

**Subject matter:** Confidential information s.41

**THE HIGHER EDUCATION FUNDING COUNCIL FOR ENGLAND v THE INFORMATION COMMISSIONER and GUARDIAN NEWS AND MEDIA LTD (EA/2009/0036)**

**Cases:** Derry City Council v Information Commissioner (EA/2006/0014)  
Bluck v Information Commissioner (EA/2006/0090)  
Pepper v Hart [1993] AC 593  
Howard v Sec of State for Health [2002] EWHC 396 (Admin)  
*Coco v A N Clark (Engineers) Limited* [1968] FSR 415  
Thomas Marshall Ltd v Guinle [1979] 1Ch 227  
Lancashire Fires Ltd v S A Lyons Co Ltd [1996] FSR 629  
Ocular Sciences v Aspect Vision Care Ltd [1997] RPC 289  
Fraser v Thames Television Ltd [1984] QB 44  
De Maudsley v Palumbo [1996] FSR 447  
Sales v Stromberg [2006] FSR 7  
Deloitte & Touche LLP v Dickson [2005] EWHC 721 (Ch)  
AG v Observer [1990] 1 AC 109  
Crowson Fabrics Ltd v Rider [2007] EWHC 2942 (Ch)  
Vestergaard Frandsen v Bestnet Europe Ltd [2009] EWHC 657  
McKennitt v Ash [2006] EWCA (Civ) 1714  
Douglas v Hello [2007] UKHL 21  
BUAV v Home Office and Information Commissioner [2008] EWCA Civ 870  
Moseley v News Group Newspapers Ltd [2008] EMLR 20  
Campbell v Mirror Group Newspapers [2004] UKHL 22  
Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776

**Background**

The Higher Education Funding Council for England (“HEFCE”) appealed from a decision of the Information Commissioner requiring it to disclose information relating to the state of the buildings at those Higher Education Institutions (each an “HEI”) which contributed data to a database of information about the management of land and buildings under their control.

HEFCE argued that most of the information had been received from third parties who had an expectation that it would be treated in confidence and that it was therefore exempt from disclosure under FOIA section 41 (information obtained by a public authority from any other person and disclosure would constitute a breach of confidence actionable by that or any other person). The obligation of confidence was said to arise from a confidentiality statement published on a website dedicated to the project of sharing HEI information and a code of conduct, which those institutions accessing the database were required to sign up to.

The Information Commissioner had decided that section 41 was not engaged. The information had been obtained from a third party, but the HEIs would not have a cause of action. He reached that conclusion, applying the three element test for breach of confidence set out in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 because:

- a. although the information in question was information to which an obligation of confidence was capable of attaching (in that it was not easily accessible elsewhere and was not trivial in nature); and
- b. it had been passed to the HEFCE in circumstances that gave rise to an obligation of confidence; nevertheless
- c. the HEIs who had confided the information to the HEFCE would not suffer any detriment if it were to be disclosed.

He considered that, having reached that conclusion, it was not necessary for him to consider whether the HEFCE would have had a public interest defence to such a claim.

Issues on Appeal – breach of confidence only needs to be arguable.

HEFCE argued, first, that the phrase in section 41 “would constitute a breach of confidence actionable by [a third party]” meant that the

exemption is engaged if it can be established that such a claim is merely arguable; it is not necessary to establish that the claim would be successful. The Tribunal considered that the language of section 41 was ambiguous and that in those circumstances it was legitimate to refer to Parliamentary materials (under the rule established in *Pepper v Hart* [1993] AC 593). In doing so it found authoritative, clarifying statements from a promoter of the legislation which made it clear that the test to be applied was that it had to be established that the notional case against the public authority would succeed, not that it was merely arguable.

Issues on Appeal – detriment not required to establish breach of confidence.

The HEFCE's second line of argument was that detriment was either not an independent requirement for a claim for breach of confidence at all, or that any such requirement was satisfied by the detriment that is necessarily involved in the unauthorised disclosure of information that has been communicated in confidence. Accordingly, it said, the third element of the *Coco v Clark* three part test no longer had to be satisfied and that the Information Commissioner had been wrong to take it into account. The Tribunal pointed out that none of the parties had been able to point to any case involving commercial information in which a court had stated that it should disregard detriment. It considered that it should take note of the fact that the courts had consistently invoked all three elements of the three part test and that it was not for the Tribunal to depart from the line of authority from the higher courts leading from *Coco v Clark* up to and including the recent case of *Vestergaard Frandsen v Bestnet Europe Limited*, ([2009] EWHC 657 (Ch)).

Issues on Appeal – detriment exists on the facts.

Turning to the question of whether, on the facts, detriment could be proved, the Tribunal decided that there would be some risk of harm to

the reputation, or at least the relative competitive position, of individual HEIs (with consequential impact on their ability to compete for staff and students or attract funding) if negative information about the standard of their buildings were to be disclosed. Although a rather unattractive argument it could not be said that no detriment at all would arise. It therefore concluded that any HEI which would be at risk of damage to its competitive position in this way would satisfy the requirement of establishing detriment.

#### Issues on Appeal – defence of public interest.

Having established that the notional cause of action did exist the Tribunal considered whether the public authority would have had a defence to a breach of confidence claim on the basis of the public interest in disclosure. Applying principles enunciated by the Court of Appeal in *HRH Prince of Wales v Associated Newspapers Ltd* ([2006] EWCA Civ 1776) the Tribunal revisited the elements of alleged detriment considered above and set them against various arguments in favour of disclosure. These included the need to give relevant information to those faced with a choice of university and the need to inform public debate on the adequacy of funding in the higher education sector. It decided that, in light of very considerable public interest in public institutions of this type making information available information about their estate, and applying the test of proportionality set out in the *Prince of Wales* case, the factors in favour of disclosure substantially outweighed those in favour of maintaining confidentiality. It followed that the HEFCE would therefore have a valid public interest defence to any breach of confidentiality claim brought by one or more HEIs.

#### Conclusion

The section 41 exemption was not engaged and the HEFCE was directed to disclose the information in question.