HCMP 2801/2015

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2801 OF 2015

BETWEEN

THE UNIVERSITY OF HONG KONG	Plaintiff
and	
HONG KONG COMMERCIAL BROADCASTING CO LTD	1st Defendant
THE PERSON OR PERSONS UNKNOWN	2nd Defendant
who has or have appropriated, obtained and/or publication the confidential information in respect of the Relevant Meetings (as defined in Part A of Schedule 1 of this Amended Originating Summons) of the Council of the plaintiff, excluding the information that is already in the public domain (as set out in Part B of Schedule 1 of this Amended Originating Summons)	

Before: Hon G Lam in Chambers

Date of Hearing: 24 November 2015

Date of Judgment: 30 November 2015

D E C I S I O N

Background

1. This application for an interlocutory injunction, pending trial, has arisen in connection with the discussions in the Council of the University of Hong Kong (which I shall call the "Council" and "University" respectively) on the appointment of the Vice-President and Pro-Vice Chancellor (Academic Staffing & Resources) of the University ("the Appointment Issue").

2. The issue came up for a final decision at the meeting of the Council held on 29 September 2015 ("29 September 2015 Meeting") to consider the Appointment Issue and various other items in respect of the financial affairs and the management of the University. (A brief description of the events leading to this meeting is set out in paragraphs 76-79 below.) The meeting started at 5 pm and lasted until approximately 7:30 pm. Discussions on the Appointment Issue lasted for about an hour in which more than 15 members of the Council expressed their views.

3. Immediately after the meeting on 29 September 2015, one of the members of the Council, Mr Billy Fung, held a press conference during which he attempted to summarise some of the discussions on the Appointment Issue and disclosed certain statements said to have been made by other specified members of the Council during the meeting. (That summary is described in paragraph 80 below.)

4. On 30 September 2015, the Chairman of the Council issued a statement condemning Mr Fung's action as a serious breach of the confidentiality of the discussions of the Council. The alleged breach of confidentiality by Mr Fung was tabled for consideration by the Council at its meeting on 27 October 2015. In the event, that item was adjourned in order to provide additional time for Mr Fung to respond to or comment on the matter with legal advice.

5. It transpired that an audio recording of at least part of the 29 September 2015 Meeting had been made by an unidentified person ("the Unknown Person"). On 28 October 2015, an audio recording of part of the 29 September 2015 Meeting, featuring the speech of a Council member, Prof Arthur Li, concerning the Appointment Issue was broadcasted on one of the radio channels operated by the 1st defendant (*viz* Commercial Radio I). The recording was also accessible on the 1st defendant's website at www.881903.com. A transcript of the recording was published on the Facebook page of the programme.

6. Following this broadcast, Clifford Chance, solicitors acting on behalf of the University, wrote urgently to the 1st defendant asking it to undertake to remove all audio recording of the 29 September 2015 Meeting from its website and to refrain from making any further disclosure of, among other things, any audio recording of meetings of the Council. The solicitors stated that if the requested undertaking was not provided, the University would be advised to apply for an interim injunction.

7. Notwithstanding the solicitors' letter, on 30 October 2015, the 1st defendant broadcasted in same programme another audio recording of part of the 29 September 2015 Meeting on the Appointment Issue, featuring the speech of a second Council member, Ms Leonie Ki. The recording and a transcript of it also became accessible on the 1st defendant's website and its Facebook page respectively.

8. In the afternoon of the same day, the University applied *ex parte* to the Court of First Instance for an interim injunction. Seagroatt DJHC granted an injunction against the 1st defendant and the 2nd defendant, which were named as:

> "… the person or persons unknown who has or have appropriated, obtained and/or offered or intend to offer for sale and/or publication the confidential information in respect of the meetings of the Council of the plaintiff. …"

restraining them from publishing or disclosing to any other person any audio recording, agenda, supporting papers and minutes of meetings of the Council.

9. An originating summons formally commencing the proceedings was also issued on 30 October 2015, by which the University seeks, among other things, (i) a declaration that the defendants are in breach of their duty of confidence in using or disclosing without its consent any audio recording of the meetings of the Council, and any agenda, papers and minutes of the Council, and (ii) an injunction restraining the use or disclosure of such information.

10. On 5 November 2015, by consent between the University and the 1st defendant, I made an order discharging the injunction and giving leave for the action to be discontinued as against the 1st defendant, upon certain undertakings given by the 1st defendant which broadly reflect the terms of the injunction. The action therefore continues now solely as against the 2nd defendant.

11. On 6 November 2015, the first return date of the injunction, the University sought an order continuing the *ex parte* injunction. With very short notice, five parties, identified below, appeared in front of me that morning asking to intervene or be joined as defendants (as the case may be) and opposing the continuation of the injunction on various grounds. To give the University a proper opportunity of response, the hearing was adjourned to 24 November 2015. The injunction was continued in the meantime but its scope was curtailed, *inter alia*, by being limited to the meetings held from 30 June 2015 to the date of the order. The definition of the 2nd defendant was revised and narrowed down. Protective orders relating to hearing papers were removed. Further, the public domain exception was revised and clarified to read:

> "For the avoidance of doubt, nothing in this Order shall prevent the Defendants from publishing, communicating or disclosing such of the Information, or ant part thereof, as was already in, or that thereafter comes into, the public domain (other than as a result of breach of this Order) …"[1]

12. On 8 November 2015, an audio recording of what was said at the 29 September 2015 Meeting by Dr Rosanna Wong and a response by the Vice-Chancellor, Prof Peter Mathieson, together with a transcript became accessible in an online discussion forum based in Taiwan. A related article appeared on Apple Daily the next day.

Parties, intervention and joinder

13. Instituting an action against a defendant who is identified by description and not by name is unusual but there are precedents for this where the circumstances so warranted. In *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633, where copies of a new *Harry Potter* book had been stolen from the printer and offered to certain newspapers for publication, an order was made by the English High Court against:

> "… the person or persons who have offered the publishers of the Sun, the Daily Mail, and the Daily Mirror newspapers a copy of the book 'Harry Potter and the Order of the Phoenix' by J K Rowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants."

14. In Hong Kong, an injunction was granted in *Billion Star Development Ltd v Wong Tak Chuen* [2012] 2 HKLRD 85 (*per* Au J) at §§49-56 and [2013] 2 HKLRD 714 (CA) at §§70-75 against a defendant who consisted of unknown persons identified by description. The practice was approved by the Court of Appeal which stated that the crucial point is that the description must be sufficiently certain so as to identify both those who are included and those who are not: see also *Bloomsbury Publishing Group plc*, *supra*, at §21.

15. The 2nd defendants, according to the Originating Summons as amended in line with the variations of the injunction made at hearing on 6 November, are:

> "The person or persons unknown who has or have appropriated, obtained and/or offered or intend to offer for sale and/or publication the confidential information in respect of the Relevant Meetings (as defined in Part A of Schedule 1 of this Amended Originating Summons) of the Council of the plaintiff, excluding the information that is already in the public domain (as set out in Part B of Schedule 1 of this Amended Originating Summons)."

The Schedule to the Amended Originating Summons reads as follows:

" PART A

1. Relevant Meetings means meetings of the Council of the Plaintiff held from 30 June 2015 to the date of the Interim Injunction Order made by the Deputy High Court Judge Seagroatt in these proceedings on 30 October 2015 (the 'Injunction Order').

PART B

1. Information, or any part thereof, as was already in, or that thereafter comes into, the public domain (other than as a result of breach of the Injunction Order), including, for the avoidance of doubt, the following materials:

(a) the audio recordings of the Relevant Meetings (or any part thereof) published on the 28 and 30 October 2015 by the 1st Defendant;

(b) the transcripts of the audio recordings (or any part thereof) referred to in paragraph 1(a) of Part B of this Schedule; and

(c) the information published by Billy Fung on 29 September 2015 in relation to the meeting of the Council of the Plaintiff on the 29 September 2015."

16. As mentioned above, on 6 November 2015, five persons sought to take part in the proceedings, namely, the Hong Kong Journalists Association, Mr Lee Hei Shun, The Hon Mr Ip Kin Yuen, Mr. Lau Yee Ching and Apple Daily Limited.

17. Mr Lee Hei Shun said he had downloaded the two recordings published by the 1st defendant on 28 and 30 October 2015 and for that reason claimed to fall within the description of the 2nd defendant (prior to amendment). Mr Ip Kin Yuen sought to be joined as an intervener on the basis of his capacities as (i) a permanent resident of the HKSAR; (ii) a member of the University's Court; (iii) a member of the University's Convocation; (iv) a convenor of a group of persons called "HKU Alumni Concern Group"; and (v) a member of the Legislative Council.

18. On the eve of the hearing on 24 November 2015, both Mr Lee Hei Shun and Mr Ip Kin Yuen indicated they no longer wished to take part. This leaves Hong Kong Journalists Association, Mr Lau Yee Ching and Apple Daily Limited, whom I shall refer to collectively as the "intended interveners". For the purpose of the hearing on 24 November, counsel on their behalves helpfully combined their effort and submitted a joint supplemental skeleton argument.

19. The Hong Kong Journalists Association has issued a summons dated 5 November for leave to appear as an intervener in the action. The association is a registered trade union of some of the journalists in Hong Kong. It has 593 members and is a body corporate by virtue of the Trade Union Ordinance (Cap 332). The association submitted that the *ex parte* injunction has far-reaching effects for press freedom in Hong Kong and on the ability of journalists to do their work. It submitted that not only is it interested in the outcome of the case, it also will be able, because of its experience and expertise, to offer an important, informed and different point of view on the questions arising.

20. Apple Daily Limited, by the affirmation of its editor-in-chief dated 13 November, stated that it applied (i) to vary or discharge the injunction as a person affected, (ii) to oppose the University's application for continuation of the injunction, and (iii) to be joined as a defendant "if necessary". The editor stated that since the Appointment Issue and related matters "have arouse[d] the interest and concern of the public, Apple Daily is and was under a moral and social duty to publish any information it has or may have in future on the subject". By a summons dated 20 November, Apple Daily Limited applied to be "joined as the 3rd defendant to discharge the ex-parte interim injunction order granted … on 30 October 2015 (as *per* clause 7 thereof), and continued and revised on 6 November 2015 (as *per* clause 4 thereof)". Mr Martin Lee SC who appeared on its behalf said that Apple Daily Limited falls within the description of the 2nd defendant because it intends to publish the information in question *if and when it receives it*, and since it is a known person, it should be separately joined as the 3rd defendant.

21. Mr Lau Yee Ching is the editor-in-chief of a students' publication of the University called "Undergrad". Undergrad is merely the name of a publication. It is not a legal entity. Nor does Mr Lau seek to intervene in any representative capacity. By his summons dated 5 November he applied for an order joining him as intervener or interested party in the action and discharging the *ex parte* injunction granted on 30 October 2015 or varying it in such way as the court sees fit.

22. The starting point for the question of joinder is that this is a private law action. The plaintiff is *prima facie* entitled to choose the persons against whom to proceed. The plaintiff's choice is, however, not conclusive. It is subject to the power of the court, among other things, to join additional parties. The question of joinder of parties, whether as an additional defendant or as intervener, is generally governed by Order 15, rule 6 of the Rules of the High Court. In particular, Order 15, rule 6(2) provides:

> "(2) Subject to the provision of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application-
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> …
>
> > (b) order any of the following persons to be added as a party, namely-
> >
> > > (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
> > >
> > > (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."

23. Order 15, rule 6(2)(b) requires some interest in the matter by the would-be intervener which is directly related to the subject matter of the action. A mere commercial interest in its outcome divorced from the subject matter of the action is not enough: ***Sanders Lead Co Inc v Entores Metal Brokers Ltd*** [1984] 1 WLR 452, 460; *Building Authority v Appeal Tribunal (Buildings)* (CACV 19 & 113 of 2012; 15 March 2013) at §15; ***In re IG Farbenindustrie AG Agreement*** [1944] 1 Ch 41.

24. 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. Each of them has made his or its application as a person not in possession of such material. In that sense they are not directly prevented by the injunction from publishing, disclosing or communicating anything. There is as yet nothing for them to disclose.

25. Instead it was submitted that they are affected because their right or freedom to *receive* information is hampered by the injunction in question. The Unknown Person cannot now, without breaching the injunction, pass the information in question to them. In my view, that is simply a general consequence of the injunction. The injunction does not target the intended interveners or seek in terms to prevent them specifically from receiving the relevant information. Nor is there any evidence that the Unknown Person wishes to pass the information in question specifically to the intended interveners and that he has refrained from doing so because of the existence of the injunction. Accordingly insofar as the intended interveners cannot, without the Unknown Person breaching the injunction, receive the information, they are in no different position from the rest of the world. I do not think this is sufficient to bring them within Order 15, rule 6(2)(b).

26. The rule does not permit joinder of a party who is merely interested in a case because and to the extent that it determines a question of law: *Spelling Goldberg Productions Inc v BPC Publishing Ltd* [1981] RPC 280; *Building Authority v Appeal Tribunal (Buildings)* (CACV 19 & 113 of 2012; 15 March 2013) at §14 *per* Fok JA (as he then was). In *Helen Tsang v Cathay Pacific Airways Ltd* (CACV 43/2001; 11 September 2001), a case raising questions on the law relating to sexual discrimination, Keith JA rejected the Equal Opportunities Commission's application to be joined as a party, holding that neither limb of Order 15, rule 6(2)(b) had been satisfied. In the result, the court allowed the Commission to provide the court with the services of counsel not as counsel for the Commission but as *amicus curiae*, though that did not make the Commission a party or intervener.

27. In *Roe v Sheffield City Council* [2003] LGR 389; [2003] EWCA Civ 1, Sedley LJ noted that it had been pointed out[2] that private law litigation could from time to time raise issues affecting the public interest, but that the provision for first-instance joinders made at that time by RSC Order 15, rule 6(2)(b) (equivalent to Hong Kong's RHC Order 15, rule 6(2)(b)) would not ordinarily admit public interest interventions.

28. In the same paragraph, however, Sedley LJ referred to the wide power to hear any person that had since been introduced into judicial review proceedings (CPR rule 54.17 and the relevant Practice Direction) and said:

> "… there is no reason why the High Court in the exercise of its inherent jurisdiction should not be able to act likewise …"

That however is a separate power arising from the inherent jurisdiction of the court to be exercised only sparingly in special circumstances.

29. It was also submitted by the intended interveners that they could take part because they were affected by the injunction which specifically stated (as is common in *ex parte* interim injunctions) that "anyone affected by any of the restrictions in [the] Order" may apply to the court to vary or discharge the order. It is well established that even without that clause a person affected by an injunction may apply to the court to have it discharged, but in my view this alone neither requires nor entitles that person to be made a party to the action as such: *Bourbaud v Bourbaud* (1864) 12 WR 1024; *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966, 978; *Lo Yu Chu v Kam Fu Lai Development Co Ltd* (CACV 50/1994; 29 September 1994). Further, for the reasons I have explained above, the way the intended interveners say they are affected is that, like the world at large, they are unable to receive the information without the Unknown Person acting contrary to the court order. It seems to me that it is not intended by the principle or by the express clause in the injunction that the intended interveners can for that reason claim a right to apply to discharge the injunction as such.

30. The question of joinder, so far as the interlocutory injunction is concerned, is largely academic, since the intended interveners have filed affirmations, have lodged skeleton arguments and their counsel have been heard in full *de bene esse*. The summons of Apple Daily Limited is, in particular, in terms limited to a joinder to discharge the interim injunction.

31. For the purpose of the further conduct and the trial of the action, however, the applications of the Hong Kong Journalists Association and Mr Lau Yee Ching are still "live". In my judgment and for the reasons explained above neither of them comes within Order 15, rule 6(2)(b) and neither should be joined as a party to the action as such.

32. However, the arguments at trial are likely to concern competing public interests and the proper balance between them. The issues are relatively novel in Hong Kong. The court is likely to be assisted by arguments on both sides. Unless the Unknown Person reveals himself or herself, it is unlikely that anyone will be contesting the University's claim at trial. It would be undesirable for the relevant legal questions in a case such as the present to be determined without the benefit of adversarial argument. The arguments will also raise issues concerning freedom of expression and press freedom. The Hong Kong Journalists Association has special familiarity with such issues. For these reasons, in the exercise of the court's inherent jurisdiction, I direct that the Hong Kong Journalists Association be permitted to take part in the trial of the action to the extent of being served with the relevant papers and making submissions to the court.

The Council

33. The University is a body incorporated by statute, namely, the University of Hong Kong Ordinance (Cap 1053) ("the Ordinance"). Subject to the Ordinance, the University is governed in accordance with the provisions of the statutes of the University ("Statutes"), which are set out in the Schedule to the Ordinance. The constitutional organs of the University include the Court, the Council and the Senate of the University. The court is primarily an advisory body. The Council is the governing body of the University. Section 7(3) of the Ordinance provides:

> "The Council shall be the supreme governing body of the University, and shall provide for the custody and use of the University seal, and subject to the provisions of this Ordinance and the statutes, the Council may exercise all the powers and is to perform all the duties of the University other than those vested or imposed by this Ordinance or the statutes in some other authority of the University or in an officer."

34. The Senate is the organ entrusted with the power of regulation of all matters relating to education in the University. Section 7(4) of the Ordinance provides:

> "Subject to the provisions of this Ordinance and the statutes, and to the financial control of the Council, the Senate shall have the regulation of all matters relating to education in the University."

35. The constitution and powers of the Council are set out in the Statutes. Statute XVIII provides that the Council shall consist of 24 persons, namely: (a) seven persons appointed by the Chancellor (ie Chief Executive), one of whom shall be the Chairman; (b) six persons appointed by the Council; (c) two persons elected by the Court; (d) the Vice-Chancellor; (e) the Treasurer; (f) four elected full-time teachers; (g) one elected full-time employee of the University, not being a teacher; (h) one elected full-time undergraduate student; and (i) one elected full-time postgraduate student.

36. Statute XIX sets out the powers of the Council which include the power to appoint any "officer" of the University. "Officers" are defined in section 12(1) of the Ordinance to mean:

> "… the Chancellor, the Pro-Chancellor, the Vice-Chancellor, the Deputy Vice-Chancellor, the Pro-Vice-Chancellors, the Treasurer, the Deans of the Faculties, the Registrar, the Librarian, and such other persons as may be designated as officers by the statutes."

37. Statute XIV paragraph 2 empowers the Council to determine and make rules for the time, place, and procedure of its meetings. The proceedings and procedures of the Council are governed by the Guide and Code of Practice for Members of the Council ("Code"), a copy of which is made available to the public on the University's website. The Code has recently been amended, I am told, by a resolution of the Council itself, in August 2015.

Action for breach of confidence

38. This is an action to restrain breach of confidence. In a claim such as this it is generally necessary for the plaintiff to show that (i) the information itself has "the necessary quality of confidence about it"; (ii) that information has been imparted in circumstances importing an obligation of confidence; and (iii) unless restrained there is likely to be an unauthorised use of that information to the detriment of the plaintiff: adapting what was said by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47.

39. It seems to me that the papers relating to and an audio recording of the meetings of the Council, which are not open to the public, are materials of a nature that *prima facie* can attract a legal duty of confidentiality. They contain information that a reasonable person would normally regard as confidential.

40. A duty of confidence can arise in many ways, and not necessarily as a result of a contract. It can arise when confidential information comes to the knowledge of a person in circumstances where he has notice or is held to have agreed that the information is confidential: *Attorney General v Guardian Newspapers Ltd* (No 2) [1990] 1 AC 109, 281B *per* Lord Goff; *Gurry on Breach of Confidence* (2nd ed), §7.03; *SNE Engineering Co Ltd v Hsin Chong Construction Co Ltd* [2015] 4 HKLRD 517, §129. The approach of the law is an objective one: whether the circumstances were such as to import a duty of confidence. The question is one of notice to an objective reasonable recipient, not whether the defendant subjectively believed or accepted the information was confidential: *SNE Engineering Co Ltd*, §131.

41. It seems to me that, for at least two reasons, an obligation of confidence *prima facie* did arise in relation to these materials. First, there was ample notice to attendees of the meetings that the documents and proceedings of the Council's meetings are confidential.

42. The Code of the Council provides as follows:

> "*Duties and Responsibilities of Council Members*

> 5.6 Council members act as trustees in the best interest of the University (para. 5.8). They should act, and be perceived to act, impartially, and avoid any situation in which their "private interests" compete or conflict with the interests of the University (para. 5.27-5.33). <u>They should also uphold the principle of confidentiality in respect of Council and University information (para. 5.41).</u> In discharging their duties and responsibilities, Council members may wish to take note of the 'Seven Principles of Public Life' promulgated by the 'Nolan Committee' in the UK (para. 5.2-5.3) as well as the Code of Conduct for members of public bodies proposed by the Independent Commission Against Corruption of Hong Kong (para. 5.4).
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> *Undertaking by Members*
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> 5.7 When joining the Council, new members are invited to undertake in writing the upholding of the principles of trusteeship and confidentiality. They will then have to sign the undertaking on an annual basis to affirm their commitment to the principles of trusteeship and confidentiality.
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> ……
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> *Confidentiality vs Transparency in the Operation of the Council*
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> 5.41 While students and staff and the public should have access to information about the proceedings and decisions of the Council (via an appropriate channel of internal communication for students and staff, and through the University's website for the public), it is absolutely necessary to keep confidential the Council agenda, supporting papers and minutes, especially when they are concerned with individuals or plans yet to be finalized or have a commercial sensitivity. Indeed, <u>discussions at the Council meetings and Council papers are confidential and all members of the Council should uphold this principle of confidentiality, to allow free discussions and exchange of views at Council meetings</u>.
>
> …
>
> 5.43 <u>The discussion and deliberations at Council meeting are strictly confidential, regardless of the nature of the business, or the confidentiality classification of the discussion papers, of the agenda item concerned.</u> When it is necessary for the Council to make announcement to the public of any of its decisions, the Council Chairman shall normally be the spokesperson or authorize an appropriate office or officer of the University to be responsible for the task. <u>Unless with the permission of the Council or its Chairman, other members of the Council should not disclose Council information in any manner.</u>" (<u>my emphasis</u>)

43. Even before its amendment in August 2015, the Code contained the following provision:

> "5.39 While students and staff and the public should have access to information about the proceedings and decisions of the Council (*via* an appropriate channel of internal communication for students and staff, and through the University's website for the public), it is necessary to keep confidential the Council agenda, supporting papers and minutes, especially when they are concerned with individuals or plans yet to be finalized or have a commercial sensitivity. Indeed, discussions at the Council meetings and Council papers are confidential and all members of the Council should uphold this principle of confidentiality, to allow free discussions and exchange of views at Council meetings."

44. While Mr Lee SC referred to paragraph 5.7 of the Code concerning the "seven principles of public life", including the principle of "openness", he did not do so — as I understand his submissions — in an attempt to suggest that the information was not confidential under the Code. In any event, notwithstanding any other statement of general principle, I think the specific provisions of the Code referred to above are such as to leave little doubt, on any fair reading of the Code as a whole, that the Council requires its papers and proceedings to be treated as confidential.

45. The evidence also shows that since June 2015, the then Chairman of the Council (Dr C H Leong) had repeatedly emphasised at various Council meetings the importance of members abiding by the duty of confidentiality and demanded that members should not disclose to any third party the subject matter or content of the discussions, voting results or papers of the Council. The evidence shows that no member objected to the Chairman's demand or otherwise expressed disagreement with the requirement of confidentiality.

46. Pursuant to paragraph 5.7 of the Code (introduced by resolution in August 2015), each member of the Council was asked to provide a written undertaking to observe confidentiality. As at 30 October 2015, the University had received the undertaking from all but four Council members. Three of those four had said they would be providing the undertaking which, I was told, has since been done. One member has to date not provided the undertaking or stated that he would be providing it, though of course this does not mean that that member is for that reason exempt from the duty of confidence.

47. According to the registrar, prior to discussions on the Appointment Issue on the 29 September 2015 Meeting, the Chairman reiterated that the discussions were confidential and appealed to members to abide by the principles of confidentiality.

48. The second reason why an obligation of confidence has *prima facie* arisen is that it appears from the evidence filed so far that the audio recording had been made surreptitiously. Since 2000 the Council had not itself made or authorised anyone to make any audio recording of its meetings, including the 29 September 2015 Meeting. All attendees at the 29 September 2015 Meeting, including the members of the Council, the registrar, the legal advisers and University staff except for one person (Dr Steven Cannon) who was in charge of the security arrangements for the meeting, were requested to hand in their mobile phones which were put in individual sealed envelopes. It is likely, therefore, that the recording that exists was made without the knowledge of anyone at the meeting except the Unknown Person. That person may be a member of the Council or a staff attendee, unless an intruder had managed to plant a recording device there earlier or operated some other eavesdropping device without being present at the 29 September 2015 Meeting, as to which there is no evidence.

49. The authorities suggest that information in the hands of a person who has obtained it by clandestine means is by reason of that fact impressed with an obligation of confidence: *Lord Ashburton v Pape* [1913] 2 Ch 469, 475. Thus it is stated in *Toulson & Phipps, Confidentiality* (3rd ed):

> "2-019 A person who obtains confidential information by dishonest or discreditable means (such as electronic eavesdropping) should be, and is, in no better legal position than if the information had been imparted to him voluntarily in confidence. Equity acts on the conscience, and the conduct of a person who obtains confidential information improperly is as reprehensible to the conscience as that of a person who violates the confidence in which he received it."
>
> "3-044 There is today no doubt of the general principle that the equitable doctrine of confidentiality applies where a person improperly or surreptitiously obtains confidential information. …"
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> "3-077 A person who obtains confidential information improperly or surreptitiously behaves in a way which by its nature is contrary to 'a properly formed and instructed conscience' … It is hard to imagine circumstances in which such a person could resist the application of the equitable jurisdiction on grounds of lack of notice of the confidentiality."

50. The right to prevent disclosure of information imparted in confidence is however not an absolute right. It is a right that admits of exceptions. One of the exceptions is the so-called "public interest defence". This defence has not, and probably cannot, be precisely defined, and its scope is not entirely clear or settled. In *Attorney General v Guardian Newspapers Ltd* (No 2*)*, *supra*, at p 282E, Lord Goff referred to it as the third "limiting principle" in these terms:

> "… although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. … It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining the confidence against a countervailing public interest favouring disclosure.
>
> Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made 'the confidant of a crime or a fraud' … But it is now clear that the principle extends to matters of which disclosure is required in the public interest …"

51. A review of the authorities shows that the courts have considered that public interest could require disclosure for the detection or prevention of wrongdoing, prevention of miscarriage of justice, or protection of public health and safety. *Toulson & Phipps, Confidentiality*, in a passage cited without disapproval by Robert Walker LJ in *London Regional Transport v Mayor of London* [2003] EMLR 4 at §36, suggests that the question depends on whether there is a "serious risk of public harm" which would be prevented by disclosure.

52. A rule that requires a simple uncalibrated weighing exercise will hardly offer guidance to parties and the courts. A defence that is too broad and ill-defined may weaken the ability of those who enter into a relationship or agreement of confidence to rely on the principle of confidentiality. Indeed, in Australia, which adopts a narrower public interest defence, it has been said by Gummow J in *Smith Kline and French Laboratories (Australia) Ltd v Department of Community Services and Health* [1990] FSR 617, 663, that unless kept within strict limits, the defence becomes:

> "… not so much a rule of law as an invitation to judicial idiosyncracy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence."

53. 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. Since the plaintiff has proceeded on this application on the basis that Hong Kong law is broadly similar to English law in this respect, I am content to proceed on a similar basis without deciding the matter.

Approach on application for interim injunction

54. This is of course not the trial of the action but merely an application for interim injunction, pending the trial of the action. Such an injunction is temporary, lasting only until trial, whose purpose is to preserve the *status quo* until the rights and obligations of the parties can be properly and finally determined.

55. The principles governing the grant of interim injunction in a general case are well established. The court has first to assess whether there is a serious issue to be tried on the merits of the plaintiff's claim for final relief. It will then consider whether damages would be an adequate remedy for either side for the loss and damage that might be caused by the grant of, or refusal to grant, the interim injunction. Finally, where damages would not be adequate, the court considers where the balance of convenience or balance of risks of injustice lies. See *American Cyanmid Co v Ethicon Ltd* [1975] AC 396.

56. In the present case Mr Lee SC and Mr Shum emphasised that the constitutional freedom of expression is involved. Article 27 of the Basic Law provides: "Hong Kong residents shall have freedom of speech, of the press and of publication …". Article 16 of the Hong Kong Bill of Rights makes more elaborate provision, as follows:

> "(1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals."

57. Mr Lee SC and Mr Shum submitted that having regard to the existence of these constitutional rights, the *American Cyanmid* approach, in particular the standard of serious issues to be tried, is inapplicable, and that instead the court should require the plaintiff to establish its case to a much higher threshold. They drew support from section 12(3) of the (UK) Human Rights Act 1998 and the cases decided under that provision. Section 12(1) and (3) provides as follows:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> …
>
> (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."

58. Section 12(3) is the product of a Parliamentary decision in the UK the background of which was explained in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, §15. 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.

59. The approach hitherto adopted by the courts in Hong Kong based on *American Cyanmid* mandates that the court should strive to adopt a course which appears to carry the lower risk of injustice if it should turn out to be wrong: *Music Advance Ltd v Incorporated Owners of Argyle Centre Phase I* [2010] 2 HKLRD 1041, §12(d), *per* Ma J (as he then was); adopting what Hoffmann J said in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680. Revisiting that topic in 2009, Lord Hoffmann said in *National Commercial Bank Jamaica v Olint Corp* [2009] 1 WLR 1405 at §§16–17, that the purpose of an interlocutory injunction is to "improve the chances of the court being able to do justice after a determination of the merits at the trial", and that the basic principle is that "the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other". This approach was also applied by Chow J in *Sima Sai Er v Next Magazine Publishing Ltd* (HCA 1500/2014; 8 August 2014).

60. The established approach allows for a closer examination, in an appropriate case, of the merits of the plaintiff's claim even at the interlocutory stage, for example where the grant of interlocutory relief would be finally dispositive of the dispute in the plaintiff's favour: *LansingLinde Ltd v Kerr* [1991] 1 WLR 251; *NWL Ltd v Woods* [1979] 1 WLR 1294, 1306F–G; *Lawrence David Ltd v Ashton* [1989] ICR 123. But even there the deeper inquiry into the merits of the case is but one factor in the consideration of the balancing exercise: *Lai Hoi Ping v Persons occupying portions of Nathan Road* (HCMP 2975/2014; 15 November 2014), §10 *per* Cheung CJHC.

61. Even before the (UK) Human Rights Act 1998, that approach had been adopted in cases concerning disclosure of information, where the crucial issues between the parties did not depend on a trial, but solely or mainly on the grant or refusal of interlocutory relief. The relative strength or weakness of the parties' cases was recognised as a consideration to be taken into account: *Cambridge Nutrition Ltd v British Broadcasting Corp* [1990] 3 All ER 523, 534–535. See, in Hong Kong, *Sim Kon Fah v JBPB & Co* [2011] 4 HKLRD 45 at §47.

62. 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.

63. In *Attorney General v Guardian Newspapers Ltd*, at the interlocutory stage of the famous *Spycatcher* case, the Court of Appeal (see [1989] 2 FSR 3, 18) applying the *American Cyanmid* approach, maintained an injunction which had been continued by Millett J. Subsequently, in the complaint brought by the newspapers that the interlocutory injunction infringed, *inter alia*, article 10 of the European Convention on Human Rights, in which it was submitted that the *American Cyanmid* principles were unduly advantageous to a plaintiff seeking to restrain disclosure, the European Court of Human Rights declined to review those principles *in abstracto*, proceeding instead to determine "whether the interference resulting from their application was necessary having regard to the facts and circumstances prevailing in the specific case before it": *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, 193. In the result the European Court held that there was no infringement of article 10 arising from the interim injunction granted between the period from July 1986 to July 1987 (ie the period prior to the publication of the book in the United States), noting:

> "In any event, … the English courts did far more than simply apply the *American Cyanmid* principles inflexibly or automatically; they recognised that the present case involved a conflict between the public interest in preventing and the public interest in allowing disclosure of the material in question, which conflict they resolved by a careful weighing of the relevant considerations on either side."

64. It is clear in the present case that pecuniary compensation to either party would be neither adequate nor appropriate. Nor can the court at this stage finally determine the rights and obligations of the parties, based on incomplete evidence and incomplete argument. 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. Given the state of the law of confidence, the resolution of the question of interlocutory relief will inevitably involve taking into account competing public interests, but this must be done having due regard to the principle that any restriction on the fundamental freedom of expression including the freedom to receive information has to be justified as necessary and proportionate.

Authority to sue

65. Two discrete points made by the intended interveners can be shortly dealt with. The first is that, it was submitted, the then Chairman of the Council had no authority to commence this action or to instruct solicitors and counsel to prosecute it. In my opinion there is no substance in this point, or in the associated point that the plaintiff failed to disclose such lack of authority at the ex parte stage. Paragraph 5.14 of the Code of the Council (introduced in 2005) makes it clear that when matters arise which are too urgent to be left to the next scheduled meeting, the Chairman may either call a special meeting or deal with them by taking action himself, taking care to do so only in an appropriate case and not to exceed the scope of his delegated authority. The evidence shows that the Chairman had on various previous occasions exercised that power. The circumstances on 30 October 2015 were urgent. The decision to seek an *ex parte* injunction could not meaningfully be deferred to the whole Council whether at a special meeting or by circulation when the Unknown Person could be a member of the Council or staff. Finally, at a special meeting held on 12 November 2015, the Council acknowledged that the steps taken in these proceedings were within the Chairman's authority and, to avoid any doubt, expressly approved and ratified them.

Loss of confidentiality

66. The second discrete point made by the intended interveners is that because of the press conference given by Mr Billy Fung on 29 September 2015, there was no further confidentiality left in the information sought to be protected. I reject this submission. On the evidence, the disclosure made by Mr Fung was incomplete and imprecise. There are clear differences in the language used with possible differences in meaning compared to the transcript of the audio recording leaked on 28 and 30 October.

67. I should mention that it has come to my attention after the hearing on 24 November that further audio recordings apparently of what was said at the 29 September 2015 Meeting (featuring speeches by Prof CM Lo, Mr Peter Wong and Mr Martin Liao) as well as the preceding Council meeting held on 25 August 2015 had become accessible at the Taiwan website referred to above.

Balancing exercise

68. As stated above, there is a right of free speech in the law of Hong Kong which is constitutionally guaranteed. This freedom has been greatly, and rightly, valued in our society. While the right is enjoyed by all, it has been said that "the ones with the greatest need for this constitutionally vital freedom are the organs of the media": *ETK v News Group Newspaper Ltd* [2011] EWCA Civ 439, §13, *per* Ward LJ. The press, including the media, are the public watchdog. It is of fundamental importance not only to afford the press freedom of expression but also to maintain the free flow of information to the press.

69. This freedom is, however, not absolute. Article 16(3) of the Hong Kong Bill of Rights itself makes it clear that there are special duties and responsibilities attached and that there may be restrictions that are necessary "for respect of the rights of others". The rights of others plainly include the rights to confidentiality. Indeed, the equivalent provision in the European Convention on Human Rights, article 10(2), expressly provides that the exercise of freedom of expression may be subject to restrictions necessary "for preventing the disclosure of information received in confidence".

70. There can be no real dispute that the information in question, in particular any audio recording of meetings of the Council, is confidential to the University. The provisions of the Code of the Council set out above make that plain. The registrar's affirmation stated that the confidentiality of Council's meetings is of great importance to the University, and that the University has an interest in upholding the integrity of the decision-making process of its Council by allowing free discussions and exchange of views, opinions and thoughts and protecting the identities of those who are the subjects of discussions.

71. While the right to confidence is a private law right, there is a general public interest in upholding the duty of confidence. That public interest is a strong one. "There is a public interest of a high order in preserving confidentiality within an organisation": *per* Griffiths LJ in *Lion Laboratories Ltd v Evans* [1985] 1 QB 526, 550G; "there is … a very strong public interest in preserving confidentiality within any organisation, in order that it can operate efficiently": *per* Lord Fraser in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1202E. In *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57, §67, Lord Phillips CJ, delivering the judgment of the Court of Appeal, said:

> "There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. … Today the test is … whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech."

72. Given that the University is a leading institution of research and tertiary education in Hong Kong, there is an additional dimension of public interest in ensuring that its governing body can function properly in accordance with its own constitution and practice.

73. As I understand the University's case, the detriment that would result from the disclosure of the information in the present case is not so much any specific risk of harm arising from the publication of the very information in question, as more generally an impairment of the proper functioning of the Council if the principle of confidentiality cannot be enforced. The concern is that a member of the Council or of the staff could surreptitiously record the Council's proceedings and publicise it — a fact that of itself has serious implications for the operation of the Council in the way it is organised. Mr Smith SC submitted that the absence of protection of confidentiality would create a "chilling effect" on free expression within the Council, and would also deter persons from serving as Council members in future.

74. As Lord Goff observed in *Attorney General v Guardian Newspapers Ltd* (No 2*)*, *supra*, at p 282, there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure.

75. I turn to the submissions of the intended interveners about the public interest in disclosing the audio recordings. In order to evaluate those submissions it is necessary to set out briefly the events leading to the 29 September 2015 Meeting. These are taken from the evidence filed by the intended interveners since the University has not yet filed full evidence on these matters.

76. In around February 2014, the University set up a search committee to identify appropriate candidates for the position of the Vice-President & Pro-Vice Chancellor (Academic Staffing & Resources). On 26 November 2014, the newspaper Wen Wei Po revealed that Prof Johannes Chan, former Dean of the Faculty of Law of the University, had been recommended by the search committee for the post. Wen Wei Po criticised Prof Chan and questioned whether he was a suitable candidate having regard to his alleged ties with a co-founder of the Occupy Central campaign who was also a member of the Faculty of Law. There were further subsequent articles in Wen Wei Po and Ta Kung Po criticising Prof Chan, one of which, citing from a leaked University Grants Commission report, stated that his academic record on research was not up to international standards when he was Dean of the law school.

77. In February 2015, the newspapers Ming Pao and Apple Daily published articles suggesting that senior government officials had lobbied certain members of the Council not to appoint Prof Chan to the post. Meanwhile the Council had not made a decision on the Appointment Issue.

78. On 30 June 2015, the Council resolved to postpone its decision on the Appointment Issue. Apple Daily reported the Chairman as telling the press afterwards that it was appropriate to wait for the appointment of the new Provost before deciding on the Appointment Issue. At a meeting held on 28 July 2015, the Council again decided to postpone the Appointment Issue. On that occasion, a number of people including certain students of the University stormed into the Senate Room, where the Council was meeting, to protest against the Council's decision. Prof CM Lo, one of the members of the Council, fell down during the chaotic incident and suffered minor injury.

79. The next meeting was held on 25 August 2015 and was moved to the Hong Kong Jockey Club Building for Interdisciplinary Research on Sassoon Road. The Council resolved to decide the Appointment Issue at its next meeting, ie the 29 September 2015 Meeting.

80. After the 29 September 2015 Meeting, the Chairman said at a news conference that the decision was based on "the best and long term interests of the University" but did not provide any details of the discussions that had taken place at the Meeting. On the same evening, Mr Billy Fung gave the press his own summary of what was said at the meeting by those who voted against Prof Chan and stated (according to the affirmation filed by Apple Daily):

> (1) Prof Arthur Li criticized Prof Chan for not having a PhD degree and suggested that the only reason why he had been appointed as the Dean of the Faculty of Law of the University was that he was a "nice guy".
>
> (2) Ms Leonie Ki, Ms Margaret Leong and Mr Benjamin Hung questioned Prof Chan's integrity and accused Prof Chan for having disclosed to the public that he was the sole recommended candidate before the Council had made a decision on the Appointment Issue.
>
> (3) Prof Edward Chen also criticized Prof Chan for not having a PhD degree, and that he had rarely published articles in academic journals, and questioned his qualifications when compared to the other Vice-Presidents and Pro-Vice Chancellors of the University.
>
> (4) Prof CM Lo criticized Prof Chan's lack of academic standard and achievements as compared to an assistant professor. He also criticized Prof Chan for not showing sympathy towards him after his fall.
>
> (5) Mr Martin Liao said that he had made a search on Goggle Scholar and had found that there were only four searches made on his works in the past five years.
>
> (6) Dr Rosanna Wong opined that Prof Chan would only further divide the University.

81. Against this background, counsel for the intended interveners submitted, in summary, that (i) the Appointment Issue is a matter of public interest; (ii) reasons should have been, but were not, given by the Council for its decision made on the 29 September 2015 Meeting; and (iii) some members of the Council had made unfounded and libellous allegations against Prof Chan, taken into account irrelevant considerations in voting against him, and not acted in the best interests of the University.

82. The fact that the Appointment Issue has generated some interest in the press and attracted some public attention is in itself not to the point. The test is not whether the matters disclosed would interest the public or be of interest to the public, but whether it is in the public interest that disclosure should be made and the confidence breached: *HRH Prince of Wales v Associated Newspapers Ltd*, supra, §68; *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359, §147.

83. Whether or not because detailed or concrete reasons have not been given for a decision of the kind under consideration public interest required that the audio recording of the discussions at the entire meeting be disclosed is a question that can have far-reaching consequences. Numerous examples readily come to mind of decisions of the Government, public bodies or even significant private corporations which can have consequences affecting the public. Is confidentiality in their proceedings lost because the matter is of interest to the public and full reasons have not been announced? What is the criterion for favouring disclosure in such a case?

84. The intended interveners refer to the "seven principles of public life" set out in the Code of the Council including in particular the principle of "openness", which states:

> "Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands it."

The conduct of the meetings of the Council is however an internal matter for the Council itself. The Council has the power to regulate its own procedure. The Code and the evidence show that its meetings have been conducted on the basis of confidentiality and collective responsibility. I do not think that the argument is sufficient to establish summarily at this interlocutory stage that the recordings should be made public in order to provide reasons for the decision or in the name of openness.

85. The third point mentioned above is grounded in the established rule that there is no confidence in iniquity — the courts do not enforce a right to confidence when to do so would be to cover up wrongdoing. By wrongdoing may be included "anti-social conduct" in the sense of "activities which, whilst not in breach of the law, are seriously contrary to the public interest": *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 895-896.

86. If there was indeed some misconduct that would be revealed by disclosure and not otherwise, it might well be that the public interest in confidentiality had to yield to the public interest of exposure. This case is special in that it is not known exactly what the audio recording stated (except those parts that have already gone into the public domain). Nevertheless the balancing exercise is a practical one grounded in reality, taking into account what would be likely to be revealed by the disclosure of materials not already in the public domain. Judging by what Mr Billy Fung divulged after the 29 September 2015 Meeting as stated above, which can for present purposes be taken to be the comments he considered objectionable enough to mention, it could be argued that there is little else objectionable whose recording has not already been disclosed. It is far from obvious that disclosure of the *remainder* of the recording would reveal some anti-social conduct in the sense described above. In other words, given the revelations of recordings already made, the expectation that further disclosure could reveal the alleged or other wrongdoing, and hence the public interest in further disclosure, is correspondingly reduced. (I should not be taken to be saying that there was wrongdoing revealed in the parts of the recording disclosed — the question simply does not arise for decision.)

87. In any event, in the circumstances of this case, the allegation that there was some wrongdoing in the majority decision of the Council is not one that I can summarily accept and find to be established in the setting of the present application. Take for example the allegation that what certain members of the Council said was libellous: even if there were *prima facie* defamatory statements made, there would still be questions as to whether qualified privilege attached to the communication and if so whether there was malice that defeated the privilege. Such allegations of wrongdoing or misbehaviour are matters that depend on evidence on which the University and Council, including individual Council members concerned, must be afforded an opportunity to contest. These and other difficulties that pervade the interlocutory stage perhaps explain Powell J's observation in *Westpac Banking Corporation v John Fairfax Group Pty Ltd* (1991) 19 IPR 513, 525-526 that the balancing between the competing public interests is an exercise which "can rarely, if at all, be satisfactorily carried out at an interlocutory stage of proceedings, and on less than complete information".

88. On the materials available at present, the University has an arguable claim that the public interest in upholding the confidentiality of the meetings of the Council should prevail. On the assumption that the University will succeed at trial, the effect of discharging the interlocutory injunction now will be to deprive the University, without a trial, of its rights and all opportunity of successfully obtaining final relief.

89. On the other hand, on the assumption that the University will fail at trial, the effect of continuing the interim injunction until trial will only be to postpone, not to prevent, the rightful disclosure by the Unknown Person of the information in question.

90. I recognise that, depending on the circumstances, delayed disclosure can cause irreparable prejudice or injustice even if the party seeking disclosure ultimately prevails. As Mr Martin Lee SC emphasised, the impact of an article or broadcast may depend on "timing, news value and topicality" (words taken from *Cambridge Nutrition Ltd v British Broadcasting Corp*, *supra*, 534-535). In the present case, however, the Appointment Issue has already been dealt with. There is no question of the Council's decision being re-opened. Prof Johannes Chan has publicly stated he will not mount any legal challenge against the decision. In fact, according to Mr Ip Kin Yuen in his affirmation dated 5 November 2015, the matter is "now history", "a chapter that is now closed". His counsel (Mr Alan Leong SC) submitted on 6 November that the subject matter was "no longer a live or current issue". In these circumstances whereas the refusal of an interim injunction would practically put an end to the action, the grant of it does not necessarily have that effect, especially if the trial can be expedited.

91. Taking into account all the circumstances of the case that are before the court, including the facts that this is an interlocutory application, that the injunction sought is temporary pending the trial, and that a refusal of interlocutory injunctive relief may effectively deprive the plaintiff of its right, I consider that an interim injunction coupled with an order for expedited trial is necessary and proportionate for the purpose of preserving and respecting the rights of the University in the interests of justice. I consider that the University's claim has sufficient merits in light of all the circumstances of the case to justify making a temporary interim order until its claim can be substantively determined and adjudicated upon. Accordingly it is my opinion that the proper exercise of the discretion in accordance with principles requires that I should continue the interlocutory injunction.

Conclusion and order

92. For the foregoing reasons, there will be an order that:

(1) the injunction granted on 30 October 2015 as amended on 6 November 2015 be continued until trial or further order; and

(2) there be a speedy trial of the action.

The plaintiff should propose the directions it seeks for the further conduct of the action within seven days hereof. The intended interveners' applications to be joined as parties to the action are refused, except that the Hong Kong Journalists Association is to be permitted to take part in the trial of the action to the extent of being served with the relevant papers and making submissions to the court.

93. As between the plaintiff and the intended interveners, I direct that any submissions on costs be lodged in writing within 21 days hereof. As to the costs relating to Mr Ip Kin Yuen, I direct that the plaintiff lodge its submissions within 21 days hereof in response to Mr Ip's submissions on costs dated 23 November 2015. As to the costs relating to Mr Lee Hei Shun, if any party seeks any costs against the other, that party should lodge submissions within 21 days hereof and serve them on the other party; in the absence of such submissions there will be no order as to costs.

(Godfrey Lam)
Judge of the Court of First Instance
High Court

Mr Clifford Smith SC and Mr Martin Kok, instructed by Clifford Chance, for the plaintiff

The 2nd defendants were not represented and did not appear

Mr Martin Lee SC and Mr Raymond Ho, instructed by Hampton, Winter and Glymm, for the intended 3rd defendant (Apple Daily Limited)

Mr Erik Shum and Ms Linda Wong, instructed by Ho Tse Wai Phillip Li & Partners, for the intended intervener (Lau Yee Ching)

Mr Erik Shum and Mr Jeffrey Tam, instructed by May Cheng & Co, for the intended intervener (Hong Kong Journalists Association)

Ms Tara Liao, instructed by Ho Tse Wai, Phillip Li & Partners, for the intended intervener (Ip Kin Yuen)

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[1] The form of wording was adapted from the Model Order annexed to the (English) Practice Guidance issued by the Master of the Rolls on interim non-disclosure orders.

[2] In the report of the committee set up by Justice and the Public Law Project and chaired by Sir John Laws, *A Matter of Public Interest: Reforming the law and practice in interventions in public interest cases* (1996), pp 17, 30-31.