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The HKU injunction reimagined: Press freedom protection in confidentiality cases

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Introduction

Albert Camus once wrote, "*a free press can of course be good or bad, but most certainly without freedom the press will never be anything but bad*."[1] In the recent interlocutory injunction application *The University of Hong Kong v Commercial Broadcasting Co Ltd*, the University of Hong Kong ("HKU case") sought to enforce confidentiality by way of an injunction against the press. The University also sought to refrain "persons unknown" from disclosing an unauthorized tape recording of the council meeting on the appointment of the Pro Vice Chancellor of the University.[2] The Counsel in the hearing submitted that, "it is not our side's intention to enter a fight with the press", but serious questions against press freedom arose.[3] The legal issue to be resolved was whether the public interests in HKU's application are properly recognized, and whether HKU should prove that the public interests in preserving press freedom do not overweigh public interest breach of confidence claim. The result of the hearing was that a permanent injunction is granted to HKU and the duty of confidentiality on that alleged meeting overrides concerns of press freedom. I believe this is justice that is delayed, and justice delayed is justice denied. [4] Consequently, I wonder whether the Hong Kong Courts are providing inadequate protection to freedom of press because of the legal approach adopted. In this essay, I will first list out the relevant facts of the case, and then discuss how the Court assessed the duty of confidence and the balancing exercise of competing interests. I will also compare HK with the laws in the UK; of which I have found that the English system grants a better protection to protect a person's freedom of expression.

Background of the HKU case

The case concerned a confidential recording of a HKU Council meeting that was leaked by the Commercial Radio and any other individuals regarding the Council's refusal to appoint Professor

[1] Albert Camus, *Resistance, Rebellion and Death*. (1960)

[2] *The University of Hong Kong v Commercial Broadcasting Co Ltd* HCMP 2801/2015, 30 November 2015. (hereafter as "*HKU case*") This is an interlocutory application (hearing held before the Hon Mr Justice Godfrey Lam on 6 and 24 November 2015) but its importance is not diminished by such nature because interlocutory injunction applications are usually time sensitive, sufficient to achieve the effects of an injunction.

[3] Personal observation of the trial of HKU case on 6 November 2015. See also Kristine Chan, '【港大禁制令】港大：無意與傳媒開戰 李柱銘：What else could it be?', *Hong Kong Inmedia* (Hong Kong, 6 November 2015).

[4] *See above, n2.*

Johannes Chan as Pro Vice Chancellor on 29th September 2015.[5] The appointment process of the pro-democracy constitutional law lawyer was allegedly tainted by politics; meaning, pro-PRC newspapers and government influences were against Chan's appointment.[6] The leaked material received wide media coverage.[7] After the meeting, the Chairman of the meeting informed the media that the decision was based on the "best and long term interests of the University". Shortly after, Billy Fung, a student council member whistle-blowed conversations of the meeting that was different to the Chairman's version. In late October, the Commercial Radio released two audio recordings in support of the Fung's version of the conversations.[8] The HKU thereby applied to the Court an interlocutory injunction grounded on breach of confidence against Commercial Radio and "persons unknown" to disclose any information on the alleged meeting. The 1st Defendant, the Commercial Radio, came into terms with HKU on 5th November by consent summons and undertook no further leakage of the conversations, and was subsequently discharged from the action. However, other media such as the Apple Daily, the HK Journalists Association (HKJA thereafter), and Legislative Councilor (Education Sector) Hon. Mr Yip Kin Yuen, the Chief Editor of Undergrad HKUSU and a HKU student applied to Court to join the proceedings as defendants or interveners ("defending parties") in defense of press freedom and in their own interests. Despite arguments for public interests, the HKU successfully

[5] Joyce Ng et al, University of Hong Kong obtains court injunction to prevent further council meeting leaks*, South China Morning Post,* 31 October 2015.

[6] Ernest Kao, Former Ming Pao editor Kevin Lau calls for answers from HKU over delayed appointment of pro-vice-chancellor, *South China Morning Post*, 2 June 2015.

[7] See for example, Lai Ying Kit, Police asked to investigate HKU audio leak: outrage over comments made about Johannes Chan, *South China Morning Post*, 28 October 2015. See also Kris Cheng,' Media unions hit back as HKU gagging order may allow for republishing of leaked Council tapes', *Hong Kong Free Press* (Hong Kong, 2 November 2015). Chinese local newspaper sources include Anonymous, '李國章否決陳文敏任副校錄音曝光', The Cable News (Hong Kong, 28 October 2015). See also Anonymous, 【有得聽】港大校委會會議錄音流出　證實李國章 Nice Guy 論　嘲陳文敏是「黨委書記」, *The Stand News* (Hong Kong, 28 October 2015).

[8] Despite the gag order, further audio recordings were leaked at a Taiwanese forum and then republished in Apple Daily in mid-November. See for example, Tony Cheung, What they said: new HKU leak reveals dispute over pro-vice chancellor choice, *South China Morning Post*, (Hong Kong, 9 November 2015); Luis Liu, Recordings of the HKU Council emerge in Taiwan, *China Daily Asia*, (Hong Kong, 10 November 2015).

obtained an interlocutory injunction on the basis of uncertain materials to be leaked and breach of confidence.

The granting of an interim injunction was temporary and discretionary.[9] In the decision, it can be summarised into 3 points. (1) Amongst the parties, no parties except the HKJA satisfy the interests requirement under Order 15 rule 6(2) or at common law because "none of the intended interveners contends that he or it is in possession of any confidential material that is the subject of the action or the interim injunction" because they are unable to receive information "like the world at large".[10] (2) The HKJA is accepted for arguments at trial are likely to concern competing public interests, freedom of expression and press freedom.[11] (3) The breach of confidence claim is prima facie established, and the competing public interests of confidentiality and press freedom shall be dealt with in a full trial. On 8th July 2016, upon full trial before Lam J, the permanent injunction was granted.

The constitutional right to press freedom

Journalists should have the liberty to decide the information, which they can and cannot disseminate. I believe that the right to receive and impart information, even if controversial, should be capable of contributing to a debate of general public interest in a democratic society. In Hong Kong, under Article 27 of the Basic Law, freedom of press is expressly protected. This constitutional right originates from article 19 of ICCPR and legislated into the Bill of Rights article 16.[12] Thus HK media outlets are legally entitled to enjoy a constitutional right to freedom of selecting information to broadcast, because the media is "the eyes and ears of the general public" and takes the role of "public watchdog".[13] The media is to impart ideas, to communicate information, thereby allowing the public to participate in public life

[9] HKU Case, at paragraph 55. *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1, at 405D. See also *London Regional Transport v Mayor of London* [2003] EMLR 4 (CA) at para 44 per Robert Walker LJ.

[10] HKU Case, at paragraph 24 to 32.

[11] HKU Case, at paragraph 32.

[12] *Secretary for Justice v the Oriental Press Group Ltd & Others* [1998] 2 HKLRD 123, paragraph 86-87.

[13] HKU case, at paragraph 68. See also *AG v Guardian Newspaper* (No 2) [1990] 1 AC 109 at 183F.

even though it is the minority who make decisions.[14] Our highest Court also recognizes this principle. In a CFA case on defamation that discusses public interests, Chan PJ once stated, "Arguably it might even be said that the media, vigilant in the interests of the investing public, had a duty to comment and draw attention to such happening [of insiders' dealings]".[15] The UK Courts also uphold similar legal principles on the media's right to free press. Per Lord Roger, in *Re Guardian News & Media*, that it is important for journalists to have the right to judge which form of information best tells the story.[16] Similarily, Lord Hoffman in *R v Central Independent Television Plc*, highlighted the importance of freedom as "*the right to say things which 'right-thinking people' regard as dangerous or irresponsible*".[17]

Of course, freedom should not be without its restrictions. Article 16(3) of the Hong Kong Bill of Rights itself makes it clear that exceptions are to restrictions that are necessary "for respect of the rights of others". In the HKU case, Lam J did reason that freedom of press shall not affect the right to confidentiality even if there is competing public interest in favour of disclosure.[18] However, competing public interest should not be given heavier weight than necessary and proportionate.[19] Whilst the proportionality test starts with a presumption over preservation of freedom, the Courts' balancing exercise in traditional confidentiality cases only requires the public interest to be overriding to other rights prescribed by law, such as the rights of others. I shall argue that the difference in Courts' approach creates a human rights loophole and thereby it is not providing adequate legal protection to press freedom.

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[14] 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.

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

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

[17] *R v Central Independent Television Plc* [1994] Fam. 192.

[18] HKU case, at paragraph 71.

[19] HKU case, at paragraph 64.

The approach adopted in the HKU case

The common law principle on breach of confidence is applied in the HKU case.[20] The concept of confidentiality originates from a legal action of breach of contract and breach of trust because it is a contractual and or equitable obligation of an individual to protect information that is considered secret or private. The exception to confidentiality for the press' rights to disclose information to the public is that there is a public interest that outweighs the interests of the parties in the action.[21] Confidentiality shall satisfy basic elements including that the information must have the necessary degree of confidence attached to them.[22] In a legal action where the Plaintiff seeks to prevent the Defendant from disclosure of a piece of information, the Plaintiff needs to establish its prima facie case. Afterwards, the Defendant then has the burden to prove that the public interest defense stands in favour of disclosing the information. The defense stems from the law of equity, that the law of confidence shall not protect misconduct or serious misdeed of such a nature that it ought to be disclosed to others.[23] The standard of proof is to prove a reasonable and serious prima facie.[24] Lord Goff's speech in the *Spycatcher* Case has laid down the public interest defense, where the public interest that confidences should be preserved and protected by law may be outweighed by other countervailing public interest that favours disclosure.[25] However, after considering legal positions of the public interest weighing exercises, Lord Goff found,

> *"The precise content of the public interest defence remains to be settled as a matter of Hong Kong law. This first instance interlocutory application is hardly the appropriate occasion to attempt to do so."*[26]

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[20] HKU case at paragraphs 38-53. *HKU case,* see n1 above, Para 38-53.

[21] *Prince Albert v Strange* (1849) 1 Mac. & G. 25. See also Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41. See also *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at page 322.

[22] *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415; HKU case, at paragraph 38.

[23] *Gartside v Outram* (1857) 26 LJ (Ch) 113 per Sir William Page Wood VC. Applied in *Maccaba v Lichtenstein* [2004] EWHC Civ 1579.

[24] *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.

[25] *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 ("the *Spycatcher* case") at 282 – 292; HKU case, at paragraph 74.

[26] HKU case, at paragraph 53.

As his Honour found the existence of a prima facie case, he then proceeded to consider the principle in *American Cyanamid Co v Ethicon Ltd.*[27] *American Cyanamid* requires the Court to adopt a course which carry the lower risk of injustice if it should turn out to be wrong.[28] His honour then added, at paragraph 62 and 64, "*I am highly conscious of the dimension of free speech in the present case, but there is nothing in the authorities to show that the traditional approach suitably adjusted and applied would necessarily fail to give due recognition and effect to any fundamental rights. … A balancing exercise with a view to finding the course likely to result in the least injustice has to be conducted, taking account of all relevant factors, including the strength and weakness of the parties' cases as well as the prejudice that would be caused to them respectively by the refusal or grant of interlocutory relief."*

The defending parties' arguments to follow *Cream Holdings Ltd* instead in light of its public element was rejected by his Honour because there is no similar legislation in Hong Kong.[29] Unlike this English case, in the HKU case, whilst there is an issue of press freedom, the public interest to protect the confidentiality nature the HKU Council meeting records outweighed the public interests to impart and receive information of the meetings. Noting the relevant cases and the UK courts' positions, the HK Court's approach contrasts with the UK Court's human rights sensitive approach, which starts from using the proportionality test and then distinguishing it from commercial or national security cases. I believe, that the HKU case should be similar to *Cream Holdings*, and that the injunction sought by HKU should have be dismissed.

The public interest therein

The writings and leaked audio of the appointment discussion is a matter of public interests as it is an illogical if not political decision not to appoint Professor Johannes Chan who was recommended by the Chairman of the Council and scrutinized by the Search Committee of the HKU.[30] The public interest

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[27] [1975] AC 396.

[28] HKU case, at paragraph 59.

[29] *Cream Holdings Ltd. v. Banerjee* [2004] UKHL 44. See HKU case, at paragraph 58.

[30] Facts as summarized in HKU case at paragraph 75 to 80. See also Singtao Daily, 陳文敏申副校 自揭受梁智鴻游說, 24 August 2015; Apple Daily, 由推薦到勸退　梁智鴻引爆陳文敏風波, 25 December 2015.

therein would be assessed with the duty of confidence of confider and confidant, which vary with the nature of relationships and undertaking.[31]

It is incontestably a matter in the public interest as it concerns university governance and academic freedom. Allegations on its functioning is of public concern rooted from its status as a statutory body, supplemented by the Code of Conduct. In *Lion Laboratories Ltd. v Evans and Others*, Stephenson LJ held that the Defendants in the case did not have to prove allegations technically true in that allegation. In the case, although the confidential report itself may trigger further investigations; the defense is sufficient if it is associated in the public mind with the allegations. Even if this argument is not accepted, the events should trigger the "no confidence in iniquity" argument. The discussion content of the meeting is to be regarded as a wrongdoing – as they are not clearly invalid reasons to an appointment issues. What Mr Fung said after the press conference is plainly whistle-blowing; which covered parts of the leaked material.

The scope of disclosure is clearly a critical issue when journalism is involved, especially when the ban to disclose information of all meetings of the Council may be allegedly too wide.[32] While the intended interveners argued for setting the injunction restrictively to the discussions of the alleged meeting not within the public domain, his Honour instead found that the *remainder* of the audio recordings that is now put to a halt by the injunction is not of public interests. The Plaintiff instead pursued an argument that a gag order be imposed to all meetings of the Council. HKU's reasoning is that its internal code of conduct is of public interest since maintaining the discussions of meetings confidential is to ensure that its members can speak freely and honestly on various aspects of issues, free of any pressure, so that the policies eventually formulated will be more comprehensive and the integrity of the system can be

[31] See for example

[32] *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".* See also *Her Majesty's Attorney General in and for the United Kingdom v South China Morning Post Ltd and Others* [1988] 1 HKLR 143

maintained. At paragraph 71 of the HKU case judgment, his Honour cited the cases of *Lion Laboratories Ltd v Evans, British Steel Corporation v Granada Television Ltd* and *HRH Prince of Wales v Associated Newspapers Ltd* in support of the argument that duty of confidence must be imposed to maintain the functioning of 'an organisation', albeit neglecting the fact that all three cases concern a breach of an employer-employee relationship who naturally have a higher duty of confidence, in a mostly commercial scenario.[33] In contrast, where a statutory and semi-official organization of university affairs and where the confider-confidant relationship is non-commercial tells a very different story. Toulson & Phipps argued that to maintain information confidential on the basis of proper functioning of an *political* organisation can be seen as simply an excuse to avoid ill-informed or captious criticism, and nothing more.[34]

Presumption over press freedom

Whilst it is trite that the proportionality test must be applied based on the incorporation of ICCPR necessity requirement into Article 17 of the BORO in public law scenarios, in a private law claim with allegedly press freedom violation such an approach has to be argued for.[35] It is not sufficient to consider the test of necessity and proportionality in between of the balancing exercise without setting straight the burden of proof and presumption for the constitutional right. In *London Regional Transport v Mayor of London*, Sedley LJ held that, it is "more helpful today to postulate a recipient who, being reasonable,

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[33] *Lion Laboratories Ltd v Evans* [1985] 1 QB 526 concerns a company manufacturing alcohol-testing breathing machines and its technicians who disclosed some confidential materials that casted doubt of the machines' accuracy. *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 on the other hand concerns the dealings of the British Steel Corporation with the government, disclosed by a disloyal employee who has access to the classified material. Lord Fraser on the same paragraph at 1202E compared purely the duty of confidence of an employer-employee relationship in a private corporation and a public corporation. *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch. 57 concerns a disloyal employee of the Prince of Wales having access to the written journals later gave them to the news agency.

[34] Toulson & Phipps, *Confidentiality* (3rd edition, Sweet & Maxwell 2012), paragraphs 19-024 to 19-034, reviews relevant arguments in terms of public interest immunity against disclosure in terms of facilitating understanding of "inner working of the government to avoid ill-informed or captious criticism".

[35] See for example *Leung Kwok Hung and Others v. HKSAR* [2005] HKCFA 40, at paragraphs 33-36, 57-58, 16-170.

runs through the proportionality checklist in order to anticipate what a court is likely to decide, and who adjusts his or her conscience and conduct accordingly".[36]

Being a private law claim makes no exception to the rule when there is freedom of expression violation alleged. Under General Comment No. 34 of the United Nations Human Rights Committee, the Committee makes clear that "*when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. ... [T]he relation between right and restriction and between norm and exception must not be reversed*". It is also for the public authorities, of which the court is one, to "*demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat*" (internal citations omitted).[37] This principle is applicable to all cases involving the protection of the constitutional right.

In light of the need for this protection, the UK has legislated to incorporate human rights standards under the European Convention on Human Rights under the Human Rights Act 1998 ("HRA") and its similar common law developments of the law. Further, section 12 of the HRA sets out the principles to be applied in determining any application of relief that might affect freedom of expression, in particular subsection (3) and (4).

> *"...(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*
>
> *(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic ..., to –*
>
> *(a) the extent to which –*
>
> *(i) The material has, or is about to, become available to the public; or*
>
> *(ii) It is, or would be, in the public interest for the material to be published*."

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[36] *London Regional Transport v Mayor of London* [2003] EMLR 4 at para 58

[37] General Comment No 34 paragraph 21 to 35. The Court in *Koon Wing-Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at paragraph 99 to 101has recognized the General Comments would provide "provide influential guidance as to how the ICCPR is applied".

Under the instrument, the burden shifts to the applicant to justify intervention. Analogous to privacy cases which developed into a body of law recently, the test tilt over press freedom when assessing the breach of a competing Convention right of privacy. It reflects that the Act changes the starting point and burden of proof in the proportionality test in justifying an intervention of the right of press freedom.[38] In fact as early as in *Observer and Guardian v. the United Kingdom*[39], a case concerning the publication of a book against national security, the Court has applied the proportionality test and required the Plaintiff to justify the intervention of article 10 on free speech as with a legitimate aim, necessary and proportionate. It must be acknowledged that, while privacy cases and the *Spycatcher* case on national security were both of vastly different subject matter, the subject matter of the present HKU case is still much comparable because of its official and political nature that triggers the constitutional right of free press. These human rights covenants sets a liberal and clearer test for Plaintiff to justify the intervention of freedom of expression "for preventing the disclosure of information received in confidence", as an express limitation in ECHR article 10(2), over a pressing public need to know.[40]

While we do not have similar instrument in Hong Kong, it does not mean the same effect of the HRA must necessarily not apply. First of all, the legislation of the HRA aims to enact the ECHR requirements, and it serves as a valuable guidance for HK courts to decide if the tripartite human rights instruments have legally and persuasively required so. The requirements and its body of law is constantly referred to in legal materials and are not in serious conflict with the existing legal regime.[41] Secondly, the conventional balancing exercise triggered only when a public interest defense is raised, puts an unduly harsh burden on the Defendants. That insufficient weight is given to the constitutional position of press freedom is to be remedied. The starting point is that the balance is presumptively tilted in favour of preservation of press freedom and of publication, unless sufficient evidence is adduced to disturb it.[42] It

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[38] See for example, *Venables & Anor v News Group News Papers Ltd & Ors* [2001] EWHC QB 32, at paragraphs 9-12.

[39] 13585/88 [1991] ECHR 49 (26 November 1991)

[40] See for example *Naomi Campbell v MGN Ltd.* [2002] EWCA Civ 1373.

[41] See for example, *Intellectual Property Law & Practice in Hong Kong* (Sweet & Maxwell 2010), Chapter 5, in particular 5.075 where the author discussed the development of privacy and the breach of privacy claim in *A v B Plc* [2003] QB 195.

[42] See *A v B Plc* [2003] QB 195 at para 11 per Lord Woolf CJ.

is thus regrettable that his Honour applies the conventional approach that fails to satisfy such human rights requirements .

The Viagogo Case and its approach

The approach can be best demonstrated in the English case of *Viagogo Ltd v Myles & Ors.* Viagogo, a ticket selling company in connection with live promoters, claimed damage to its business interests against investigative reporting by Channel Four Television.[43] The first Defendant, a former employee, gained access to detailed, specific yet confidential information of the company and did covert filming. Stressing that though improperly if not unlawful garnering of evidence is certainly a matter of concern albeit is inevitable by the nature of activities of the defendants, the Court looking at the internal guidelines and evidence to importance to honouring them, concluded that "the way in which it is conducting its website in this particular respect in relation to primary tickets … is, to put it no higher, shady." Almost directly confrontational to the private interest of confidentiality, this approach to balancing public interest gives the highest respect to public need for openness and investigative acts to functioning of the company.

The Court, in addition, demanded the Applicant to bear the burden to prove a probable case. By HRA section 12(3), that the applicant has to first prove sufficiently favorable, ie more likely than not, that the publication of the materials ought not to be published.[44] The Court continued, at paragraphs 36 - 54, that apart from an interest of confidentiality to be protected, the applicant must then show that this confidentiality must override any other reasons or public interest in a balancing test. [45] Applying the test, Viagogo failed to prove that absence or insignificance of iniquity is entitled to non-disclosure. On its facts the company concealed true sources of tickets and benefited from mark-up of prices and collusion with sellers. This case provides very useful and persuasive guidance to the Court's approach to confidentiality claims upon concerns of public interests.

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[43] [2012] EWHC 433 (Ch)

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

[45] *Ibid* at paragraphs 36-54.

Injunctive relief and human rights protection.

With emphasis to freedom of press, the test for injunctive relief should also be critically reassessed. Justice Lam relying on the principles set down in *American Cyanamid Co v Ethicon Ltd*, held that notwithstanding press freedom concerns, a prima facie case is established and a refusal of interlocutory injunctive relief may effectively deprive the plaintiff of its right. However, as noted by the House of Lords in *Cream Holdings Ltd. v. Banerjee*, the conventional approach would permit the courts to readily grant restraint on publication "to preserve the status quo until trial whenever Applicants claimed a threatened publication would infringe their rights of [privacy]".[46]

> "*The dangers inherent in prior restraint are such that they call for the most careful scrutiny on the part of the court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest* (see *Observer and Guardian v United Kingdom (1991) 14 EHRR 153*, para 60). *The court would, however, observe that prior restraints may be more readily justified in cases which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest*."[47]

Applying HRA section 12(3) which is directly related to injunctive relief, Lord Nicholls in *Cream Holdings* stated *".... the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial*."[48] The balance again favours publication. Indeed, HRA section 12(3) produces twofold effects. First, it enhances the weight which freedom of expression carry in the balancing exercise. Moreover, the hurdle that one must overcome in order to obtain an interim injunction increases. Lord Nicholls reiterated, "*[t]his approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing Convention rights."*[49] Thus, on its content, the correct approach to interlocutory injunctions relating to

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[46] *Ibid* at paragraphs 13 – 16.

[47] *Mosley v United Kingdom* [2012] EMLR 1, at paragraph 117.

[48] ibid, at paragraph 22.

[49] ibid, at paragraph 23.

press freedom should give reference to *Cream Holdings* in the same spirit of complying human rights standards of freedom of expression.

In *HKU* case, Justice Lam refused to apply HRA section 12(3) and *Cream Holdings* because his honour found that HRA section 12(3) is a parliamentary decision.[50] Undeniably the legislating body of HK has no intention to legislate an equivalent act, the *Cream Holdings* position supplemented the balancing exercise of freedom of expression in the present case. It is also worthy to note that Lord Woolf CJ in *A v B Plc* has explained the background of the legislation,

> "*The fact that if the injunction is granted it will interfere with the freedom of expression of others and in particular the freedom of the press is a matter of particular importance. This well-established common law principle is underlined by section 12(4) [of HRA]. Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society... The existence of a free press is in itself desirable and so any interference with it has to be justified.*"[51]

There is no such discussion across jurisdiction on application of the thresholds of the relevant sections of HRA; yet it is trite that *American Cyanamid* bears no universal application. In *Cambridge Nutrition Ltd v BBC*, Kerr LJ noted that, *"It seems to me that cases in which the subject matter concerns the right to publish an article, or to transmit a broadcast, whose importance may be transitory but whose impact depends on timing, news value and topicality, do not lend themselves easily to the application of the Cyanamid guidelines*".[52] Kerr LJ thereby held that, "*Where neither side was interested in monetary compensation and the decision on an application for an interlocutory injunction would be the equivalent of giving final judgment and, in particular, where the subject matter of the application for an interlocutory injunction was the transmission of a broadcast or the publication of an article the impact and value of which* ***depended on the timing of the transmission or publication****, the court should not*

[50] HKU Case at paragraph 58.

[51] *A v B Plc* [2003] QB 195 at paragraph 11.

[52] *Cambridge Nutrition Ltd v BBC* [1990] 3 All ER 523 at 535. In particular, it is said that "the *American Cyanamid* case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a strait-jacket.".

grant an interlocutory injunction restraining transmission or publication merely because the plaintiff was able to show a good arguable case and the balance of convenience lay in granting an injunction."

In the above case and the references Kerr LJ made, there is strong indication that the great reluctance of the courts to fetter free speech by injunction is supported authorities. he legal test is sensibly a development of common law principles that remedies concerns of press freedom *per se*. *Cream Holdings* also entails this as an exception to the rule **where circumstances make this necessary**.[53] Such approach should not be precluded from application but for the absence of equivalent legislation, nor the view that the appointment procedures and presumably its public debate have ended[54].

Conclusion: Restraint to press freedom unresolved

In this essay, I attempted to compare the HK approach to the UK Courts' approach. Relatively speaking, the English Courts are more human rights sensitive; of which I find that it should be applied in Hong Kong. HK Courts should consider more English cases in the future. I believe that, press freedom can only be preserved with an emphasis to substantial weight given by shifting the burden of proof on the claimant. Tilting the presumption over the Plaintiff at the interlocutory stage causes irreversible harm to press freedom. This has been done in the HKU case. We saw articles removed in fear of legal actions. The debate on the appointment into HKU governance body was abrupt as a result of end of council procedures and in the long run, there shall be loss of public confidence to the Council's accountability behind legal actions.

[53] *Cream Holdings,* paragraph 20.

[54] HKU Case, at paragraphs 58, 63 and 90.