limited v Trailfinders Limited* [2021] EWCA Civ 38 at [14]:

> *"...an equitable obligation of confidence will arise not only where confidential information is disclosed in breach of an obligation of confidence (which may itself be contractual or equitable) and the recipient knows, or has notice, that that is the case, but also where confidential information is acquired or received without having been disclosed in breach of confidence and the acquirer or recipient knows, or has notice, that the information is confidential. Either way, whether a person has notice is to be objectively assessed by reference to a reasonable person standing in the position of the recipient."*

39. In the present case, the Gazette, through Ms Strangeways, obtained the Tamine Affidavit from the Official US website – an open, official and judicial source. The document was on the public record in the US proceedings and in the public domain – and so available to all.

Misuse of private information

40. The Gazette submits that this is not a claim for, or a case about, private information. The elements of the cause of action in misuse of private information are:

(i) does the claimant have a *"reasonable expectation of privacy"* in relation to the information (this takes account of all the facts and circumstances); and

(ii) if so, does the right of privacy outweigh the right to freedom of expression (or vice versa) (this fact-dependent exercise often turns on an assessment of the public interest in publication)[24].

41. There are distinctions between a claim for breach of confidence and for misuse of private information. One important distinction is that a person can have a reasonable expectation

[24] See, e.g., *ZXC v Bloomberg LP* [2022] UKSC 8, [2022] AC 1158 at [26], [49-62], [76-77].

of privacy in relation to information, even where there has been some degree of publication; this is because further publication of private information (in such a case) represents a further intrusion into a person's private life[11]. The point is illustrated by the (split) decision of the UK Supreme Court in *PJS v News Group Newspapers* [2016] UKSC 26, [2016] AC 1081 (*"PJS"*). Although private information relating to sexual activities by certain individuals had been widely published in the USA and online, the majority agreed that an interim injunction to prevent publication of that information within the jurisdiction should be imposed: see Lord Mance at [25-27] and Lord Neuberger at [57-58]. Lord Neuberger noted at [57] that if PJS's claim had been based on confidentiality, while he would not characterise it as "*hopeless*", it would have *"substantial difficulties"*; the substantial publication abroad (in the USA and Canada) had been accompanied with extensive online publication within the jurisdiction; and *"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 the evidence, I would, I think, accept that, if one was solely concerned with confidentiality, that point had indeed been passed in this case."* By contrast, *"claims based on respect for privacy and family life do not depend on confidentiality (or secrecy) alone"*: [58].

42. The decision of Tugendhat J in *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB), [2005] EMLR 31 (*"Green Corns"*), also illustrates the difference. The case concerned the publication of the addresses of care homes for troubled children, as part of a report by the newspaper of a campaign by neighbours to have the claimant's plans for the homes abandoned. Although said to be a claim in confidence *"or"* misuse of private information [48], it is plain that it was treated and determined as a privacy claim [49] ff. The court was concerned primarily with the privacy rights of children under Article 8 of the European Convention of Human Rights ("ECHR"), in the context of a local newspaper publishing reports which included addresses which were to be used as homes for children with troubled histories, prompting local protests [35]. The judge considered the public domain at [69-81]; his analysis was in the context of his finding that the information sought to be protected in the case was *"obviously private and requiring of protection"* [66-68]. He considered relevant authorities, including at [76-77] the observations of Lords Goff and Keith in *Spycatcher*. At [78], he concluded that so far as

"personal information about a person" was concerned, while there may be cases where the information had been so widely published that an injunction would serve no purpose, it was *"not possible in a case about personal information"* simply to conclude that, if it is *"generally accessible"*, that would be the end of the matter; see also [79]. On the facts [81], this was not a case in which the information sought to be restrained was in the public domain to such an extent that its republication *"could have no significant effect"* or was *"not eligible for protection at all"*; rather (emphasis added)

> *"The information about the addresses, linked with information as to the business of the applicant and thus to the likely disabilities and other characteristics of the occupants of the addresses brings together matters which together amount to new information which was previously accessible to the public only in a limited and theoretical sense. Publication or republication risks causing serious harm to the children and carers who occupy, or are to occupy, the addresses concerned. The extent to which the material has or is about to become available to the public is not, on the evidence of this case, a reason for withholding the injunction sought."*

43. Tugendhat J dealt shortly with (and dismissed) an argument as to public interest in publication [82-89]; and found, on balancing the values engaged, that while the Article 8 interests of the children and their carers amply warranted a restriction on the newspaper's Article 10 rights, there was no justification for interfering with their privacy rights [90-102]. A restraint on publishing the addresses was necessary and proportionate [107].

44. At [47], Tugendhat J quoted Lord Steyn's statement of the approach of the court to the "*interplay*" between ECHR Articles 8 and 10 in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593 at [17]:

> *"..First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."*

45. Lord Hoffmann had said something similar in *Campbell v MGN* [2004] 2 AC 457 [55] where he said:

> *"I shall first consider the relationship between the freedom of the press and the common law right of the individual to protect personal information. Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need: see Sedley LJ in Douglas v Hello! Ltd [2001] QB 967, 1005, para 137."*

Section 9 of the Bermuda Constitution

46. Freedom of expression is not an absolute right, but, as this Court observed in *R v Bishop* [2022] CA (Bda) 12 Civ ("*Bishop*") at [21], it is *"axiomatic that any justification of restrictions on freedom of expression must be convincingly established"*. In *Bishop* the Court of Appeal endorsed the application of the three-stage test adopted by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 PC *("de Freitas")* when determining whether a restriction was *"reasonably required"* or shown not to be *"reasonably justifiable"* in a democratic society (in that case, under the freedom of expression provision in the Constitution of Antigua and Barbuda): see *Bishop* at [11], [24], [26]. The *de Freitas* test[17] asks:

> *"Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".*

47. A restriction on freedom of expression may be justified under Section 9(2) of the Bermuda Constitution where it is *"reasonably required"* for one (or more) of the specific purposes (including the protection of the rights of others and maintaining the authority and independence of the courts), unless it is shown *"not to be reasonably justifiable in a democratic society"*. In determining the outcome in a particular case, by reference to Section 9 and the *de Freitas* test, an intense focus on the facts and circumstances of the case in question is required (just as when ECHR Articles 8 and 10 are in play, see [44] above). The court should consider the nature and content of the information in question,

together with the harm that its publication might cause (on the one hand) and the interests in its publication, both on the part of the publisher (to impart it) and the public (to receive it). The importance of the role of the media has been acknowledged in many cases in Strasbourg and the domestic law of England and Wales. See, for example, the ECtHR Grand Chamber decision in *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15 at [102]18:

> *"..Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them."*

Open justice

48. The principle of open justice is a vital one with, as the Court observed in *BPHL v Registrar of the Supreme Court* [2015] SC Bda 48 Civ (also an application for documents) at [27] "*deep roots*". The open justice principle requires that there should be no right to restrict the publication of information that has been made public in court proceedings. There may well be circumstances in which the court will consider the necessity of a departure from open justice (for example, conferring anonymity on a party or witness, or protecting information from publication pending determination of a claim for confidentiality). However, once information enters the public domain in or through court proceedings, it cannot be considered confidential or information in which there could be any reasonable expectation of privacy.

49. In the light of those principles Ms Rogers made the following submissions on behalf of the Gazette:

(i) There was no serious issue to be tried;

(ii) Mr Tamine had suffered no harm that could not be compensated in damages;

(iii) The balance of convenience favoured the Gazette

Serious issue

Confidentiality

50. There was, it was said, no serious issue. The Tamine Affidavit was in the public domain of an official website of the US District Court, which had refused to restrict any access to it. It was accessible to the public (including the public in Bermuda) and any confidentiality had been lost. If Ms Strangeways could access it, as she did, so could anyone else. The Gazette had obtained the Tamine Affidavit from a public site; and, having done so, it was not and could not be bound in conscience by any obligation of confidentiality. That documents lose their confidentiality if they come into the public domain is a bright line rule. The judge was wrong to take the approach that he did in Ruling 1.

51. Even if Mr Tamine were to be permitted to raise a claim of misuse of private information the publication of the Tamine Affidavit in public court proceedings in the US meant that there could be no reasonable expectation of privacy in relation to it. Given the accessibility to the public of the Tamine Affidavit – it was available to all on the Official US Website - there was no need to go on to consider the extent of publication that had taken place. Where information is not on the public record (in the sense of open court proceedings, proceedings in a legislative body, records that are made available to the public, or otherwise), wide publication is a relevant factor: see, e.g., *Spycatcher, PJS* or *Attorney General v Bermuda Press Holdings Limited* [2009] SC (Bda) 60 Civ (18 December 2009) (AG v BPHL)23. But matters of public record are, as a matter of principle, in the public domain and not confidential.

52. Further, even if the judge was entitled to make Ruling 1, the Offshore Alert publication was a material change of circumstance. Mussenden J accepted that – following and as a result of the Offshore Alert publication – the Tamine Affidavit was "*now in the public domain*" Ruling 2 at [25][25]. That should have led him to conclude that there was no

[25] His exact words were "*although I have found that there has been a rather limited publication of [the Tamine Affidavit], in my view, it is now in the public domain. However, that finding does not automatically mean that the Ex Parte Order could be set aside. Thus, I rely on the principles set out in Green Corns and the line of cited cases that there[sic] Lord Goff's statement cannot be so rigidly applied when the issue pertains to private information.*"

serious issue to be tried on confidentiality: any quality of confidence was lost; Lord Goff's limiting principle applied; and BPHL could not be under an obligation of confidence.

Notice

53. Any reasonable person who obtained a copy of the Tamine Affidavit from the US Court website would understand that the document was now a public document.

Privacy

54. The bright line rule in relation to a claim in confidence is equally applicable to a claim for misuse of private information. There could be no reasonable expectation of privacy once the Tamine Affidavit had been made public in the US District Court and had become publicly accessible.

55. In any event the judge should not have considered misuse of private information at all. The claim was said to be founded on breach of confidence. No claim in privacy had been formulated. Nor had Mr Tamine identified what information in the Tamine Affidavit was alleged to be his private information. The judge's error is apparent from the following:

(i) Ruling 1 at [60] and the summary of Mr Tamine's arguments at [43-44] (the latter referred to his "*privacy as a litigant*") & [47]. Given that the causes of action in confidence and privacy are different, the judge should have accepted the arguments on behalf of the Gazette, as summarised in [32-33].

(ii) In Ruling 2 at [25] the judge observed by reference to *Green Corns* that the public domain rule "*cannot be so rigidly applied when the issue pertains to private information*"[26], without adverting to the fact that no private information within the Tamine Affidavit had been identified by Mr Tamine.

The phraseology is not entirely clear: but I take him to have been saying that it could not be said that the Tamine Affidavit was not in the public domain at all.

[26] The Judge had stated wrongly at [22] that *Green Corns* was authority for "the proposition that even though information may be widely available it does not necessarily undermine its confidentiality" (emphasis added); in

56. The error was compounded when the existence of Tamine 3 and the judgment of CJ Hargun in *BCT Limited v Evatt Tamine* came to light, after (so far as the Gazette was concerned) the first hearing of the second application to discharge, and it became apparent that the content of the Tamine Affidavit and Tamine 3 overlapped. There can be no reasonable expectation of privacy in relation to information contained in Tamine 3, deployed and referred to in open court proceedings.

57. If the court is to consider any claim in relation to private information, the court must be put into a position where it can identify clearly what information is alleged to be private: this is essential in determining whether the plaintiff can have any reasonable expectation of privacy in relation to that information and (if they do) in evaluating the nature and extent of the interests at stake (privacy and publication) and the justification for any interference with those rights. It is incumbent on the plaintiff to identify the information in question. Mr Tamine should have identified what information within the Tamine Affidavit was said to be his private information; and – given the overlap between its contents and the contents of Tamine 3 – Mr Tamine should have produced a copy of Tamine 3 to the court and the Gazette. They would then have been able to identify what – if any – information was contained only in the Tamine Affidavit, although this task should have been carried out by Mr Tamine himself instead. Mr Harshaw for Mr Tamine contended[27] that "*it is not the information in [ET 2020] that is injuncted, it is that affidavit itself, because it was sworn in sealed Court proceedings, and this Court is protecting its own process.*"

58. As a result the judge was led to adopt the wrong approach in Ruling 2 at [35-38]. He accepted that information in Tamine 3 was "*in the public domain*", but said that he was "*unable to say*" whether or not Tamine 3 and the Tamine Affidavit were "*substantially the same*" because he had not had the opportunity of reviewing Tamine 3[35]. Given the extent of the overlap that was apparent, it was for Mr Tamine to satisfy the court that there was information contained in the Tamine Affidavit (but not in Tamine 3) which could merit protection. The judge should have concluded, from the fact that he was

---

fact, as set out in paragraph 34 above, *Green Corns* was concerned with private information (and a privacy claim), not breach of confidence. The difference is crucial.

[27] 13 June 2022 60/1242

unable to make that assessment, that there was no proper basis upon which he could conclude that the Injunction served a "*useful purpose*" [38].

59. The judge was wrong to hold that, so as to protect its own process, the court should not take account of publication which had occurred after the Injunction had been granted: Ruling 2 at [26]. That was wrong and conflicts with the approach of Bell J in *AG v BPHL*. In that case, after the Gazette had applied to discharge an *ex parte* injunction restraining the Gazette from publishing a "leaked" cabinet memo, VSB News broadcast its own report about the contents of the memo. Bell J at [13] referred to the memo "*now being in broad terms, in the public domain*", with the effect that the court should no longer restrain its publication.

60. Further, in regard to [26] the judge was wrong to find that this case was analogous to *CTB v News Group Newspapers* ("*CTB*") (Eady J), cited on behalf of Mr Tamine [19-20] . In *CTB* (as in *PJS*) the court was concerned with a claim for misuse of private information (not breach of confidence); the information in question was identified and concerned a core privacy issue (sexual relations); publication of that (private) information was likely to be harmful to the claimant (even though there had been some publication already); and there was no public interest in publication [28]. Here, there was no such private information; there was no evidence as to what (if any) harm would follow from publication of the Tamine Affidavit (there was none as to any harm from the publication that had occurred – either following the Gazette's Articles or the Offshore Alert publications – nor as to any future likely harm); and there was considerable public interest in publication of the Tamine Affidavit.

No harm that cannot be compensated in damages

61. There was no (or no proper) basis for the judge's finding in Ruling 1 that Mr Tamine "*had set out the harm likely to be occasioned on him and his family and their reputations*" [58]. In fact, Mr Tamine had failed to identify any harm that had followed or would be likely to follow from reporting of the Tamine Affidavit. By the time of his application for the Injunction, a week had passed since the Gazette had published the Articles (and a

further two weeks passed before Mr Tamine swore his 1st affidavit). Had any harm occurred (or been likely), Mr Tamine would have been able to evidence it.

62. The judge made a number of points about Mr Tamine's evidence (by reference to paragraph numbers in his 1st Affidavit) as listed by the judge in [58] of Ruling 1 in respect of which the following comments are relevant:

(i) At [9], Mr Tamine had said that anyone reading the Tamine Affidavit would be aware of his "*Bermudian wife and her Bermudian family*". But the fact that he was married to Sophie Tod was a matter of public record, known for a number of years; likewise, it was well known that she was Bermudian and a lawyer[28].The reference to her "*Bermudian family*" appears to derive only from reference to a property in Bermuda ("Bewdley"), which was also in the public domain[29]

(ii) At [15], Mr Tamine referred to concerns of potential damage "*should an inaccurate report*" be published by BPHL. Firstly, a distinction must be drawn between publication of a report said to be inaccurate (which might give rise to a claim for defamation) and a report of information contained in the Tamine Affidavit (which would be a report of what Mr Tamine himself said about events, that is, on his account, accurate). Secondly, [15] refers to Mr Tamine's state of mind before publication by the Gazette (it led him to instruct Schillings International Plc ["Schillings"] on 14 September 2022); the letter of 17 September 2021 written by Schillings to the Gazette after publication of the Articles claimed there had been a contempt of court and, under the heading "*other inaccuracies*", complained of a single allegation in the Article "*Lawyer is a key witness…*" on the basis that it was defamatory and false, not that it constituted a breach of confidence or privacy. The

[28] This was acknowledged by Mr Tamine in the transcript of 24 January 2022 (after Ruling 1 had been delivered to the parties) 56/1018. Also, Ms Strangeways contacted Ms Tod, knowing her to be a Bermudian, having seen her name in the course of her research (before she saw the Tamine Affidavit): Strangeways 1 at 9/116; and see, e.g., the Bloomberg article of 21 August 2020 at 13/181 & /185 (2nd paragraph). See also the Judgment of Hargun CJ in *Medlands (PTC) Limited (& ors) v Commissioner of the Bermuda Police Service* [2020] SC (Bda) 20 Civ (26 March 2020) (Medlands), which refers to Ms Tod by name as Mr Tamine's wife and a barrister [3] [10.1], [12.2] and [72]; their home address (in Bermuda as at 2018) is stated at [10].

[29] Reference was made to the *Medlands* Judgment (fn [28] above) at [13-14], and also [43], [51]. This appears, however, to be an incorrect reference.

allegation which Mr Tamine said was contained in that Article was that he had been the architect of Mr Brockman's network of offshore companies and trusts.

(iii) At [26], Mr Tamine stated that the proceedings concerning the Brockman Trust (defined by him in [7]) were *"very complicated and involve variously open and closed hearings"*, as well as including allegations which were malicious (according to Mr Tamine), yet to be adjudicated on, and which were highly damaging to him and his family. Firstly, the US Proceedings[30] were concerned with a wide investigation into Brockman (including his affairs in Bermuda); thus there would be all the more reason to permit reporting of what Mr Tamine said was an accurate account of events (in the Tamine Affidavit). Secondly, as to the merits of allegations made against Mr Tamine, the 6 May 2022 BCT judgment of Hargun CJ referred to in [28] above resulted in judgment against Mr Tamine for US $22.195m and GBP 5m. Thirdly, it is impossible to see how harm could result to Mr Tamine's family as a result of publication of the Tamine Affidavit (or any part of it). It must be borne in mind that Mr Tamine did not suggest that there should be any inhibition on reporting the Brockman indictment, the US proceedings, or, for that matter, any material (save that derived only from the Tamine Affidavit). Mr Tamine did not identify what the ramifications or potential damage there could be from publication of information in the Tamine Affidavit to his wife or their children; in reality, there was no harm (or risk of harm).

(iv) At [28], Mr Tamine, referred to the publication of "*such personal information as my home address, my wife's family details and other such private information*" and asserted this "*might well put my wife and young daughters at risk*". There was nothing in this. The Gazette had not published his home address (his address in the UK, given in the Tamine Affidavit, was blacked out); the article referred to a prior home address in Bermuda (which

[30] In fact Mr Tamine was not referring to the US proceedings but the proceedings in Bermuda where SJTC had been removed as Trustee on the basis that any new Trustee should not be Mr Tamine.

was in the public domain); the only references to his "*wife's family details*" were in relation to the Bewdley property (also in the public domain): see sub-paragraph (1) above. The "*other private information*" was not identified.

On a proper analysis of Mr Tamine's evidence, and the submissions made on his behalf, the judge would have been compelled to conclude that Mr Tamine had not shown any harm (let alone any harm that could not be compensated in damages).

63. The fact that Mr Tamine then brought proceedings against the Sydney Morning Herald is not to the point. The complaint was for defamation – the defamation alleged being the suggestion that Mr Tamine was named in the indictment and that it was alleged in the indictment that Mr Tamine was the creator of Mr Brockman's offshore companies and trusts - resulting in the publication of an apology and other remedies, including damages of $ 190,000 and a retraction. That did not assist the court in determining whether there had been, or would be, harm from publication of information contained in and derived from the Tamine Affidavit.

64. In addition the judge erred in applying too low a test. He should have applied the test in *Brewster v Premier of Bermuda (No.1)* [2021] SC 45 (Bda) Civ (9 June 2021) ("*Brewster*"), which required Mr Tamine to establish harm "*at a convincing level of particularity*", demonstrating a "*high likelihood*" that harm will occur. In *Brewster* at [27], Hargun CJ quoted and adopted the following passage from *Spencer v. The Attorney General of Canada* [2021] FC 36 at [81] (emphasis added, references omitted):

> "*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 Inc v Canada (Attorney General) [1991] 1 SCR 311 (Canada Supreme Court) 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 ...*"

The judge was wrong to reject that test as inapplicable. Had he applied it Mr Tamine would have failed the test, not least because he should have failed the lower one applied by the judge.

The balance of convenience

65. The judge said that the *de Freitas* test was something that he had "*also considered*" [66] in Ruling 1; but it should have underpinned his whole assessment. And he approached the test wrongly by focusing on the order that had apparently been made in the Trust Proceedings, rather than on the information contained in the Tamine Affidavit which was said to be confidential. It was, moreover, highly unsatisfactory that the Court (and the Gazette) had no copy of the order said to have been made as to sealing.

66. Mr Tamine relied upon the fact that, according to *Medlands v The Attorney General* [2020] SC (Bda) 30 Com (23 July 2020) ("the July 2020 judgment"), Subair Williams J had made "*the Confidentiality Order*" referred to in [19] of the Judgment, for the reasons stated in [20]. At [19], the Judgment stated:

> "*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."*

67. As appears from the heading to the July 2020 judgment, the Trust was referred to as "the B Trust" and the 2nd Respondent as "RTB" (this anonymity was later abandoned and reference was made to the Brockman Trust and Robert Brockman: see [3] of [2021] SC (Bda) 41 Com); Mr Tamine was referred to by name in the Judgment. The basis upon which the Order was made was said to be outlined in [20], which set out the skeleton argument that had been filed in support of the making of the Order. What was relied on in that argument was a line of Bermuda authority relating to the making of confidentiality orders in trust cases. There was no suggestion that Subair Williams J had ever considered (or been asked to consider) whether to make an order protecting the Tamine Affidavit as confidential (or private) in those proceedings, still less that she had made an order

specifically in relation to it. The only information the court had about the purpose of the 5 November 2018 Order was what was stated in the July 2020 judgment.

68. In those circumstances, the judge was right in Ruling 1 to be "*sceptical*" about whether the 5 November 2018 Order covered the Tamine Affidavit, but wrong to regard that as being an issue for trial [61] or as a relevant factor in deciding whether or not to grant the Injunction [61-63]. On the evidence before him, the judge should have left that Order out of account and/or he was wrong to consider that there was any proper basis for considering that the protection of the "integrity" of the court was at stake, either at all or sufficiently to warrant the grant of an injunction against BPHL at the behest of Mr Tamine. There was no request by the court of its own motion in the Trust Proceedings (Subair Williams J) or by the Attorney-General of Bermuda – or by Mr Tamine - to commence contempt proceedings against the Gazette[31]. The judge erred in taking that order (not seen by the court or by the Gazette) into account.

69. Further, the judge referred to the balance of convenience in Ruling 1 without carrying out an "*intense focus*" evaluation of the competing values contended for by the parties by reference to the specific facts and circumstances. So far as Mr Tamine's case is concerned, the judge failed to analyse (or have regard to) the nature and content of the information the publication of which was to be restrained; had he done so, the judge would have found that there was no confidential information (and, without prejudice to the contention that he was wrong to consider misuse of private information at all, that there was no private information) requiring the protection of the court. So far as the Gazette's case is concerned, the judge failed to have proper regard to the considerable public interest factors in favour of publication; had he done so, he would have found that they outweighed any right of Mr Tamine.

70. The judge dealt very shortly with the right to freedom of expression and failed to pay any or any sufficient regard to the strong public interest in publication. In summary:

[31] As appears from the submissions that were made to us by the Gazette after the oral hearing a claim in contempt would not appear to have been available.

(i) The third limiting principle stated by Lord Goff in *Spycatcher* was that the public interest in favour of preserving confidences "*may be outweighed by some other countervailing public interest which favours disclosure*"; this had originally been referred to as an "*iniquity*" principle, but had been acknowledged to extend to "*matters of which disclosure is required in the public interest.*"

(ii) There was unquestionably a legitimate public interest in the Brockman case, the largest case of its kind in the USA, including: the DoJ investigation, the charges in the indictment, and the steps taken in the US Proceedings; the basis for the charges against Brockman, including the information provided by Mr Tamine to the DoJ (as a co-operating witness offered immunity); the activities carried out by Brockman, including (specifically in the context of this case) those carried out in Bermuda. The DoJ's case included that Brockman had used Tangarra (Mr Tamine's company) and that it was a "*paper entity.*"

(iii) The judge had evidence supporting the public interest arguments: see Strangeways 1 at [5-24], [28-30]. At the time the Articles were published, there was considerable interest in the Pandora Papers, in which Brockman had been mentioned: see Strangeways 1 at [29]. The public interest arguments were advanced before the judge in writing and orally.

(iv) The Gazette had a history of investigative reporting and the Tamine Affidavit was a first-hand source of information as to what Mr Tamine had been doing.

71. In short, on a proper analysis the interests were all one way – in favour of publication. On the three stage *de Freitas* test what the judge should have found was:

(1) There was no pressing need which the Injunction sought to address (nor, in this context, was the 5 November 2018 Order in the Trust Proceedings material).

(2) (Without prejudice to the contention that the analysis should cease at step 1) the restrictions in the Injunction were not rationally connected to any such aim. The Tamine Affidavit is freely available in the US court proceedings. On the basis of the information before the court as to the 5 November 2018 order, no such rational connection had been shown between the Injunction and that order.

(3) (Without prejudice to the contention that the analysis should cease at stage 2) the Injunction constituted an infringement of the Gazette's right to freedom of expression that was more than minimal. The effect of the Injunction was that the Articles were removed from online publication, notwithstanding the public interest in their publication.

72. Lastly the judge in Ruling 2 failed to carry out a rigorous analysis of the competing interests (whether in the balance of convenience or otherwise) by reference to the facts and circumstances of the case as they then stood, including the Offshore Alert publication (which, as the judge found, meant that the Tamine Affidavit was in the public domain) and the continuing public interest in publication: see Ruling 2 at [22-26], [35- 38]

The submissions for Mr Tamine

73. Mr Adam Speker KC, for Mr Tamine submitted that, on the hearing of the first application, Mussenden J was entitled to reject the application and decide to "*hold the ring*". And he was entitled to do so on the second application since there had been no significant material change of circumstances. In particular, he was entitled to find :

(i) There was still "*only rather limited publication of the Tamine Affidavit in the public domain*"; and there was support in the authorities that such limited publication did not necessarily undermine confidentiality.

(ii) The availability of the Tamine affidavit on another website was not a material change of circumstances.

(iii) The fact that some of the information in the Tamine affidavit appeared in a ruling of the Chief Justice did not mean that the injunction had to be

discharged. The injunction did not prohibit publication of information that appeared elsewhere.

(iv) The effect of the injunction was reduced by the fact that information in the public domain could be published but that did not mean that there was nothing left to play for in circumstances where the Tamine affidavit had been filed in "*sealed proceedings*".

In reaching these decisions the judge made no error of law nor did he reach a conclusion which was outside the parameters of what was reasonable: hence on well-established principles the Court of Appeal should not interfere: *PJS* at [20] and [50]; *ZXC v Bloomberg LP ("ZX")* [155] – [156]. The Gazette now seeks to appeal rather than proceed to trial, the latter being what the judge thought appropriate. It had not applied to Subair Williams J for sight of copy of her order or made any attempt to vary the order that she made in those proceedings.

74. Mr Speker's submissions responded to the various headings adopted by Ms Rogers, as follows.

Breach of confidence

75. The Tamine affidavit was a confidential document. Even in cases heard in open court there is a strong public interest in treating witness statements or affidavits that have not yet been disclosed in open court as confidential and protected from disclosure. This is for various reasons:

a. knowledge of the fact that a statement has been created and/or that information about the contents could be disclosed could discourage witnesses from being full and frank in the information provided to an investigatory body or a court;

b. disclosing information could contaminate the evidence of others. How a particular matter is put by a potential witness, which words are used or what order they are in, might be highly material and influential;

c. to ensure that individuals are not put off coming forward to assist police investigations and court cases, particularly where to do so might incur the displeasure of others; and

d. to avoid causing damage to the author of the statement.

76. In *Bermuda Press (Holdings) Ltd v Registrar of the Supreme Court* [2015] SC (Bda) 49 Civ, the Chief Justice held that there is a prohibition on access to court documents but this is subject to an important caveat that, given the open justice principle, documents referred to in a public hearing in a case of genuine public interest can be obtained where justice so requires: [59]. The access principle would rarely if ever apply, however, in relation to *in camera* hearings and/or the vast majority of civil or commercial cases where only private interests were in play: [32]. There is no free-for-all on documents which are put before a court.

Blue v Ashley

77. In *Blue v Ashley* [2017] EWHC 1553 (Comm), [2017] 1 WLR 3630, the Times newspaper applied, ahead of a commercial trial between two businessmen, for copies of trial witness statements served by Mr Ashley and referred to briefly at an interim hearing. Leggatt J (as he then was) acknowledged that, while it was the default position that access should be permitted where a document had been placed before the judge, it was none the less necessary to consider the circumstances, including the nature of the document in question, its role and relevance in the proceedings and, importantly, the purpose for which access to the document was sought. Witness statements were produced not for the public, but to assist the parties in preparing for trial and to promote the trial's efficiency. He held that an interest in reporting the parties' evidence before it was given did not engage the open justice principle and that the default position of granting access to statements referred to at a public hearing was displaced by the general undesirability of the court supplying a witness statement to a non-party before the statement had been deployed in the proceedings. See [12]-[13], [15]-[16], [21]-[24], [26].

78. At [16], Leggatt J explained that there were positive reasons why it was generally undesirable for witness statements to be made public before such statements were put in evidence. He said, with reference to a statement made by Lord Wilberforce in *Roy v Prior* [1971] AC 470, 480, that there are safeguards in place through the cross-examination process to protect third parties who might be named in a statement which were absent if the documents were provided and could be published before the witness was called and possibly challenged on the statement's contents.

79. *Blue v Ashley* was followed in *R v Secretary of State for Defence, ex p Yar* [2021] EWHC 3219 (Admin). In that case Swift J refused an application by the BBC for sight of witness statements referred to in open court in judicial review proceedings notwithstanding that the judge accepted that the journalist seeking sight of the documents was serious and responsible. He held that a wish to '*follow the story*' did not justify access to witness statements: [22]. He said that the open justice principle might require that witness statements be provided to allow those watching proceedings to understand what is going on but that there is no strong public interest in providing them to allow for '*journalistic preview.*' A similar point was made by Warby J (as he then was) in *HRH Duchess of Sussex v Associated Newspapers Ltd* [2020] 1 WLR 4762, [57] citing *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, [1].

80. The Tamine Affidavit was obtained from the US Court website without it having been deployed in court and without any fact specific balancing exercise being done in Bermuda or any reasoned decision from the US Court. The Tamine Affidavit :

(a) had not yet been deployed in any open court proceedings;

(b) had been filed in sealed proceedings held *in camera* where there was no intention that it would ever become public;

(c) contained personal information about Mr Tamine and others; and

(d) should never have reached the US authorities.

81. In relation to (c) above the Tamine Affidavit contained a picture of Mr Tamine's life here and in the United Kingdom. The Gazette published articles, derived from it, containing information about Mr Tamine's marriage, the fact that he had children, his personal addresses in both this jurisdiction and in England and the address of a 'storage facility' here. The article headed "*Secretive billionaire accused ... etc*"[32] contained a photograph of Mr Tamine's house here and one of him outside his home in Australia. Having given out addresses here to readers and told readers the price of the properties he owned here, which would have indicated that they were expensive, it then informed them that he was not actually present at the properties because he now lives in the United Kingdom.

82. The Tamine Affidavit contained detailed information about Mr Tamine's wife. Her rights were also engaged and the court has to have regard to, them whether or not she is a party: see e.g. *K v News Group Newspapers* [2011] 1 WLR 1827, [14] where the England and Wales Court of Appeal said that weight must be given not only to the right to respect for private life of the claimant himself, but also to the rights of X [with whom he had had a relationship], and, in addition, to the rights of the claimant's wife and children; *PJS* [38]-[74] and *CDE v MGN Ltd* [2010] EWHC 3308 (QB), [2011] Fam 360, where the Court said, at [7], that the rights of third parties cannot be ignored '*on the basis of traditional arguments along the lines of who has a cause of action and who does not*".

83. In relation to (d) the evidence of Special Agent Ted Lair dated 9 August 2021 for the proceedings in the US, at para 7, was that, '*...With the exception of the affidavit of Evatt Tamine, all of the exhibits cited, specifically all of the exhibits with an "ET" bates*[sic] *prefix were provided to the government by Evatt Tamine*". If, as appears to be the case, it was provided to the US authorities without lawful authority because it was done without the consent of Mr Tamine or the permission of the Court where it was filed, then that would support the grant of an injunction: see *Imerman v Tchenguiz* [2011] Fam 116, [68]-[69].

84. Accordingly when, having regard to the strength of the right to be protected , the Court, on an interim application was faced with an application:

[32] 10/126-7.

(a) seeking to protect a document with a special status;

(b) which was filed in Trust proceedings being held *in camera* within the jurisdiction;

(c) which was apparently inaccessible to non-parties;

(d) which contained sensitive personal and financial information about Mr Tamine and his family;

(e) as well as a plethora of information about a number of other third parties, who do not appear to have been on notice of the intention to publish it;

(f) which had been filed in trust litigation which had not yet concluded;

(g) a copy of it had been transferred out of the jurisdiction without the consent of the Respondent;

(h) which was then made available to the press.

Public domain

85. Mr Speker accepted that, generally speaking, when confidential information enters the public domain it cannot be regarded as having the necessary quality of confidence. But, he submits, what exactly is meant by "*entering the public domain*" such as to extinguish confidentiality is not straightforward. It is, he submits, a question of fact and requires a nuanced consideration of:

(a) the type of information in question. Even under traditional breach of confidence principles (and not only under misuse of private information) the courts have, when considering the public domain, treated personal or health information, for instance, differently to national or trade secrets;

(b) whether the information in question being available to be found on a website is the same as it being generally accessible;

(c) whether the information in question even if it is generally accessible overseas is therefore in the public domain within the jurisdiction.

86. Thus, in *Spycatcher* Lord Keith acknowledged, at 260F-H, that it was possible to envisage cases where, even in the light of widespread publication abroad of certain confidential information, a person whom that information concerned might be entitled to restrain publication by a third party in the country. He cited *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 as an example; and said that if the Duke had secured the revelation of marital secrets in an American newspaper, the Duchess could reasonably claim that publication of the same material in England would bring it to the attention of people who were more closely interested in her activities than American readers, and the publication would therefore be more harmful to her than publication in America. His Lordship cited another example about publication in America of medical information about an English pop group.

87. The point was touched upon in *Venables v News Group Newspapers* Ltd [2001] Fam 430. In that case Elizabeth Butler-Sloss J (as she then was) granted wide-ranging injunctive relief to protect the identities of two child murderers. The judge acknowledged, at 470-1, that even though an injunction may not be fully effective to protect the claimants from acts committed outside England and Wales resulting in information about them being placed on the internet, the injunction still performed a useful purpose in preventing wider circulation of that information through the media. See further, the discussion in *Green Corns*, [79]. This line of authority has been extended in *PJS* in relation to the misuse of private information.

Obligation of confidence

88. The Gazette was under a duty of confidence. There are a variety of different circumstances in which a person can become bound by such a duty. Thus, in *Spycatcher* Lord Goff explained, at 281, that a duty of confidence is capable of arising where a person

comes into possession of information in circumstances where that person actually knows—or is fixed by law with knowledge of, or ought as a reasonable person to know—that the claimant wishes to keep that information confidential. In *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, Lord Neuberger PSC explained, at [25], that a defendant who learns of a trade secret in circumstances where she reasonably does not appreciate that it is confidential, may none the less be liable to respect its confidentiality from the moment they are told, or otherwise appreciate, that it is in fact confidential.

89. It is, thus, no answer to the claim in confidence for the Gazette to point to the fact that Ms Strangeways obtained the Tamine Affidavit from a publicly accessible source. The document was a confidential document; its confidentiality had not been entirely lost by its publication on the US Court website; and the Gazette learnt, before the publication on 16 September 2021 that the Tamine Affidavit was "sealed": see [14] of Ms Strangeways' witness statement; and this was acknowledged in one of the Articles published[33]. Ms Strangeways therefore knew that Mr Tamine and the Court wanted to keep the Tamine Affidavit confidential. In those circumstances, if, in truth, the Tamie Affidavit remained confidential, the duty to respect that confidence arose. At the lowest there was plainly a serious issue to be tried.

Misuse of private information

90. The tort of misuse of private information grew out of the equitable cause of action for breach of confidence: see *Campbell v MGN Ltd* [2004] UKHL 22; *Douglas v Hello! Ltd* [2007] UKHL 21; *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, *PJS*, above, and *ZXC*, above. It has, however, as Lord Nicholls observed at [14] in *Campbell v MGN* "*now firmly shaken off the limiting constraint of the need for an initial confidential relationship*".

91. Whilst misuse of private information is now understood to protect different values, it is also a means by which some of the same information can be protected without the need to establish a duty or obligation of confidence. Many of the cases that led to the

[33] 10/129

establishment of the cause of action were breach of confidence cases and the issues often overlap: see, for instance, *Campbell v MGN*, above.

92. There is a two stage test for establishing a misuse of private information: (i) whether the claimant has a reasonable expectation of privacy in relation to particular information which takes account of all the facts and circumstances; and (ii) if so, whether the right of privacy outweigh the defendant's right to freedom of expression: see *ZXC v Bloomberg LP* [26], [49]-[62], [76]-[77].

93. In *ZXC v Bloomberg LP*, the UK Supreme Court held that, as a legitimate starting point, there was an expectation that information that a person who had not yet been charged with a criminal offence was under criminal investigation was private. The Court explained that, whilst all the circumstances of each case must be considered, there are certain types of information which will normally, but not invariably, be regarded as giving rise to a reasonable expectation of privacy. In addition to being under investigation by the state, these included: '*involvement in civil litigation concerning private affairs.*'[52]

94. *PJS* is authority for the proposition that an interim injunction can be granted even where the private information in question might not be said to be secret any longer because it had been widely published in the jurisdiction in a different medium and in foreign jurisdictions: see [6]-[8], [49]. This is because the tort can protect against further and repeated invasions of privacy by further publication of private information even if the information could no longer be said to be confidential in the traditional sense.

95. The Respondent seeks to distinguish (and downgrade) the UK Supreme Court decision in *PJS*, referring to it as a 'split decision'. Insofar as it matters, Lord Toulson, the only dissenter on the decision, accepted that, *'confidentiality in a meaningful sense can survive a certain amount of leakage, and every case must be decided on its facts'*: [86]. He went on also to accept that '*repeated publication of private (and essentially intimate) photos may properly be prevented by injunction.*'

96. *Green Corns,* above, was cited with approval by Lord Mance in *PJS* [26]. It was one of several first instance decisions where the courts were working towards the development

of the tort of misuse of private information. In *Green Corns*, the injunction was granted to restrain address of a care home operated by the claimant where troubled children lived, even though people could find out the address themselves through public domain information. As Tugendhat J acknowledged in *Green Corns*, in cases of personal information, it was not possible simply to apply Lord Goff's test in *Spycatcher* as to whether information is generally accessible, and to conclude that, if it is, that is the end of the matter.

Section 9 of the Bermuda Constitution

97. The gravamen of the Gazette's contention appears to be that the judge did not conduct a proper balancing exercise. But a judge can grant an interim injunction on the basis of confidence and/or privacy in order to hold the ring. In making the orders that he did, on an avowedly temporary basis, the judge did not infringe any rights of the Gazette.

Open justice

98. The importance of the principle of open justice is not in dispute. But the fact that information has been placed before a Court in the USA does not necessarily mean that a Court in Bermuda is powerless to grant any injunctive relief. It is not even the case that once information is in the public domain through court proceedings that all privacy rights are lost: *Khuja v Times Newspapers* [2017] UKSC 49.

99. Courts make orders (and must be able to make orders) to protect information and the integrity of their own processes even where information may already be available within the jurisdiction or overseas. They do so in a variety of different situations e.g.:

(a) to protect the rights of individuals including parties and witnesses (see *Yar* and *Blue*, above; *X v Y* [2021] ICR 147 Cavanagh J granting anonymization post-hand-down of judgment; and *Del Campo v Spain* (2018) 68 EHRR 27 where the ECtHR found a violation of the applicant's article 8 rights where he was named in a judgment in proceedings to which he was not a party);

(b) to ensure a fair trial, e.g. orders to ensure that juries do not read particular information, even if published in the jurisdiction.

Courts can also grant geo-blocking orders to restrict access in one jurisdiction to information available elsewhere in order to protect intellectual property rights: see e.g. *Columbia Pictures Industries Inc v British Telecommunications plc* [2021] EWHC 2799 (Ch) and [2022] EWHC 2403 (Ch).

The grounds of appeal

100. In relation to the grounds of appeal, there was plainly a serious issue to be tried in relation to breach of confidence and misuse of private information. The judge in Ruling 1 made factual findings, which he was fully entitled to make, as to whether or not the Tamine affidavit was sufficiently in the public domain such that there was no confidentiality or privacy left in its contents. It was of significance that the Gazette did not serve any evidence as to the number of hits on the Article on its website or the number who sought to download the Tamine Affidavit between 16 and 24 September 2021. On the facts facing the judge the information in the Tamine Affidavit was not generally known. The judge found, as he was entitled to do [41] that the fact that the Tamine Affidavit was available to be downloaded from a US website did not mean that the information was well-known to the population of Bermuda [51]. The judge was also entitled *not* to find that (limited) publication outside of the jurisdiction meant that confidential information has entered the public domain within the jurisdiction and could not be protected here in Bermuda.

101. In respect of Ruling 2 the judge was fully entitled to conclude (a) that there was no material change of circumstances, as was required: see *PJS,* above, [56]; and (b) that, where there was no specific evidence of how many times the Tamine Affidavit had been downloaded or accessed from Offshore Alert, there was no basis for concluding that confidentiality had been extinguished via this route. Moreover, he was entitled to take account of the authorities which stated that, where the information was personal, extent of publication was not the only consideration: see [25]-[26]. These again are factual findings.

102. The judge was also entitled to come to the conclusion that, until the status of the proceedings in which the Tamine Affidavit was filed was properly understood (i.e. whether they were sealed proceedings), it was right to prohibit publication of it. He accepted however that '*if information in the ET 2020 Affidavit is obtainable from other sources then it is available for publication. To that point, in my view, the Transposed Information is in the public domain*': Ruling 2 [35].The effect of this is that the Appellant could and can publish information in Tamine 3.

Misuse of private information

103. Mussenden J was correct, in Ruling 1 [60] not "*to attach much significance to the argument that Mr Tamine has only pleaded breach of confidence at this early interlocutory stage*". After all, as Diplock LJ said in *Letang v Cooper* [1964] 1 QB 232, 242-3 '*a cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person.*' It would not have been just to have precluded consideration of misuse of private information on these facts.

104. There was clearly a serious issue to be tried as to whether Mr Tamine had a reasonable expectation of privacy in respect of information contained in a sealed affidavit served in private trust litigation which was inaccessible to the public. He clearly did have such an expectation and he had not consented to any further publication. The judge was entitled to find, at the interlocutory stage, that there was no public interest that could override that expectation. And there was a serious issue to be tried as to whether the publication of the Tamine Affidavit and the information derived from it was a misuse of Mr Tamine's private information.

No harm that could not be compensated for in damages

105. The judge was entitled to find that Mr Tamine would suffer harm that could not be compensated in damages. He was entitled to distinguish *Brewster v Premier of Bermuda (no1)* [2021] SC 45 (Bda) Civ (9 June 2021) for the reasons he did. In that case, the argument was made that *American Cyanamid* was not the appropriate test on an application for an interim injunction involving a constitutional issue and where the Government was a party: [13]. This was accepted at [15]. No such argument could be

made here where the parties are private. It is not a ground of appeal here that *American Cyanamid* was the wrong test to apply on the application. The judge was correct to decline to follow *Brewste*r: [55]-[56]. With that I agree.

106. In *PJS,* above, the Supreme Court acknowledged that the only really effective remedy in confidence and privacy cases is an injunction: see [38]-[43]. In the later Supreme Court case of *ZXC*, above, it was further acknowledged that reputation could be protected in a misuse of private information claim: [108], [112], and [125]. Indeed, it was because of the potential damage to reputation from being named as a suspect in a police investigation that the Supreme Court held that an individual had a reasonable expectation of privacy in that information which would justify the grant of an injunction.

Balance of convenience

107. Any assessment of the balance of convenience is an evaluative exercise with which the Court of Appeal should be very slow to interfere. The criticism that the judge failed to approach the balance of convenience issue through the prism of the *de Freitas* case and for placing weight on the order of Subair Williams J is misplaced. What is said in respect of both *de Freitas* and the Subair Williams J order, is that the judge should have assessed the information in the Tamine Affidavit; but the applications were not argued by the Appellant on the basis that the information in the Tamine Affidavit was not confidential. They were argued on the basis that the contents were *no longer* confidential once the Tamine Affidavit appeared on a US website. The judge made no error.

Analysis

108. It is necessary to bear in mind that the rulings which are the subject of this appeal were interlocutory rulings in relation to which the judge needed to address the classic questions as to (i) whether there were serious issues to be tried; (ii) whether there was, absent some form of injunction, a risk of harm which could not be compensated for in damages; and (iii) where the balance of convenience lay. Any findings of the judge were made on an interim basis and would not necessarily be made upon a final resolution of the matter

between the parties. Further the appeal court is ever cautious about interfering with facts found (or not found) by the judge at first instance – see *Racing Partnership* at [178], although that caution may be less strict if the case has been determined entirely by reference to what is on paper. It is unlikely to interfere unless the judge was plainly wrong.

109. In my judgment the judge was entitled to find that the Tamine Affidavit was a document which had the "*necessary quality of confidence*". Its confidentiality arises from the fact that it was a document relating to a private trust (the details of which are inherently confidential) which had been filed in *in camera* proceedings that had been sealed. The confidentiality is thus derived from (i) the nature of the matters with which it deals; (ii) the order of the Court, which the Court requires to be obeyed; and (iii) the expectation of the parties and the Court that the document will remain confidential. The Court would require, and the parties would expect, that, absent some further order of the Court, or some further development, the documents filed in those proceedings should not be available for public access and that their confidentiality would be preserved.[34]

110. The Gazette submits that the sealing order was no more than a fairly standard order made in trust administration proceedings, without reference to the Tamine Affidavit, and that Mr Tamine, who was neither a trustee nor a beneficiary, should not be allowed to avail himself of whatever protection from disclosure that order gave to such persons.

111. I do not regard the analysis in [109] above as inapplicable because the sealing order was made before the Tamine Affidavit was filed in the proceedings - so that the Court did not specifically consider whether the Tamine Affidavit should be treated as confidential; or because Mr Tamine, at the time a stranger to the trust, swore and filed it in order to correct findings that had been made against him in the *in camera* trust proceedings which were, so he said, misplaced. An affidavit filed in those circumstances appears to me to fall

[34] Such a conclusion is consistent with decisions (a) that a statement made under caution to the police is confidential: *Bunn v BBC* (1998] EMLR 846 and the cases cited at [16] in *Mitchell v News Group Newspapers* [2014] EWHC 879 (QB); (b) that ,even in a case which is to be heard in public, witness statements are not generally to be made available to the public before they are put in evidence at trial: *Blue v Ashley* [2017] EWHC 1553; *R v Secretary of State for Defence ex parte Yar* [2012] EWHC 3219. Cp *R ex parte Guardian News & Media Ltd v City of Westminster Magistrates Court* [2012] EWCA Civ 420 where disclosure was ordered of documents that had been referred to by the Magistrate at an extradition hearing although not read out in court; and a similar decision in *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38.

within the penumbra cast by the sealing order, which applies to the case file. The judge expressed some doubt about this (although part of his reasoning for granting an injunction was a recognition of the importance of the protection by the Court of its own orders), which I do not, presently, share. At the very lowest there is a serious issue to be tried. It may be that, on an application to Subair Williams J, the order might have been varied so as to permit publication: but that has never been sought.

Contempt

112. After the oral argument before us had concluded the Gazette's counsel drew to our attention the provisions of section 10 of the *Administration of Justice (Contempt of Court) Act 1979*. That provides as follows:

> *"10* ***Proceedings held in camera***
>
> *(1) The publication of information relating to proceedings held in camera shall not of itself be regarded as contempt of court except in the following cases, that is to say—*
>
> *1. where the proceedings relate to the wardship or adoption of a person under sixteen years of age or wholly or mainly to the guardianship, custody, maintenance or upbringing of such a person, or rights of access to such a person;*
>
> *2. where the proceedings are brought under Part V of the Mental Health Act1968 [...] or under any provision of that Act authorizing an application or reference to be made to a mental health review tribunal or to a court;*
>
> *3. where the information relates to proceedings or part of them held in private for reasons of national security;*
>
> *4. where the information relates to a secret process, discovery or invention which is in issue in the proceedings;*
>
> *5. where a court, having power under section 6(10) of the Constitution [...] to do so, expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.*
>
> *(2) Without prejudice to subsection (1), the publication of the text or a summary of the whole or part of an order made by a court sitting in camera shall not of itself be contempt of court except where the court, having power under section 6(10) of the Constitution [...] to do so, expressly prohibits the publication."*

113. The above section was considered by Hellman J in *Trustee N (& Ors) v Attorney General* [2015] SC (Bda) 50 Com (13 July 2015). At the beginning of his judgment Hellman J said this:

> *"4 In Bermuda the fact that a hearing takes place in private does not* ***in itself*** *mean that the parties are prohibited from using material from the hearing in other proceedings or from disseminating it to the public. Thus, section 10(1) of the Administration of Justice (Contempt of Court) Act 1979 provides that the publication of information relating to proceedings held "in camera", which for present purposes is synonymous with "in private", shall not of itself be regarded as contempt of court, except in various specified circumstances, eg where the Court expressly prohibits such publication.*
>
> *5. It was for these reasons that, at an ex parte hearing in the second half of 2013, I made the Confidentiality Order. The Court's power to do so has not been challenged. The Order provides that the file in these proceedings shall be sealed and that they shall be heard in camera. It further provides that all "Confidential Information" shall be kept confidential by each Defendant and shall not be used for any purpose other than these proceedings, but with liberty to any person to apply to vary or discharge the terms of the Order. However the Order provides that a Defendant may disclose confidential information if required to do so by law or to a "Permitted Recipient"".*
>
> [Bold added]

114. Section 14 of the 1979 Act provides as follows:

> ***"Punishment***
>
> *Subject to the other provisions of this Act any person who—*
>
> *(a) wilfully insults any person before whom a judicial proceedings is being held or any officer of a court or tribunal during the sitting of a court or tribunal or during such time as the person or officer is present on the premises*
> *where the court or tribunal is sitting or is going to or returning from such premises;*
>
> *(b) wilfully interrupts the proceedings of a court or tribunal or otherwise misbehaves in the premises where the court or tribunal is sitting;*
>
> *(c) while a judicial proceeding is being held makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person concerned with such proceeding in favour of or against any party to such*

> *proceeding or calculated to lower the authority of any person before whom such proceeding is being held; or*
>
> *(d) publishes without permission of the court a report of evidence taken in any judicial proceedings held in camera,*
>
> *is guilty of a misdemeanour:*
>
> *Punishment on summary conviction: imprisonment for 12 months or a fine of $2,000 or both such imprisonment and fine.*
>
> *Punishment on conviction on indictment: imprisonment for 3 years or a fine of $5,000 or both such imprisonment and fine.*"

115. The drafting of the 1979 Act is not of the highest quality; but it seems to me that the punishment for the misdemeanour of publishing, without permission of the court, a report of evidence taken in any judicial proceedings held *in camera*, must be treated as applicable to such publication as comes within the exceptions in section 10. The Legislature cannot have intended that a publisher should not be guilty of contempt for publishing that which did not fall within the exceptions, but would, nevertheless, be guilty of a misdemeanour and potentially subject to criminal sanctions if he did so.

116. There is, moreover, an additional problem. Section 10 provides that the publication of information relating to proceedings held in camera shall not of itself be regarded as contempt of court. It then provides for an exception where a court, having power to do so under section 6 (10) of the Constitution, expressly prohibits the publication of all information relation to the proceedings or of information of the description which is punished. But section 6 (10) provides, by way of exception to section 6 (9), which stipulates that all proceedings shall be in open court, that:

> "*(10) Nothing in subsection (9) of this section shall prevent the court from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court—*
>
> *(a) may be empowered by law so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or*
>
> *(b) may be empowered or required by law to do so in the interests of defence, public safety or public order.*"

117. Thus section 10 provides that it is not a contempt to publish information relating to proceedings held *in camera* save where, so far as presently relevant, a court having power under section 6 (10) expressly prohibits the publication of information. Section 6 (10) provides for the exclusion of people from the proceedings (effectively ordering them to be held in camera) but does not contain a power to prohibit the publication of information. We have not heard argument on this topic and I will say no more about it other than it does not seem to me that section 10, which provides that publication of information relating to proceedings held in camera shall not *of itself* be regarded as contempt of court except in the specified cases, precludes a court from making an order under its general powers that such information shall not be published, breach of which could be a contempt. That that was so appears to have been accepted in the case before Hellman J.

118. It is not clear whether or not the Confidentiality Order of Justice Subair Williams contained the provisions summarised in [5] of the judgment of Hellman J set out above, or similar ones. In the absence of any attempt to obtain a copy of that Order by either party, I shall assume, for present purposes that it did not. The absence of such provisions does not, however, mean, in my view, that the parties to the proceedings were entitled to disseminate that material to the public. The fact that the 1979 Act provides that, save in the cases mentioned in it, the publication of information relating to proceedings held *in camera* shall not of itself be regarded as contempt of court means that, save in those cases, the publication of information will not attract the sanction of punishment for contempt, which may involve a fine or a sentence of imprisonment.

119. But that cannot, in my judgment, mean that the parties, or anyone else, are at liberty to publish anything confidential that has been filed in sealed proceedings ordered to be heard *in camera*. If it were so, the sealing and *in camera* orders, whose classic purpose is to preserve the confidentiality of private trust proceedings, particularly in relation to evidence filed in the proceedings, would be without any practical meaning or operation and the law of confidentiality would be rendered inapplicable. The Act does not have the effect that documents which, on the grounds of their confidentiality, were ordered to be sealed, and which were filed in proceedings ordered to be heard *in camera*, lose their confidentiality because no one can be fined or imprisoned for leaking them. Equity does not require the assistance of the criminal law to recognize the obligations of confidence that she imposes (of which non-publication is one), and to grant relief for breach of that

obligation[35]. A duty to respect confidence is one that binds the conscience of the recipient. Whether or not his act of disclosure be criminal is not determinative.

120. The judge decided, on the basis of the material before him, that he was not satisfied that the confidentiality of the Tamine Affidavit had been lost by its publication on the US Court website with the result that no relief should be granted in relation to it; and that there was a serious issue to be tried on that question.

121. Whether or not confidentiality has been lost, to such an extent that equitable relief to avert further breach of confidence cannot, or should not, be granted, is, in essence, a factual question. As Lord Hoffmann observed in *Douglas v Hello* [2008} AC 1 [122] "*whether there is still a point in enforcing the obligation of confidence depends on the facts*". It is not the case that, once there has been some publication somewhere, any claim to injunctive relief in respect of breach of confidence evaporates. The Court must necessarily take account of the character of the information in question; the nature and extent (both in terms of form and duration) of the publication relied on; the persons to whom publication has or is likely to have been made; and the interest (or the lack of it) that they might have in the information. In some cases, very limited publication might be sufficient to preclude injunctive relief. That which is of relevance only to a very limited class of people may be unsuitable for protection if a substantial proportion of the class to whom it is relevant have learnt it. In other cases what may be regarded, by those resisting relief as a manifestly public revelation (e.g. on the US Court website) may not be sufficient to rule out further relief because such publication to a limited range of cognoscenti, may not mean that the wider public has any awareness of it.

122. In this respect the Court needs to consider, *inter alia*, the relative sizes of the groups to which publication is likely/not likely to have taken place. It is also material to consider the locations of these groups. Thus, in the present case, relief was sought from the Bermuda Court, whose writ does not run beyond this jurisdiction, to prevent those who access the Royal Gazette website from reading in the Articles anything taken from the

[35] A useful consideration of the range of remedies available in equity is contained in the judgment of the Court of Appeal of Singapore in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting & Ors* [2020] SGCA 32. These include the power to grant injunctive relief, as occurred in the present case. Breach of such an injunction could be a contempt of court.

Tamine Affidavit and to remove the hyperlink that led to it. The persons who are likely to access the website for these purposes are predominantly (but not exclusively) Bermudians. Whilst, in an internet age, publication outside Bermuda would, generally speaking, be more likely to reach Bermudian readers than the House of Lords thought the publication in America of the marital secrets of the Duchess of Argyll was likely to reach English readers, the fact that what was sought was an order of the Bermuda Court, and such publication as had taken place was on the website of a court in Houston, was of obvious significance. The public domain is, in one sense, enormous; and care must be taken in discerning where, within that domain, publication has taken place, the extent of that publication, and the utility of the injunction sought having regard to the extent of publication and the ambit of the jurisdiction invoked.

123. In the light of those principles it was, in my view, entirely open to the judge to find that the presence of the Tamine Affidavit on the US Government website did not mean that the information was so generally available that confidentiality had been wholly lost. Those who were aware of the US Government website and of the presence of the Tamine Affidavit on it would seem to be a limited group and greatly smaller than the number of Bermudians (and others) who were not. We do not know how many downloads of the Tamine Affidavit there were from this website after it was placed there in August 2021, or from the Gazette's website between 16 September and 24 September 2021. But I would expect the number of those who did so, or will, in the case of the US website, do so in the future, to be limited. The number of such persons who were not aware, and will remain unaware, of the site and the presence of the Tamine Affidavit on it must have been much larger.

124. Similar considerations apply to the Offshore Alert site. The judge was entitled to conclude that the publication on that site was not a material change of circumstances. There are in addition two further considerations.

125. First, it is, as Blake J observed in *Barclays Bank Plc v Guardian News and Media Ltd* [2009] EWHC 591 [26] somewhat unattractive for a defendant to rely upon publication by others if that publication was caused by the wrongful publication by the defendant on its own website in the first place. The decision of Offshore Alert to put the Tamine

Affidavit on their website appears to have arisen as a consequence of the Gazette putting it on a website, to which it provided a link.

126. Second, different considerations arise when the publication that is relied on as justifying or requiring the non-continuance of interlocutory relief that has already been granted is a publication which was made in order to achieve that very aim, as would appear to be the case here: see [27] above. In those circumstances the Court strongly inclines, as I do, against discharging an injunction that has already been granted because of a publication that was designed to nullify that injunction.

127. It is, also apparent that the Gazette was on notice that the Tamine Affidavit was confidential because they were, through Ms Strangeways, aware, before 16 September 2021, that it was filed in a case in which the documents were sealed. Further, when interviewing Ms Tod and seeking to interview Mr Tamine, Ms Strangeways did not reveal that she had access to the Tamine Affidavit, which, I would infer, betokened some sensitivity as to whether it could properly be deployed (or, at least, an apprehension that any attempt to do so would lead to an application for injunctive relief).

128. A question arises as to whether it is necessary for a claimant who seeks relief for breach of confidence to show what can be characterised as a detriment attributable to the actual or threatened breach. As to that the observations of Lord Keith of Kinkel in the *Spycatcher* case, made at a time when the tort of breach of privacy was undeveloped, are instructive. As he said at page 255:

> "*If the confider has suffered no detriment thereby [i.e. by the breach of confidence] he can hardly be in a position to recover compensatory damages. However, the true view may be that he would be entitled to nominal damages. Most of the cases have arisen in circumstances where there has been a threatened actual breach of confidence by an employee or ex-employee of the plaintiff,* ***or where information about the plaintiff's business affairs has been given in confidence to someone who has proceeded to exploit it for his own benefit:*** *an example of the latter type of case is Seager v. Copydex Ltd. [1967] 1 W.L.R. 923. In such cases the detriment to the confider is clear. In other cases there may be no financial detriment to the confider, since the breach of confidence involves no more than an invasion of personal privacy.*

> *Thus in Duchess of Argyll v. Duke of Argyll [1967] Ch. 302 an injunction was granted against the revelation of marital confidences. The right to personal privacy is clearly one which the law should in this field seek to protect. If a profit has been made through the revelation in breach of confidence of details of a person's private life it is appropriate that the profit should be accounted for to that person. Further as a general rule it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself. Information about a person's private and personal affairs may be of a nature which shows him up in a favourable light and would by no means expose him to criticism. The anonymous donor of a very large sum to a very worthy cause has his own reasons for wishing to remain anonymous, which are unlikely to be discreditable. He should surely be in a position to restrain disclosure in breach of confidence of his identity in connection with the donation.* ***So would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."***
>
> [Bold added]

129. I respectfully agree with this approach, which reflects the customary approach that, in breach of confidence cases, where the information in question should not have been revealed, damages are not usually an adequate remedy, not least because the continuance of publication destroys the confidence which is the foundation for relief and it is that continuance which is detrimental to the confider.

130. Mr Speker submitted that there is a further potential obstacle in the way of the appellants, which is that this is an application to discharge an injunction the making of which has never been appealed. As to that the Lord Neuberger said in *PJS* in the Supreme Court:

> *"55. In January 2016, the Court of Appeal thought it was likely that, at the end of the trial of this action, a judge would grant a permanent injunction restraining NGN from publishing the story. Accordingly, the question to be resolved is whether, despite the publicity which has already been given to the story, as described by Lord Mance in paras 6, 7 and 8 of his judgment that is still the likely outcome at trial.*
>
> *56. On that centrally relevant issue, it must be remembered that this is an application to discharge an interlocutory judgment before the trial of the action concerned. NGN's case must therefore be that the interlocutory injunction should be revoked because of "some significant change of circumstances" since it was granted in January 2016 - Thevarajah v*

> *Riordan [2016] 1 WLR 76 para 18 citing Buckley LJ in Chanel Ltd v F W Woolworth & Co Ltd [1985] 1 WLR 485, 492-493. Accordingly, with the exception of the effects of the subsequent publicity referred to in para 55 above, the conclusions reached in the first judgment of the Court of Appeal must be assumed to be correct; in particular, it must be assumed that there is no public interest in publication of the story, and that, were it not for the publicity which has occurred since January 2016, it is likely that a permanent injunction would be granted."*

131. The only material change of circumstances would seem to me to be (a) the publication of the Tamine Affidavit on the Offshore Alert website; and (b) the judgment of the Chief Justice in BCT. Mr Speker submits that the extent of the crossover between what is public as a result of that judgment and the Tamine Affidavit is a matter for trial.

132. The position in the present case differs from that in *PJS*. In the latter case there was a decision of the Court of Appeal (unappealed to the Supreme Court) which was followed by an application to discharge it on account of changed circumstances. The UK Supreme Court held that such an application must proceed on the basis that the first decision of the Court of Appeal, never having been appealed, was correct; and the question was whether there had been some significant change of circumstances since then. In the present case there is a decision of our Supreme Court granting an injunction followed by two applications to discharge it; and the appeal is brought against both the original and the second refusal to discharge.

Privacy

133. In relation to a claim of misuse of private information a number of points arise. Such a claim is a claim in tort and differs from a claim for breach of confidence which is an equitable one: see *Racing Partnership* at [70]. A plea of breach of confidence is not, therefore, the same as a plea of misuse of private information, although the same activity may amount to both. In those circumstances the question arises as to whether it was open to the judge to address the question of misuse of private information when that had never been pleaded. The importance of pleading is obvious and was emphasized in *Al-Medenni (Nada Fadil) v Mars UK Ltd* [2005] EWCA Civ 1041 [21], cited in *Racing Partnership* [175].

134. Not without some hesitation I do not regard the judge as having been in error in entertaining at this early interlocutory stage consideration of whether there was a serious issue as to whether Mr Tamine had a reasonable expectation of privacy in relation to the contents of the Tamine Affidavit and whether an injunction should be granted on that basis also.

135. The parties seem to have taken the position before the judge that Mr Tamine was free to serve a Statement of Claim, or an amended Statement of Claim, which included whatever he wanted to plead. It was said on his behalf that, even though the Gazette had entered an appearance, until such time as the writ was served he could amend without leave[36]; whilst it was also said on behalf of the Gazette that Mr Tamine did not need (or there was no pressing need) to serve the writ because the Gazette had entered an appearance[37]; and because the writ had not been served the obligation to enter a memorandum of appearance and to file a Statement of Claim thereafter had not come into play.

136. This seems to me to be a muddle. The writ did not have to be served if an appearance was entered, as it was. The appearance waived the failure to serve. And the pleadings (if the "Particulars of Claim" contained in the writ is to be treated as a Statement of Claim endorsed on the writ), could be amended at any time before the close of pleadings, which has not yet occurred. If the Particulars of Claim included in the writ are not to count as a Statement of Claim, a Statement of Claim was required within 14 days from the entry of an appearance: Order 18/1. But the plain fact is that no mention is made in the writ of a claim for beach of privacy, no such claim is made in the Particulars of Claim endorsed on the writ, and no pleading has ever asserted such a claim at any time.

137. Nevertheless it seems to me to have been open to the judge to decide, at this early stage, whether, on the material before the Court, interlocutory relief on the grounds of breach of privacy was also available. The interaction between the equitable doctrine of confidence and the tort of breach or privacy, the latter being, in some respects, the child

[36] 55/975
[37] 59/1216-7

of the former, is such that it would be inappropriate at an interlocutory stage, not to consider the two causes of action together[38].

138. Having said that, the extent to which what was published in the Gazette, and, perhaps more significantly, what was contained in the Tamine Affidavit, was information in respect of which Mr Tamine had a "*reasonable expectation of privacy*", such that a more generous approach to granting relief might be applicable, seems me to be minimal.

139. Mr Tamine relied on the fact that the Articles contained information about Mr Tamine's marriage, the fact that he had children, his personal address in both Bermuda and England and the address of a storage facility here. There was also a photograph of his house in Bermuda and one of him outside his home in Australia. The Articles also indicated that the price of the properties he owned here was expensive and that he now lived in the United Kingdom.

140. The fact that Mr Tamine was married to Ms Tod was a matter of public record, as Mr Harshaw accepted at the hearing before Mussenden J on 24 January 2022[39]). Mr Harshaw also accepted that he could not complain about the publication of the address in Bermuda either; and I note that that address is to be found at [10] of the judgment in *SJTC v Watlington & Ors* [2020] SC (Bda) 20 Civ (26 March 2020). So is the address of the storage facility which was searched. All that the relevant Article says about residence in England is that Mr Tamine now lives in the east part of an English county, which it identifies. The picture of him, taken by or for the Sydney Morning Herald, outside his house in Australia shows nothing other than him and a door. I doubt whether, in the case of Mr Tamine, there was a reasonable expectation of privacy in respect of the bare fact that he had children, who attended a Bermuda school; and his family is, in any event, referred to in [15] of the BCT judgment.

141. In relation to the grant of injunctive relief the courts have taken a different approach in relation to claims for breach of confidence and claims for breach of privacy. In the former

[38] I note that at [66] of *Imerman* Lord Neuberger regarded the question whether the claimant had a "*reasonable expectation of privacy*" as a good test to apply when considering whether a claim for confidence was well founded.
[39] 56/1018

case it asks itself whether confidentiality has been lost to such an extent that no useful purpose would be served by making any order. In the latter case, the Courts have shown themselves more prepared to grant injunctive relief, even though there has been some widespread publication of the information in question, particularly in relation to information about private sexual behaviour (the unrestricted publication of which would add to the intrusiveness and distress felt by a claimant and his partner and their children) or information which would risk harm to the vulnerable (as in *Green Corns*). In many such cases the information might appropriately be described as both private and personal. This is based, at least in part, on the fact that each new publication is an additional intrusion into private life, the need to prevent such intrusion being an essential basis of the tort; and that the Court will grant an injunction if it "*would serve a useful purpose*" as would be the case if it would prevent such distress. The classic example of this is *PJS v News Group Newspapers*, where the UK Supreme Court reversed a decision of the Court of Appeal, which had set aside an injunction. The Supreme Court adopted the approach taken in a number of previous authorities.

142. In relation to the material in the Tamine Affidavit, itself, there seems to me little in it that comes within the category of private information of such a nature as might entitle Mr Tamine to relief that might not be available in a claim based in breach of confidence. The Tamine Affidavit contains confidential information about the private business affairs of Mr Tamine and his relationship with Mr Brockman; but it does not seem to me that, in the present case, if an injunction to restrain breach of confidence is not warranted, an injunction on the grounds of privacy would be. It is also difficult to see what harm Ms Tod and the children would suffer from the publication of the Tamine Affidavit,

The section 9 question

143. The critical question in this case is as to the interplay between the Gazette's right of freedom of expression and the confidentiality rights of Mr Tamine, which, for present purposes, must, *prima facie,* be treated as existing. The grant of an injunction pursuant to the law of confidentiality does not contravene the prohibition in section 9 of the hindrance of freedom of expression to the extent that the law of confidence (which allows for the grant of an injunction) makes provision that is *reasonably required* for the purpose of (a) protecting the rights of person such as Mr Tamine to confidentiality; (b) preventing

the disclosure of information received in confidence, or (c) maintaining the authority of the Court, unless the law or what is sought to be done pursuant to it is shown "*not to be reasonably justifiable in a democratic society*".

144. In relation to that question the judge was, in my view, entitled to reach the view that the application of the law relating to confidentiality, and the grant of an injunction, was reasonably required for each of those purposes. Those who provide confidential information in relation to business matters in respect of which they have a reasonable expectation of privacy (see *Imerman v Tchenguiz* at [66]) in proceedings which are sealed (which sealing gives rise to such an expectation) and to be held *in camera* are entitled to have the confidentiality of that information protected. The Court which makes the sealing order and orders the proceedings to be *in camera* is entitled to have its authority in making the order maintained. Neither of these are requirements which are not reasonably justifiable. Nor, as it seems to me, was the public interest in the Brockman case of such a character as to justify refusing the confidentiality relief sought. Further, to use the wording of the *de Freitas* test (as opposed to the more pertinent wording of the Constitution) the objective of the law to preserve confidentiality and maintain the authority of the court justifies a limitation of freedom of expression; and the granting of injunctive relief was rationally connected to that objective and no more than was necessary to accomplish it. At any rate the learned judge was entitled to take that view, on an interlocutory basis.

145. There are other matters that appear to me to be relevant. First, the law of confidentiality is not absolute. Its principal exception is that the Court will not preserve the confidentiality of wrongdoing – the iniquity principle. This is not a case where the Gazette seeks to rely on that principle. This exception has been developed so as to include cases in which it the public interest requires (sic) that the confidential information should be disclosed in the manner sought: see Lord Goff in *Spycatcher*. If the elements of confidence are made out, the burden is on the defendant to establish that some overriding public interest should displace the plaintiff's right to have his confidential information protected (and the right of the court to have its orders followed). It does not seem to me that any lesser test should apply in the context of section 9 of the Constitution and I am not persuaded that an overriding public interest has been established, at any rate at this stage.

146. Second, I take account of the fact that no application has ever been made to Justice Subair Williams, who made the Confidentiality Order, and who was fully conversant with the underlying facts and the considerations which caused her to make it, to vary the Order, or declare it inapplicable to the Tamine Affidavit. I do not regard the failure to do so as some form of absolute bar to the success of the appeal. But, when considering whether there is some overriding reason to refuse injunctive relief, it is material to take into account that there was a route by which the Gazette could have sought a ruling from the judge who made the sealing order to unseal it insofar as it applied to the Tamine Affidavit.

147. Third, these are interlocutory proceedings. I realise that a number of major decisions in this field have been made in relation to interlocutory rulings. At the same time it does not seem to me unreasonable, in a case such as this, to grant interlocutory relief, realising that at a final hearing (or following a review by the judge of the Confidentiality Order) a different result may follow. In this respect Mussenden J was, in my view, entitled to find that the balance of convenience was in favour of Mr Tamine, in that if the injunction was refused all hope of retaining confidentiality would vanish, whereas an interlocutory injunction would do no more than "hold the ring" until the final hearing.

148. I have not ignored the fact that the contents of the Tamine Affidavit were likely, in some respects, to become public. That is what has happened in relation to the BCT judgment which I consider further below. That cannot, however, affect the confidentiality of material in the Tamine Affidavit which does not relate to that judgment. Because it is necessary to consider exactly what the Tamine Affidavit contains I have prepared a summary of it, which is contained in the confidential annex to this judgment, which I order to be sealed.

149. I have also not ignored the fact that the Tamine Affidavit was sworn in order to vindicate Mr Tamine's position, which was that he had been the subject of seriously adverse findings that were wrongly made. How exactly Mr Tamine envisaged that being done is uncertain. It might have been the case that Subair Williams J would have addressed the matter at an *in camera* hearing. But it might be that the matter would fall to be dealt with in public (e.g. as a result of a decision of hers or upon an appeal). But that has not happened and we should not, in my view, decline to uphold the injunction because it

might have done. Similarly, if Mr Tamine had given evidence at the trial of Mr Brockman, more of the content of the Tamine Affidavit might have become public knowledge: but that will, now, never happen.

The BCT Judgment

150. I turn then to consider the significance of the fact that in the BCT Judgment the Chief Justice relied to a considerable extent on the contents of Tamine 3, portions of which he summarised, and some of which he set out verbatim in paragraphs which were in exactly the same terms as the corresponding paragraphs in the Tamine Affidavit.

151. The BCT Judgment addressed the following circumstances. According to Tamine 3, during the course of 2015, Mr Brockman and Mr Tamine began to discuss potential locations for the headquarters of the Brockman Trust. The property that was eventually chosen was Bewdley, a Bermudian property then owned by Mr Tamine's wife's family through a trust. Mr Brockman and Mr Tamine resolved that Mr Tamine would purchase Bewdley, renovate the property to make it suitable for use as the headquarters of the Brockman trust, and then lease the property to SJTC, the then trustee of the trust.

152. In **March 2016**, Mr Tamine was paid $ 5.395 million by a company called Spanish Steps Holdings Ltd ("SSHL"), a subsidiary of SJTC. Mr Tamine's evidence was that this sum comprised monies which had not been paid by Mr Brockman to him under his Employment Agreement and a loan from SSHL in the amount of $ 2.495 million which was thereafter set off against Mr Tamine's remuneration under the Employment Agreement. It was his evidence that Mr Brockman agreed, in Mr Tamine's performance review meeting at the end of 2017, that the amount had been repaid.

153. It was, also, Mr Tamine's evidence that during the course of 2017 he and his wife decided to move to the United Kingdom. His family moved out to the UK in April 2018 and he intended to join them in September 2018. He said that he was advised that, in order to structure his remuneration in the most tax efficient way, Mr Brockman should pay him an advance of six years' salary (being the amount of time he intended to live in the UK) which he could then lawfully remit to the UK as needed. He would then pay tax on the

remitted sum as a non-domiciled resident of the UK. Mr Tamine said that in August 2018 Mr Brockman agreed to the proposal and Mr Tamine then took steps to cause SSHL to transfer the sum of $ 16.8 million to his accounts. Of that $ 15.6 million represented a six-year advance of salary and $ 1.2 million represented funds that he would need to cover his legal expenses in the event of an anticipated challenge by the US authorities to the tax position of the Brockman Trust. Mr Tamine accepted that the $ 15.6 million constituted an advance payment made in respect of his work as Mr Brockman's employee and, as he had not carried out that work, he was not entitled to retain that sum but he contended that, as Mr Brockman might have a claim in respect of this sum, he should not be required to pay that sum to SSHL. He intended to bring a claim for interpleader relief.

154. On 5 September 2018 a search warrant was executed at Mr Tamine's house and his storage facility in Bermuda. Two payments totalling $ 5 million were made thereafter to Mr Tamine to cover his legal costs in respect of the DoJ investigation of him, for which he retained the services of Herbert Smith Freehills in New York and London. Mr Tamine said that both payments were authorised by Mr Gilbert, a director of SJTC on 6 September and 8 September 2018.

155. The issue before the Court was whether admissions made by Mr Tamine and Tangarra in their defence, whereby they agreed to repay the above amounts (without prejudice to their case that the payments were made and received in good faith) could be withdrawn. The Chief Justice declined to allow the defence to be amended and gave judgment in favour of SSHL against the defendants for the three amounts.

156. I do not regard these circumstances as invalidating the injunctive relief granted. As has been made clear the Gazette is at liberty to report whatever is contained in the BCT Ruling. As I have said, in paragraph 2 of the Gazette's supplemental submissions of 8 June 2022 MJM set out the details of what had been cited by the Chief Justice from Tamine 3 in the BCT judgment, which goes beyond the matters to which I have referred in [151] – [155] above. All of that to which the Chief Justice referred in his judgment is now publicly available, and the Gazette is free to use whatever comes from it.

157. I have considered whether, since some of the information which is in the Tamine Affidavit is in the public domain ("the public domain information"), the appropriate course is to

restrict the injunctive relief to the publication of such of the content of the Tamine Affidavit as does not contain such information. I do not, however, regard this as an appropriate course for three reasons.

158. First, the Gazette and others derive their entitlement to make use of the public domain information from the BCT judgment, which should continue to be their information source. Second, any order which permitted publication of such of the content of the Tamine Affidavit as contained public domain information would require a careful analysis of *exactly* what that content was – an exercise not wholly without difficulty. That problem is entirely avoided by leaving the Gazette and others to rely on the BCT judgment for the information. Third, I cannot see that the Gazette is in any way prejudiced by this course.

159. Accordingly, for the reasons I have stated, I would dismiss the appeal. Subject to any submissions that may be made to us in writing within 14 days of the handing down of this judgment, I would order that the appellant should pay the respondent his costs of the appeal, to be taxed on the standard scale, if not agreed.

SMELLIE J.A.

160. I agree.

GLOSTER J.A.

161. I also agree.