Parliamentary Privilege

Background

On 23 October 2018 the Court of Appeal in the case of *ABC & Others v Telegraph Media Group Limited* [2018] EWCA Civ 2329 granted ABC, a leading businessman, an injunction preventing the Daily Telegraph from publishing information it had obtained in breach of confidence (i.e. in breach of agreements entered into by ABC and others to keep confidential certain matters between them).

Such agreements are commonly known as non-disclosure agreements or NDAs. The injunction was granted on an interim basis, meaning that confidentiality of the information was preserved only until a full trial would take place, when the Court would decide whether or not to continue it.

Penal notices

Injunctions of this kind carry penal notices which have implications not only for the parties to the action, but also for others who know of the injunction. The penal notice usually contains the following words:

"Any other person who knows of this order and does anything which helps or permits the defendant to breach the terms of this order may also be held to be in contempt of court and may be imprisoned, fined, or may have their assets seized."

Therefore, anyone with knowledge of the interim injunction could be held to be in contempt of court if they published the confidential information that was the subject of the injunction.

The Court of Appeal judgment

It is clear from the judgment of the Court of Appeal that the decision to grant the interim injunction was reached following account being taken of the following:

- Whether the applicant is more likely than not to succeed at trial (s.12(3) of the Human Rights Act 1998 (HRA))
- Whether the potential adverse consequences of disclosure are particularly grave (e.g. pose a heightened threat to the rights to private life under Article 8 of the European Convention on Human Rights)
- Whether the interests of justice will be best served by a restraint on publication until a disputed issue of fact can be resolved at trial
- The right to freedom of expression under s. 12(4) of the HRA

The Court of Appeal also considered it likely, first, that a substantial part of the information sought to be published was obtained through breach of duty of confidentiality to the Claimants, either in breach of the NDAs, or by those with knowledge of the NDAs, and the Daily Telegraph acquired the information with knowledge of the NDAs and the breach of confidence. Not granting the injunction would undermine the public interest in the observance of duties of confidence, especially those contained in an express contractual agreement freely entered into and with the benefit of independent legal advice without improper pressure.

Secondly, the most serious allegations were denied by the Claimants and a trial would be needed to resolve the veracity of the allegations.

Thirdly, by being bound by the NDAs, the Claimants would be unable to effectively challenge the allegations were the newspaper to publish all the information it wished in respect of them.

Fourthly, it was likely that at trial the Claimants' right to confidentiality would not be trumped by the argument it would be in the public interest to publish the information. This was because there was no evidence that any of the existing Settlement Agreements (which contained the NDAs) were procured by bullying, harassment or undue pressure by the Claimants. The Court of Appeal noted that each employee received independent legal advice before entering into the Settlement Agreement; and that the Settlement Agreements contained provisions authorising disclosure to regulatory and statutory bodies.

Fifthly, in the settlement of employment disputes, the employee may have as much concern to maintain confidentiality as the employer. The Court of Appeal drew attention to the fact that two of the complainants supported the Claimants' application; and one of them expressly wished their privacy to be protected. A third complainant did not object to disclosure but only on the basis that they would not be named. However, the publication of particulars of their allegations would create a high risk that it would be possible to identify them.

Finally, the Court of Appeal held that there was a real prospect that publication would cause immediate, substantial and possibly irreversible harm to all the Claimants and their companies which may have implications for their employees.

Having considered all the circumstances of the case and the issue of proportionately, the Court of Appeal ruled that there was sufficient likelihood of the Claimants defeating the public interest defence at trial. This justified the granting of an interim injunction, pending comprehensive consideration of the policy considerations and evidence of both sides at trial.

Undermining of the injunction

Nonetheless, without allowing the legal proceedings to run their course, Lord Hain stated in the House of Lords that he felt it was his duty under parliamentary privilege to name the individual granted the interim injunction. He jumped to his own defence in stating that he was doing so precisely because the media were subject to an injunction preventing publication of the full details of a story, which he deemed to be in the public interest.

This has brought into sharp focus the uneasy juxtaposition between a court's decision to prevent by injunction the publication of information, and the ability of a parliamentarian to disclose the very same information, using parliamentary privilege.

Lord Hain expressed concern about the use of NDAs, notwithstanding that the existence of NDAs was a factor in the decision of the Court of Appeal to *grant* the interim injunction.

Had Lord Hain identified the businessman by words spoken outside Parliament, where he would not have been able to claim parliamentary privilege, he could have been held to be in contempt of court.

Parliamentary privilege

Parliamentary privilege, as described in Article 9 of the Bill of Rights 1689, provides that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. The result is that parliamentarians are not exposed to civil or criminal penalties for what they say or do in the course of *proceedings* in Parliament. This privilege is essential to the effective working of Parliament.

The Joint Committee on the Publications of Proceedings in Parliament in its Second Report in 1970 HL 109, HC 261, defined parliamentary proceedings, at paragraph 27(1)(a), as

"*all things said done or written by a Member or by any officer of either House of Parliament…in or in the presence of such House, and for the purpose of the business being or about to be transacted…*"

and at paragraph 27(1)(b) as

"*all things said done or written between Members and officers of either House of Parliament or between Members and Ministers of the Crown for the purpose of enabling any Member or any such officer to carry out his functions as such provided that publication thereof be no wider than is reasonably necessary for that purpose*."

It was held by the Supreme Court in *R v Chaytor and others* [2010] UKSC 52, that the extent of parliamentary privilege is ultimately a matter for the court, paying careful regard to any views expressed in Parliament by either House. In that case the court held that parliamentary privilege did *not* apply to the submission by MPs of claim forms for allowances and expenses because scrutiny of such claims by the courts "*will have no adverse impact on the core or essential business of Parliament, it will not inhibit debate or freedom of speech*" (Lord Phillips at [47]).

It is not clear why Lord Hain could not have carried out his functions or advance a debate about the use of NDAs without naming an individual whom he knew had been granted an interim injunction by the Court of Appeal which sought to prevent his being named.

Time for change?

This episode surely calls for a detailed consideration as to the appropriate use of parliamentary privilege.

The privilege is to encourage freedom of speech and debates or proceedings in Parliament without parliamentarians fearing penalty for what they say or do.

Where it was readily foreseeable that the statement made in the House of Lords would attract immediate and widespread attention, could it ever have been said with confidence that publication of Lord Hains' statement would be "*no wider than is reasonably necessary for [the purpose of enabling him to carry out his functions]*"? The answer to that question must be 'no'. The ease, speed and power of communication in 1689 were very different to today.

Should there be a ban on reporting outside Parliament, words spoken inside Parliament where it is known that the information being reported is the subject of an injunction? Such a ban would not infringe on freedom of speech and debates or proceedings in Parliament but would prevent a de facto privilege applying to anything said or done outside Parliament.

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