

High Court grants local authority injunction to prevent breach of confidence

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 18 February 2021

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On 5 February 2021, the Queen's Bench Division of the High Court handed down judgment in *London Borough of Lambeth v AM (No. 2)* [2021] EWHC 186 (QB). Browne Jacobson acted for the claimant council. The judgment is critical reading for public bodies who need to take action to restrain the use of confidential information in circumstances where that information has been inadvertently disclosed to a third party, most likely in response to a request under either the Data Protection Act 2018 or Freedom of Information Act 2000.

By way of brief background, the case concerned a referral made by the defendant's sister ('HJ') to the council's Children's Services department in confidence, under condition of anonymity, in respect of the defendant's daughter. After the referral was eventually closed, the defendant made a Subject Access Request to the council for a copy of the file held by Children's Services. Unfortunately, the defendant was able to uncover the confidential information that had been redacted by the council simply by copying and pasting the file into Microsoft Word. The defendant thereby discovered HJ's identity and thereafter threatened to use the confidential information to bring a claim against her for defamation, harassment and various other torts.

The council commenced a claim for breach of confidence seeking to restrain the defendant from using the confidential information. The essential ingredients of the tort of breach of confidence are that: (i) the information is confidential in quality; (ii) it was imparted so as to import an obligation of confidence; (iii) there has been or will be an unauthorised use of that information to the detriment of the party communicating it: see *Coco v Clark* [1968] FSR 415. An interim injunction was obtained and, following several interim hearings, the matter was set down for an eight day trial before Mr Justice Pepperall in July 2020. The defendant sought to argue that even if the tort of breach of confidence was made out, he relied on the public interest of iniquity on the basis that his sister had been acting with malice when making the referral and the council had been a 'bad actor' because of the way it had assessed the referral and handled his personal data (the latter argument was struck out at an interim hearing).

In a detailed judgment, Mr Justice Pepperall held that:

1. HJ's identity was confidential information because of the wider public interest in encouraging members of the public to come forward to help the authorities to protect children, citing *Re A (A Child) (Family Proceedings: Disclosure of Information)* [2013] 2 A.C. 66. This protection did not come to an end because either the defendant's own personal data was involved, or the council had closed its investigation by the time of the disclosure.
2. It was clear on the evidence that the council had attempted to keep HJ's identity confidential and the defendant knew this. The law will impose a duty of confidence where obviously confidential information is obtained whether by design, such as where someone obtains the information improperly or surreptitiously (see: *Lord Ashburton v. Pape* [1913] 2 Ch 469; *Inerman v. Tchenguiz* [2011] 2 W.L.R. 592), or by chance, such as where the document is wafted by an electric fan out of a window or dropped in a public place and then picked up by a passer-by (see *Attorney General v. Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, at p281).

3.

4. Whilst detriment to the confider is required in a claim by a private litigant, the position is different for public bodies, who must establish that the public interest will suffer detriment if an injunction is not granted. In this case, there was no doubt that it was in the public interest to enforce the confidentiality of the identity of an informant who reports their concerns about the care, health and development of a child to the relevant local authority. Indeed, a failure to do so would undermine public trust in the council's ability to protect the confidentiality of future informants and therefore put at risk the authority's effectiveness in protecting the children within its area.
5. Even if the referrer had acted maliciously this alone would be insufficient to constitute a defence in the public interest, as the public interest also protects untruthful or malicious informants (see *Re A* cited above). Whether the defence of iniquity is established will depend upon: (a) the nature and degree of the iniquitous conduct established; and (b) whether such conduct outweighs the powerful public interest in respecting the confidence of those who make anonymous referrals to a local authority. In the present case, there was no public interest defence to the claim because the evidence did not establish that HJ had acted with any malice when making the referral.

For these reasons, the court concluded that the council was entitled to final injunctive relief to prevent the defendant from using the confidential information.

Breach of confidence is a complex area of the law. However, the important lesson for public bodies is that there are steps that can be taken to protect confidential information when such information has been disclosed to a third party either by mistake or due to the improper conduct of a third party.

Our public law law team frequently advises public bodies in respect of breaches of confidentiality, and its lawyers are experienced in liaising with the Information Commissioner and police in respect of possible criminal offences and commencing civil proceedings to restrain the unlawful use of confidential information. Please contact us with any questions about the High Court's judgment or to discuss what steps you should take in a particular case where a breach of confidentiality has occurred.

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