

[1] HCMP 2801/2015, 30 November 2015. The interlocutory hearing is on 6 and 24 November 2015, before Hon G Lam J. On 6 November, his lordship, despite the contesting arguments on the authority of the plaintiff and the duty for full and frank disclosure in the ex-parte application, agreed to adjourn the trial and to narrow the scope of the order with an effective public domain exception. On 24 November, the parties addressed the Court on the issues arising of Plaintiff's application, namely, whether the other parties can join as interveners and where there is a breach of confidence established prima facie of the submissions. I will refer to the judgment thereafter as "the HKU judgment".

[2] Whether Mr Fung's message has been the gist, as Mr Lee SC argues, or an "incomplete" and "imprecise" record of the discussion, as Lam J suggests, is a fact to be determined.

[3] Upon Court order, the Commercial Radio took down the tapes online, and further came into terms with HKU on 5 November by consent summons and undertaking not to leak further audio recordings of the meeting. He is discharged from the action.

[4] HKU judgment at paragraphs 38-53.

[5] *Prince Albert v Strange* (1849) 1 Mac. & G. 25.

[6] Per Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

[7] *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at page 322.

1 [1968] FSR 415, followed in Hong Kong in *PCCW-HKT Telephone Ltd v Aitken* FACV 27/2008, 13 February 2009.

[8] HKU judgment, at paragraph 39. See also *Tchenguz & Ors v Imerman* [2010] EWCA Civ 908, at paragraphs 58-71, in particular paragraph 66. The CFI adopts fully

in *Sim Kon Fah v JBPB & Co and others* HCA 49/2011, 24 June 2011 and *SK Hynix Inc v Vannex International Ltd* HCA 1473/2014, 10 February 2015.

[9] *Gurry on Breach of Confidence* 2nd Edition paragraph 7.39.

[10] *SNE Engineering Co Ltd v Hsin Chong Construction Co Ltd and others* [2015] 4 HKLRD 517, para 131.

[11] This position is supported in Toulson & Phipps, *Confidentiality* (2012) paragraph 6-058. The author discusses *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, where Robert Walker LJ and Sedley LJ that the existence of such a duty by the reasonable recipient conscience is an important limitation to the ECHR Article 10 right to freedom of expression.

[12] [1975] AC 396.

[13] The defending parties argued that the test on injunctive relief in a case involving human rights should not be applied here, and should follow *Cream Holdings Ltd. v. Banerjee* [2004] UKHL 44 instead.

[14] HKU judgment, at paragraphs at 52- 53. Lam J upon reviewing the authorities, also sees the uncertainty as a matter of Hong Kong position, in the definition and requirement of the public interest defense.

[15] It should be reminded of the public nature of a university. The University is a publicly funded body and regulated under the University of Hong Kong Ordinance (Cap 1053). The Council is, as conferred by statutes, the decision-making body for the University.

[15] Analogous to the Executive Council of Hong Kong, the argument is eventually similar to that of the Executive Council in the HKTv Free License Saga, as reflected

in the written reply by the Chief Secretary for Administration in Legislative Council Question 19, accessed at <http://www.info.gov.hk/gia/general/201311/27/P201311270647.htm>.

[16] Toulson & Phipps, *Confidentiality* (2012), paragraphs 19-024 to 19-034, reviews relevant arguments in terms of public interest immunity and seemingly suggests that there is an argument against disclosure in terms of facilitating understanding of “inner working of the government to avoid ill-informed or captious criticism”.

[17] *Gartside v Outram* (1857) 26 LJ (Ch) 113 per Sir William Page Wood VC. See also *Maccaba v Lichtenstein* [2004] EWHC Civ 1579. The extension of this rule, as suggested by Clarke (1990: 75), as “whether it is in the public interest that certain information be made public”, is seemingly too broad and vague to be the test. I shall discuss no further.

[18] *Lion Laboratories Ltd. v Evans and Others* [1985] Q.B. 526. For the development of the rule, see also *Harrods Ltd v Times Newspapers Ltd* [2006] EWCA Civ 294 at paragraph 38.

[19] *Ibid.*

[20] Another point of observation in the trial, is that the arguments for disclosure often require submissions on facts, overtly political, and is not so well received by the Court. With all respect, Mr Lee SC’s speech in particular was doused with his passion for HKU and seemingly relied on *Wednesbury* unreasonableness in supporting “public interest”.

[21] HKU judgment at paragraph 85.

[22] See also *R v Central Independent Television Plc* [1994] Fam. 192.

[23] This right is generally recognized but not discussed in full its substance. See for example, *Secretary for Justice v the Oriental Press Group Ltd & Others* [1998] 2 HKLRD 123.

[24] *AG v Guardian Newspaper (No 2)* [1990] 1 AC 109 at 183F.

[25] See for example, the House of Lords decision in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. The case is well received by Hong Kong Courts in defamation cases.

[26] See for example, *Next Magazine Publishing Ltd and others v Ma Ching Fat* [2003] 1 HKLRD 751, at paragraph 36.

[27] [1994] Fam. 192.

[28] *Re Guardian News & Media* [2010] UKSC 1 at [63] per Lord Roger.

[29] An extra hurdle, which is not yet addressed in the judgment, is the scope of the disclosure permitted under this public interest argument, and whether it is necessary to publish the whole of the information to satisfy that public element. See *Her Majesty's Attorney General in and for the United Kingdom v South China Morning Post Ltd and Others* [1988] 1 HKLR 143. In *Barclays Bank Plc v Guardian News and Media Ltd* [2009] EWHC 591 at paragraphs 29 to 30, Blake J weighs public interests in understanding great financial institutions like the bank, being a part of the bedrock of our economy and society. “...If the debate can flourish without the publication of the full documents themselves, that is a highly material factor... the more that is sought to be published... The self-direction of a responsible journalist is to consider whether the justification of full verbatim quotation as part of the exercise of freedom of expression is made out with particularity to the form of publication that is intended”.

[30] HKU judgment, at paragraphs 25 to 32.

[31] See *Man Whi Chung v Man Ping Nam & Another* [2003] 1 HKC 549 at paragraph 23. Deputy Judge Andrew Cheung (as the CJHC then was) held that “a person with a doubtful interest in the subject matter of the litigation was allowed to be joined, so that the doubt over his interest could be resolved at trial together with the relevant issues between the original parties.”

[32] See Civil Procedure in Hong Kong 2016, 15/6/1 and 15/6/8.

[33] In *Sanders Lead Co Inc v Entores Metal Brokers Ltd* (1984) 1 All ER, followed in *Wong Chun Loong Tony v Ada Ltd* [1991] 1 HKC 86 at p. 94 D-I.

[34] FOIA, section 1(a), as confirmed in *Kennedy* at paragraph 16.

[35] This point is discussed in the HKU judgment, at paragraph 64, 90. Section 12(4) is also of relevance where the public interests defense and the relevant privacy code (for example the Press Complaints Commission’s Code of Practice and Ofcom’s Broadcasting Code) codify some of the defenses available to journalists.

[36] The proportionality test in the UK, unlike the Hong Kong test in *Leung Kwok Hung and others v HKSAR* [2005] HKCFA 41, has adopted the ECHR prescription of a fair balance. See *Soering v United Kingdom* (1989) 11 EHRR 439 and *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. What is discussed in *Douglas & Ors v Hello Ltd. & Ors* [2005] EWCA Civ 595 as the “ultimate balancing test” is to be distinguished here because unlike privacy, confidentiality is not a convention right.

[37] *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at paragraph 65.

[38] 13585/88 [1991] ECHR 49 (26 November 1991).

[39] Applied in cases such as *Naomi Campbell v MGN Ltd.* [2002] EWCA Civ 1373.

[40] [2012] EWHC 433 (Ch).

[41] *Cream Holdings Ltd. v. Banerjee* [2004] UKHL 44.

[42] An extra point of consideration that the Court adopts, interestingly, is inquire what is the gist and purpose of the application. Considering also *Tillery Valley Foods v. Channel 4 Television* [2004] EWHC 1075, the Court asks itself whether the breach of confidence claim is in fact a retaliation of defamation, if so the application must fail.

[43] *Kennedy v Charity Commission (Secretary of State for Justice and others intervening)* [2015] A.C. 455 at [1].

[44] See R. Clayton, 'The Curious Case of Kennedy v Charity Commission' U.K. Const. L. Blog (18th April 2014).

[45] See for example, paragraphs 61-101, 154.

[46] (1987) 9 EHRR 433.

[47] *Österreichische v Austria*, Application No. 39534/07, 28 November 2013, at paragraphs 33-36. Following the Grand Chamber decision in *Gillberg v Sweden* (2012) 34 BHRC 247, the Article 10 right to information is enforced onto a University professor to disclose research material methodology for other professors' use and inquiry.

[48] For example, some cases supporting a general right arguably rely more on the intervention of "without interference by public authority" limb of the article. See for example, *Ozgur Gundem v Turkey* (2000) 31 EHRR 1082 and *Centro Europa 7 Srl v*

*Italy* (Application No 38433/09) (unreported) 7 June 2012 . In the latter case, the Grand Chambers discussed at paragraph 134, while balancing the importance of pluralism in a government-dominated TV licensing system, that there is a positive obligation to place appropriate framework to guarantee effective pluralism.

[49] See paragraph 128-129 and 133.

[50] At paragraphs 240 – 242.

[52] At paragraph 13 to 19, the Committee places special focus to the role of the press.

[53] *Ng Shek Wai v Medical Council of Hong Kong* [2015] 2 HKLRD 121 at paragraphs 84-85, citing *Toktakunov v Kyrgyzstan* (UNHRC, Communication No 1470/2006, 28 March 2011).

[54] The Code only permits inquiries on the basis that the information is in the possession of that department. Arguably, the University Grants Committee Secretariat may not have information of the HKU Council, and is of no use to the parties.

[55] Bulter-Sloss P in *Venables & Anor v News Group News Papers Ltd & Ors* [2001] EWHC QB 32 has expressly denounced the test at paragraphs 10–12 when balancing the interests thereof.

[56] *Douglas & Others v Hello Ltd. & Others* [2005] EWCA Civ 595 at paragraph 81.

[57] (2001) 185 ALR 1.

[58] See *Associated Newspaper Ltd v Prince of Wales* [2008] Ch 57 at 31 and 65-68. Also discussed in Toulson & Phipps, *Confidentiality*, paragraph 6-58.

[59] As respectfully contrasted with paragraph 58 of HKU judgment “there is no similar legislation in Hong Kong and it is not for the Court of First Instance to rewrite the law by a judicial decision to adopt an equivalent approach [following section 12(3) of HRA].

[60] Toulson & Phipps, *Confidentiality*, paragraph 6-59.