

Between a rock and a hard place: gauging the public interest in financial information.

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The financial difficulties Northern Rock has found itself in over the past few months have been hitting the headlines on a regular basis. Who can forget the queues of customers outside the bank's many premises patiently awaiting their turn to clear out their respective accounts. At the moment the future of the bank still appears anything but clear. The turbulences have also spilled into the court room recently. In *Northern Rock plc v Financial Times and others*¹ the bank sought an interim injunction to stop the publication of certain confidential commercial information contained in a 'Briefing Memorandum'. In its search for potential investors Northern Rock provided detail as to how it proposed to use such investment in the Memorandum. The document contained a clause that the information was to be treated in strict confidence.

However, details of the Briefing Memorandum were leaked to the press. First, information based on the Memorandum was published in an article in the *Daily Telegraph* on 8th November 2007. The article also stated that the paper had seen the full document. One would have expected that Northern Rock had let their lawyers off their leash at that stage, as the document included confidential and commercially sensitive financial information. Instead, however, and after having prepared a draft form of order to apply for an injunction, public relations representatives were asked to contact numerous newspapers asking them to refrain from publishing any information drawn from the Memorandum.

Apparently, this move turned out to be not much of a deterrent.

Only five days later, the *Financial Times* used its FT Alphaville website, a specialist digital financial news and commentary service aimed at finance professionals, to publish ten original pages of the memorandum in full. On the same day, other news publishers jumped on the bandwagon, sourcing their stories largely on what was made available via FT Alphaville. Rather than relying on the public relations professionals for a second time, an application for an interim injunction was filed in the High Court against both the *Daily Telegraph* and the *Financial Times* in respect of their respective published articles.

Mr Justice Tugendhat agreed that much of the information contained in the Memorandum was confidential in nature, it being "detailed financial statistics and projections," and that Northern Rock had a strong case on this basis.² The judge reiterated that he was asked to strike a delicate balance between keeping certain information away from the public eye and the freedom of expression enshrined in Article 10 of the European Convention on Human Rights: "The effect of article 10 is that an injunction must be satisfied as being no more than is necessary in a democratic society in the interests stated, one of which is preventing the disclosure of information received in confidence."³ This balancing act, so the judge said, required him to embark on both a qualitative and quantitative assessment, distinguishing cases where only one single publication occurred against other scenarios where the information had been made available through mass media.

The legal teams for the defendants emphasised that the delay in taking legal action on the part of Northern Rock should weigh heavily against them. Also, it was argued that there may well be occasions where there is an overriding public interest in the publication of confidential commercial information. In respect of the latter point, the case of *London Regional Transport v The Mayor of London*⁴ was cited in support. In that case, their Lordships upheld the publication of a redacted version of a report critical of governmental calculations in relation for a private public partnership for the London Underground.

Mr Justice Tugendhat disagreed. He stated that on the one hand "in some cases there is a public interest for material to be published because without publication there is a risk of members of the public being deceived, or being kept from information which they are entitled to know in a democratic society." However, "it is hard to see an argument of that kind succeeding on the information that has been given to me. On the other hand, in a democratic society such as ours it is essential that some financial information be protected by law from premature publication. The

detailed commercial information in issue in the present case is, in my judgment, close to the example of the Budget speech, and a long way from the carefully redacted report that was in issue in the *LRT* case."⁵

After noting that the evidence before him was far from complete, the Judge reached the following conclusions. In respect of the FT Alphaville publication, short injunctive relief was granted. There was extensive copying of detailed financial information of a type that would fall quite readily into the commercially sensitive category. The Judge agreed that "there is a real possibility that further publication may do harm that has not already been done".⁶ Also, there did not seem to be any flaws in the information published which would trigger publication of it being in the public interest. No relief, however, was granted in respect of the *Daily Telegraph* article. That publication had drawn on the Memorandum a lot less directly, compared to its FT counterpart, and its content had been reported widely in other parts of the media since then. In short, that type of information had become part of the public domain to such an extent that injunctive relief would be meaningless.

The question arises whether treating the two publications differently for the purposes of granting an injunction was correct. The Judge emphasised that in respect of the *FT* publication extensive copying of a large original part of the Memorandum would tip the balance in favour of injunctive relief. While this may be understandable to some extent, the argument that the gist of the information that was published five days later in more detailed form had already been in the public domain courtesy of the *Daily Telegraph* article would be equally viable, especially as it had been sourced from the same primary source in the form of the Memorandum. In the end the detailed nature as well as the extent appeared to make the difference. The argument that Northern Rock should have been on the case of the *Daily Telegraph* right away by deploying their legal team was largely ignored in the decision. If the information contained in the Memorandum was indeed of such a strictly confidential nature, one would imagine that Northern Rock would deal with even slight leaks of it a lot more convincingly.

Certainly, asking public relations representatives to deal with the issue appears to be akin to fire fighting with a watering can. It is suggested that a firmer line could have been taken by the Judge in this respect. Finally, recalling the queues outside Northern Rock branches also assists in determining where the public interest may lie in such a scenario. Without doubt, there will not be many better examples of scenarios where the public interest should lie with keeping information under lock and key as with sensitive commercial information about a financial institution which is responsible for looking after the interest of millions of customers who have invested their life savings with it. On the other hand, it is an equally viable argument that it must be in the public interest to disclose all relevant information so that the punters are put into the picture of where they actually stand. Mr Justice Tugendhat had a tough call to make as to where to strike the balance in this case.

Granting a limited and short-lived injunction in respect of the FT Alphaville publication may just render the Judge as wise as Soloman rather than as strict as Solon.

Footnotes:

1. [2007] EWHC 2677 (QB)
2. Para. 11
3. Para. 14
4. [2001] EWCA Civ 1491
5. Para. 20
6. Para. 25