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Case No: BL-2020-000635

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (CH)

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 22/05/2020

Before:

MR JUSTICE MILES

- -

Between:

(1) FORTESCUE METALS GROUP LTD
(2) CHICHESTER METALS PTY LTD **Claimants**

- and -
(1) ARGUS MEDIA LIMITED
(2) S&P GLOBAL INC.

Defendants

- -
- -

James Drake QC, David Hirst and Nicholas Gibson (instructed by **Harcus Parker Limited**) for the **Claimants**
Antony White QC and Kirsten Sjøvoll (instructed by **Wiggin LLP**) for the **First Defendant**
Andrew Caldecott QC and Greg Callus (instructed by **Mischon de Reya LLP**) for the **Second Defendant**

Hearing dates: 12, 13 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 3.00 pm on 22 May 2020.

Mr Justice Miles:

Introduction

1. The Claimants seek an injunction restraining the Defendants until trial from publishing news stories referring to the monthly discount used by the Claimants as part of a formula for pricing sales of iron ore. The Defendants are publishers of journalism and the application therefore engages Art. 10 of the European Convention of Human Rights ("the ECHR") and s.12 of the Human Rights Act 1998 ("the HRA").

2. The First Claimant is a producer of iron ore based in Perth, Western Australia, and the Second Claimant, one of its subsidiaries, is the contracting entity for all sales of iron ore products of the group of which both Claimants are part, known as "FMG". FMG is the fourth largest producer of iron ore in the world.

3. The First Defendant ("Argus") is a UK company. It publishes market data, news stories and analysis about the international energy and commodity markets, including the metal industries. The Second Defendant is incorporated in the USA. The claim concerns the business of one of its divisions known as "S&P Global Platts" ("Platts") which has its global headquarters in London. It too publishes market data, news and analysis about the energy and commodities markets.

4. The Defendants are price reporting agencies ("PRAs"), that is, publishers of prices, data and analysis about commodities markets, including iron ore. The Defendants supply this information to their subscribers which include businesses operating in the relevant industries, traders, government bodies, regulators and academics. As well as publishing news, analysis and commentary PRAs compile aggregate spot price indices for physical commodities including iron ore. This is known as a benchmarking function.

5. The global physical iron ore market involves, in very broad terms, two main forms of dealing. The spot market is typically used by smaller producers and end-users, with sales often effected through intermediaries. The long-term contract ("LTC") market is generally used by larger producers and end-users which require greater continuity in their supply chains. But though the method of sale differs, the two markets are for the same commodity and some of the parties who enter into long-term contracts may also from time to time buy or sell iron ore on the spot market. Global spot market sales account for around 15% of global iron ore sales and LTC sales for about 85%.

6. Spot market sales may be "on-platform" or "off-platform". On-platform sales are exchange sales and the prices are visible to parties with access to the platforms. Off-platform sales are bilateral sales contracts at a price negotiated by the parties.

7. As already mentioned, as one of their functions PRAs publish indices of spot prices. They gather information about spot sales, on-platform and off-platform. PRAs have direct access to the platforms to enable them to gather data about prices of spot sales. Producers, including FMG, also supply information about off-platform spot sale prices to the PRAs. The PRAs aggregate the information and publish their indices. These are an important source of information for market participants.

8. The indices are also used as a benchmark in pricing formulae used by large suppliers such as FMG in their long-term contracts. The agreements in issue in the current case generally include a formula which uses, as one of its elements, the Platts 62 Fe IODEX index ("the Platts 62 index") ("62 Fe" is a grade of iron ore).

9. The Claimants' case, in broad outline, is that from about late 2018 they started to focus increasingly on the LTC market and that, by 2020, that made up about 85% of their business. FMG's long-term contracts almost invariably contain a pricing formula under which the price is determined in each month of the contract's life for deliveries of iron ore in the following month. As I have said, part of the formula is the Platts 62 index. Another part of the formula is a percentage discount known as "the DMTU discount" (DMTU being a dry metric tonne unit, the internationally recognised way of measuring iron ore).

10. FMG's long-term contracts contain other elements, and various pricing formulae, but almost all of them appear to include the DMTU discount and the Platts 62 index. At some point towards the end of each month FMG informs its existing and prospective LTC customers of the DMTU discount for the following month.

11. The Claimants argue that the DMTU discount is confidential information which they have a commercial interest in protecting. They say that their existing long-term customers and prospective customers are prohibited either by contractual terms or equitable duties of confidence from disclosing the DMTU discount.

12. FMG have been setting a DMTU discount as part of their dealings with their customers for many years. Other large producers have also set their own discounts, which perform a similar function in their own contracts.

13. Since 2014 various PRAs, including the Defendants, have published market reports and analysis containing information about FMG's monthly DMTU discounts. The published stories often give the amount of FMG's DMTU discount for the relevant month and compare it with the discount for the previous month, showing whether it is narrowing or widening, and expressing views about the implications of these movements for trends in the supply and demand for iron ore.

14. As I say, these stories have appeared since 2014 without any action being taken by the Claimants. The Claimants have however recently started to take steps to seek to prevent the PRAs from publishing their discounts. I shall return to this point in a moment.

15. The use of discounts of this kind is common in the industry and those set by other large producers (such as BHP, Vale and Rio Tinto) have also been reported by PRAs over the years. There is no evidence of any of the producers taking any action to restrain publication.

16. Though the Defendants have not disclosed their full journalistic sources, the almost invariable pattern has been that they have published their stories shortly after FMGs' DMTU discount has appeared on Chinese social media, either on an account published on a Twitter-type platform known as "Weibo" or an online chatroom called "WeChat".

17. As I have said, in late 2019 or early 2020 the Claimants' position changed, and they sought to take steps to enforce what they said was their confidence in the DMTU discount. To explain this change of stance, the Claimants say that the contractual function of the DMTU discount in its pricing formulae has changed. They say that since 2018 they have concentrated on LTC sales and, whereas the DMTU discount was previously used to determine provisional (but not final) prices, it is now part of their final pricing formulae. Their case (as explained in the first round of evidence before the court) is that since December 2019 they have taken a number of steps to protect what they say is the confidential nature of the DMTU discount, by using confidentiality terms in their contracts and by sending out notices to existing and prospective customers. I shall return to this point in more detail below.

18. In early 2020 the Claimants sought undertakings from the Defendants and other PRAs to cease publishing the DMTU discount. It appears that one PRA agreed not to publish, but the Defendants did not. The DMTU discount for April 2020 was disclosed on social media soon after it was made available to customers in March 2020 and, soon after that, Platts published news items about the amount of the discount. There is at least one PRA which seems not to have responded to the Claimants' request for an undertaking, but which did not publish the April 2020 discount.

19. The Claimants started this action on 17 April 2020 seeking to restrain the Defendants from continuing to publish the DMTU discount for May 2020 and later months.

20. The DMTU discount for May 2020 was sent to customers and potential customers in April 2020. To date it does not appear to have been posted on the Weibo or WeChat social media sites.

Procedural history

21. The claim form was issued on 17 April 2020.

22. On 23 April 2020 HHJ Hacon granted a short interim injunction restraining Platts from publishing, procuring, or soliciting details of the DMTU discount until 30 April 2020. He expressly did so on the basis that he had not undertaken the full analysis required by Art. 10 of the ECHR and s.12 of the HRA and that he was doing no more than holding the ring. Argus gave an undertaking not to publish until 30 April 2020.

23. On 27 April 2020 Platts issued an application contesting the court's jurisdiction and seeking an order that the applicable law of the claim is New York law.

24. On 29 April 2020 there was a further hearing before HHJ Hacon at which he adjourned the return date for the injunction until 12 May 2020 and granted (against both Defendants) a further interim restraint order against publication (but not against

soliciting the information). The jurisdiction challenge was adjourned until a date to be fixed not before 30 May 2020.

25. The parties agreed that the current hearing would proceed on the footing that English law applies.

Principles concerning applications for restraint orders

26. The right to freedom of expression is set out in Art. 10 of the ECHR:

> "FREEDOM OF EXPRESSION
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

27. S.12 of the HRA provides (as material) 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.
>
> (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, literary or artistic material (or to conduct connected with such material), 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;

(b) any relevant privacy code."

28. In Cream Holdings v Banerjee [2005] 1 AC 253 at [22] Lord Nicholls (giving the leading speech) said:

> "… There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood make the prospects of success "sufficiently favourable", the general approach should be that the courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court that he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights."

29. Lord Nicholls explained that there may be exceptional cases where the court may depart from this general approach. The Claimants accept for the purposes of this hearing that the general rule in [22] of Cream Holdings applies and that they need to satisfy the court that they are more likely than not to obtain a permanent injunction at trial.

30. The present case does not involve other Convention rights (such as Art. 8). It is concerned with confidentiality.

31. The authorities concerning cases of this kind were considered by Popplewell J and the Court of Appeal in Brevan Howard Asset Management v Reuters ([2017] EWHC 644 (QB) and [2017] EMLR 28 respectively). In that case a hedge fund provided information under conditions of confidentiality to potential investors who, by applying for the electronic delivery of the information, expressly undertook to keep it confidential. Some of the information came into the hands of Reuters which intended to publish it. The fund applied for an interim restraint order. Art. 10 and s.12 were engaged. There was no issue about the confidentiality of the information. Reuters argued that publication was in the public interest. Popplewell J concluded that the fund was more likely than not to obtain a final injunction at trial and granted an interim restraint order.

32. Popplewell J explained that he was following the general approach set out in para [22] of Cream Holdings. He referred to Sunday Times v United Kingdom (No 2) (1992) 14 EHRR 229, where the ECtHR summarised the key principles of Art. 10 at [50]. These include the importance attached to freedom of expression under the Convention; the need to construe the exceptions narrowly; that the freedom of the press is particularly important; that the exceptions in para 2 of Art. 10 only apply where necessary; and that any interference with the freedom must be proportionate to the legitimate aim pursued and must be relevant and sufficient.

33. He also referred to Observer and the Guardian v United Kingdom (1992) 14 EHRR 153 at [60] where the ECtHR stated that the dangers inherent in prior restraint are such that they call for "the most careful scrutiny on the part of the Court".

34. At [21] he said that where Art. 10 is engaged, the freedom of expression which is thereby protected may justify breach of confidence where publication is in the public interest. This is a fact-sensitive exercise and requires balancing the claimant's right to confidentiality with the defendant's right to freedom of expression. He cited the speech of Lord Goff in Attorney General v Observer Ltd [1990] 1 AC 109 (the Spycatcher case) and the decision of the Court of Appeal in Associated Newspapers Ltd v HRH Prince of Wales [2002] Ch 57 (the Prince of Wales case).

35. At [22] he said:

> "Where there is a breach of confidence, the test is not simply whether the information is a matter of public interest, but rather whether in the circumstances it is in the public interest that the duty of confidence should be breached: see the Prince of Wales case at paragraph [68]. In that case the Court of Appeal also said this:
>
> > "67. There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships which carry with them a duty of confidence, ought to be able to be confident that they can disclose, without wider risk of publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act 1998 came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality which would otherwise prevail. Today the test is different. It 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."

36. At [42] Popplewell J said that, where the defendant relied on the public interest, the Prince of Wales case showed that it is not sufficient to establish that there is a public interest in publication. There must be a public interest in breaching the confidence which attaches to the information. That involves weighing the relative importance of the maintenance of confidentiality against the relative importance of the public interest in publication, which is a fact-specific exercise in each case.

37. At [44] Popplewell J said that in applying the balance the nature of the relationship which gives rise to the duty of confidence may be important. This was a significant factor in the case before him: a hedge fund would be able to provide more candid and full disclosure to its investors if it could rely on the confidence of the process.

38. The Court of Appeal decided that Popplewell J had applied the correct principles and dismissed the appeal. They held that as the case was one about confidential

information (rather than privacy) he had been right to apply the principles in the Prince of Wales case. That authority was centrally concerned with the issue whether the common law of confidence required to be revised in the light of Art. 10. There was nothing inconsistent between it and the Strasbourg jurisprudence and no difference in principle between Art. 10 and the common law. The central question for the judge in carrying out the balancing exercise was whether the important public interest in the observation of obligations of confidence was outweighed by sufficiently significant matters of public interest in favour of publication. Having conducted that exercise the judge's decision was a proportionate exception to the defendant's right to freedom of expression. At [63] to [64] the Court of Appeal adopted what was said in the Prince of Wales case at [67] and [68].

Confidential information under English law

39. The principles concerning the imposition of a duty of confidence under English law were set out in the well-known case of Coco v AN Clark (Engineers) Ltd [1969] RPC 41. Megarry J said at p.47 that in cases of contract the primary question is that of construing the contract and any terms implied in it. This is an important point, and I shall return it below.

40. Megarry J then turned to the position where there was no contract, and said this:

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself … must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

41. There may in practice be an overlap in the factors going to the first and second elements. Information may have a greater or lesser "quality of confidence about it"; there is a scale rather than a black or white answer. The more pronounced the quality of confidence the more likely it is the parties will be treated by equity as having created an obligation of confidence.

42. Lord Goff also gave a well-known general description of the cause of action in the Spycatcher case at pages 281B-C:

> "I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection."

43. At p. 282 he set out three limitations:

> "The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. I shall revert to this limiting principle at a later stage.
>
> The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point.
>
> The third limiting principle is of far greater importance. It is that, 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. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining 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": see Gartside v. Outram (1857) 26 L.J.Ch. 113, 114, per Sir William Page Wood V.-C. But it is now clear that the principle extends to matters of which disclosure is required in the public interest: see Beloff v. Pressdram Ltd. [1973] 1 All E.R. 241, 260, per Ungoed-Thomas J., and Lion Laboratories Ltd. v. Evans [1985] Q.B. 526, 550, per Griffiths L.J."

44. In Thomas Marshall Ltd v Guinle [1979] Ch. 227, 248 Sir Robert Megarry said that "[i]t is far from easy to state in general terms which is confidential information or a trade secret". On the same page he offered this tentative guidance:

> "If one turns from the authorities and looks at the matter as a question of principle, I think (and I say this very tentatively, because the principle has not been argued out) that four elements may be discerned which may be of some assistance in identifying confidential information or trade secrets which the court will protect. I speak of such information or secrets only in an industrial or trade setting. First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e., that it is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade

> concerned. It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection."

45. I was taken to a number of cases in which price information was discussed. The first was Herbert Morris v Saxelby [1916] 1 AC 688 at 705 which supports the view that information about pricing *may* be confidential, but not that it is always or even usually so.

46. Thomas Marshall v Guinle was an employment case. The judge held that is was arguable that negotiated prices were confidential. The application was for an interlocutory injunction on American Cyanamid principles and the plaintiff was required to establish only a good arguable case.

47. Faccenda Chickens v Fowler [1987] Ch 117 was another case about an express clause in an employment contract. The Court of Appeal held that, on the facts, the information in issue, which included prices, was not confidential. At p. 140A-B Neill LJ explained that information about negotiated prices in a market where it is known that the prices will be kept secret may be confidential. He then enumerated various reasons why on the case before the Court information about prices was not confidential information for the purposes of the contract. Faccenda was followed by Andrew Smith J in Fibrenetix storage Ltd v Davis [2004] EWHC 1359 (QB). He again held that prices may in some but not all cases be confidential. One of the points he emphasised at para 71 was whether the prices could be regarded as secret. Each of the parties before me sought to rely on the Faccenda factors set out on p.140. I do not consider them to be of any general application.

48. JN Dairies v Johal Dairies Ltd [2009] EWHC 1331 (Ch), a decision of HHJ Cooke sitting as a High Court judge, concerned a theft of invoices which allowed the wrongdoer to know the prices being charged by a dairy company to its customers. The dairy company was charging different prices to its different customers and the information allowed the wrongdoer to travel from customer to customer and undercut the dairy's price. The judge held that the stolen information was confidential.

49. These cases show that information about prices may or may not be confidential depending on the circumstances. There is no one-size rule that fits all cases, and the issue is highly sensitive to the particular facts. So, where the information is about a tender for a particular contract, or concerns the specific prices charged to particular customers, it is more likely to be confidential. Other factors will include the extent to which the claimant has taken steps to keep the price secret in the past. Practices or usages of a given market are likely to be important. Some of the factors which may be relevant were set out in Faccenda, but that case like all others needs to be read in its factual context (in that case an employee's covenant).

50. Returning to the elements of the claim, there has been a debate in the cases about whether detriment is a requirement of a claim for breach of confidence. *Toulson and Phipps on Confidentiality* (4th Ed.) para 5-021 says this:

> "In the case of private [viz. not governmental or public] confidences, the confider may have an interest in the information being kept confidential,

> regardless of whether disclosure would be positively harmful to it, for reasons which may be perfectly understandable (and which would be understood by any reasonable person in the position of the confidant). If so, for the reasons suggested by Lord Keith in the Spycatcher case, that should be sufficient to found a cause of action; and the question whether unauthorised disclosure in such circumstances is considered to involve "detriment" is an exercise in semantics. If on the other hand the confider has no substantial interest in the information being kept confidential, it would follow that the information would not possess the necessary quality of confidence to found an obligation of confidentiality."

51. Popplewell J in Brevan Howard at [33] took the view that it is not a separate requirement but that, if it was, it was easily satisfied in the case before him. I shall return to this point below.

52. So far I have been discussing the position as between the provider and the recipient of the information. A third-party recipient of information who knows it to have been provided under circumstances of confidence may equally fall under a duty in equity to maintain the confidence. There was no debate about this element of the claim on the current application. The Defendants did not seek to argue that if the Claimants could show to the Cream Holdings standard (more likely than not) that FMG's customers were under a duty of confidence, this would not suffice to fix the Defendants with an obligation of confidence for the purposes of this application.

53. The Claimants also have a claim under the Trade Secrets Regulations 2018. They claim that the DMTU discount is a trade secret and say that the Court may grant remedies under the Regulations, including an injunction, to protect it. It is possible that this gives rise to a separate claim. However, this application concerns an interim restraining order, and s.12 of the HRA and Art.10 of the ECHR apply whatever the nature of the underlying cause of action relied on by a claimant. As I have explained the exception to Art. 10 relied on in the present case is "the disclosure of information received in confidence." Given the terms of s.12 and Art. 10, the Claimants can only succeed on this application, whatever the legal source of their claim, if they are able to show that there has been a breach of confidentiality. In the course of the hearing Counsel for the Claimants accepted that the claim under the 2018 Regulations did not add anything for the purposes of the present application: if the Claimants could not meet the requirement of s.12 under the breach of confidence claim they would do no better under their claim under the Regulations. I therefore say no more about this claim in this judgment.

Confidentiality: evidence and evaluation

54. I need to say something more about the nature of the information said by the Claimants to be confidential. The information they are seeking to protect is the monthly DMTU discount. The DMTU discount is an element in the formulae used to price their products (expressed as a discount from the Platts 62 index). Though slightly different descriptions are given to it in different contracts the general pattern is that a single DMTU discount is fixed by FMG each month and communicated to all contracting parties under the LTCs. According to the witness statement of Ms Stabler, a legal manager at FMG, the DMTU discount is also communicated to prospective long-term customers of FMG.

55. The DMTU discount is used as one element in the pricing formulae in nearly all the LTCs that have so far been disclosed by the Claimants. There are however some variations between the formulae. As the pricing terms are confidential (and the LTCs have been supplied under a confidentiality club) I shall not set out the variants in this judgment. The differences between the formulae mean that one cannot always take the DMTU discount and the Platts 62 index and reverse engineer the price to be paid by a given buyer under its contract. But the DMTU discount and the index are key elements in determining the price.

56. The Claimants seek to assimilate the DMTU discount to "bespoke" prices charged to particular customers. They also refer to the DMTU discount itself being "bespoke". This is an overstatement. The contractual pricing formula for a given customer may be bespoke, but the DMTU discount is a single, invariable percentage set each month for all FMG's long-term customers and prospective buyers. This is reflected in the way the DMTU discount is described in some of the contracts that have been disclosed. It is defined variously as "Seller's prevailing official monthly discount for the applicable product for the month of shipment", or as "Seller's official monthly discount rate defined as the discount rate announced by Seller for the month of the first day of the Loadport Laycan which will be announced and communicated to the Buyer by written email".

57. Ms Stabler explains that the process of arriving at the DMTU discount for each month is a complex one involving the exercise of judgment and expertise by several members of senior management in FMG. They consider a wide range of factors and it is not derived mechanically. This was emphasised by the Claimants during the hearing. I have no reason to doubt that the process is indeed complex and sophisticated and that much thought goes into it. But I do not think the process by which it is reached has much significance for this application. The result of the process is a single percentage figure which is then given to the LTC buyers. They are not concerned with the complexity or otherwise of the process. It is this percentage figure which has been disclosed in the reports made by the PRAs, rather than the process by which it is reached.

58. A second general point to be kept in mind when assessing the issues of confidentiality is that (as already explained) the amount of FMG's DMTU discount has been published by the Defendants and other PRAs regularly (more or less monthly) since 2014. There is no evidence of the Claimants taking any action before 2020 to prohibit these articles being written about the DMTU discount.

59. Against this general background I turn to consider whether the Claimants can establish to the necessary standard that recipients of the DMTU discount have a duty to keep it confidential.

60. I should start by explaining how the evidence has developed since the start of the case. The Claimants' case in its first round of evidence (the statement of Ms Stabler of 17 April 2020) was that as of December 2019 the Claimants put in place a number of steps designed to protect the confidentiality of the Fortescue DMTU discount Prices. She said that they had done this through contractual confidentiality provisions and through appropriate email notices.

61. Ms Stabler also said at paras 12 and 13 of her first statement that spot market prices are not confidential whereas, "in stark contrast", the terms of the contracts with LTCs are confidential, including the prices set by the Claimants.

62. In the light of this evidence, the Defendants applied for the disclosure of samples of the LTC contracts and the spot contracts. The Claimants opposed disclosure on the grounds of irrelevance. HHJ Hacon ordered disclosure on 6 May 2020 saying that the documents would throw light on whether there was indeed a stark contrast as described by Ms Stabler.

63. The disclosed documents show that essentially the same confidentiality provisions are contained in the spot contracts and the LTCs. There is no material difference in the wording of the clauses between the two sets of contracts. Some of the disclosed spot contracts also refer to the DMTU discount as part of the pricing formula.

64. Some of the buyers under the spot contracts were also buyers under the LTCs.

65. Ms Stabler has recently provided a third statement, in which she clarifies the evidence given in her first statement. She says she has spoken to colleagues in the FMG marketing department and that the spot prices under off-platform contracts are confidential but that FMG has voluntarily disclosed the spot prices for all Chinese yuan spot transactions (but not US$ deals) to the PRAs to assist with the compilation of their indices.

66. As the Defendants point out, the confidentiality provisions in those contracts are mutual and, on their own case, the Claimants would not have been able to provide the information to the PRAs without the consent of the buyers. There is nothing in the evidence to suggest that has happened.

67. The Claimants' case about precisely when they took further steps to protect their information from disclosure has also developed through the various rounds of evidence. In her first statement Ms Stabler appeared to be saying that FMG had sent out email notices from December 2019 onwards. It now appears that it was only in March 2020 that such emails were sent to its Chinese customers, which is where the bulk of its customers are located. I shall return to this point below.

68. Against this background I turn to consider the first element identified by Megarry J in Coco v Clark, that is, whether the discount has "the necessary quality of confidentiality".

69. As I have explained above, the Claimants assimilate the DMTU discount with bespoke prices. But the discount is not itself a price; rather it is an element of pricing formulae. It is given in common to all LTC customers; there is no special or bespoke DMTU discount.

70. To the extent the decided cases about pricing information apply they show that standard or generic prices are less likely to be treated as confidential than specifically negotiated or tendered ones.

71. On the other hand, as the Claimants note, the DMTU discount is not published generally by the Claimants. It has been set by them for a specific purpose and

disclosed only to a specific class of recipients (actual and prospective buyers). The Claimants do not publish it to the PRAs or the world at large. This points in favour of the information being confidential.

72. The cases also show that, when considering whether the information has a confidential quality, it is relevant to consider how widely it was known and what steps are taken by the owner of the information to keep it secret. As I have said, for many years the DMTU discount has been widely published without any action from FMG. However, FMG's stance has now changed. In March 2020 it told its Chinese buyers (the large majority of its customers) of that pricing information (including the discount) was confidential and was not to be disclosed.

73. The Defendants also point out that for many years they and other PRAs have published information about similar discounts used by other large iron ore suppliers. This is, they say, further reason for thinking that such discounts are not generally treated as secrets. The Claimants observe that the stories in question invariably attribute the information to (anonymous) sources other than producers, and that the producers themselves do not divulge their discounts to the PRAs.

74. Basing myself on the available evidence and looking at things in the round, I have reached the view the DMTU discount is information having a quality of confidence. It has been supplied only to a limited class of customers, for a specific purpose. It is provided as part of the pricing process under the LTCs. Though it is generic it is not in the nature of a list price provided to anyone who may be interested in it. Given the various factors pointing the other way, I do not however consider that this is a case where the quality of confidence is particularly strong or pronounced.

75. I turn then to consider the two ways in which the Claimants say they imparted the information to LTC customers so as to impart it with confidence.

76. The first is the contractual confidentiality provisions which are (with minor variations between contracts) in the following terms:

> "1. DEFINITIONS AND INTERPRETATION
>
> (5) Confidential Information means any and all trade secret information, data, processes, apparatuses, specifications, drawings, reports, operations, inventions, patents, technology, knowhow, accounts, dealings, records, materials, plans statistics, finances or other documents or things whether written, electronic or oral and of whatever type or nature relating to the property assets liabilities finances dealings transactions or affairs of the Seller or Buyer as the case may be."
>
> "26. CONFIDENTIALITY
>
> 26.1 A Party may only disclose Confidential Information:
>
> (1) To that Party's professional advisers;
>
> (2) If required by law or by a recognised stock exchange on which the shares of that Party are listed;

(3) If necessary to perform that Party's obligations under this Agreement; or

(4) If the other Party consents to the disclosure.

26.2 In this clause, Confidential Information includes:

(1) Negotiations leading up to this Agreement; and

(2) Any term of this Agreement.

26.3 This clause survives termination of this Agreement."

77. Ms Stabler's first statement gave the impression that these contractual provisions were introduced as one of the steps taken by the Claimants since late 2019 specifically to protect the DMTU discount from disclosure. That impression was not right. First, some of the LTCs disclosed by the Claimants (after Ms Stabler's first statement had been served) are from as early as May 2018 and, secondly, as already explained, the confidentiality terms in these contracts are the same as those in the spot contracts.

78. This is not however the end of the matter and the question turns not on when or why the contracts were entered, but their true meaning and effect.

79. The Claimants accept that the clauses contain drafting infelicities but submit nonetheless that they cover the monthly provision of the DMTU discount. They say that the discount is a trade secret or data or a document or other thing relating to their dealings, affairs or transactions. They say, alternatively, that the DMTU discount is to be treated as a term of the contract.

80. The Defendants make several points about these provisions. They emphasise, first, that the DMTU discount is described elsewhere in a number of the disclosed contracts as the "official" price, which will be "announced" by FMG and that this suggests something akin to a list price, provided to all LTC customers (and not a bespoke number) rather than something confidential passing between the parties under the agreement. They observe that some of the sample contracts do not require notification of the official discount to the customers, which strengthens the idea that it will be "announced". Other contracts draw a distinction between the price being "announced" and it being communicated to the buyer, suggesting that the former involves a more general disclosure.

81. As to the context, the Defendants reiterate that the DMTU discount has been widely reported to market participants since 2014. They point out that some of the LTCs which contain confidentiality terms using the same wording date from before December 2019, being the date when the Claimants say they started to take steps to seek to prevent publication of the DMTU discount.

82. The Defendants rely on the fact (already explained) that the same confidentiality terms appeared in the contracts for the spot sales where, according to at least some of the Claimants' evidence, buyers had an expectation that the prices could be disclosed to the PRAs. At least two of the customers were also buyers under LTCs and there may be more cases.

83. The Defendants also emphasise that the DMTU discount is only one part of the price formula. As already explained, someone knowing the DMTU discount and the index cannot necessarily deduce the price paid by the customer. The Defendants argue that while a reasonable reader of an LTC contract might suppose that the price formula itself (as a term of the contract) would be kept confidential he could also reasonably suppose that the "official", generic, DMTU discount to be supplied each month had not been kept secret in the past and was not intended to be made secret now.

84. In the light of the other language of the contracts and the factual setting the Defendants say that the DMTU discount does not fall within the contractual definition of "Confidential Information". They contend that it is apt to cover information about each parties' processes, finances, affairs or dealings and so on which comes to the knowledge of the other as a result of the contract, but is not apt to cover the LTCs or communications leading up to or made under the LTCs. They point to the extended definition given by clause 26.2: when the parties wished to refer to the LTCs or their terms they did so in terms.

85. As to the specific wording of the term "Confidential Information", the Defendants contend, first, that the DMTU discount would not be considered a "trade secret" partly because of its quality as generic information provided to all long-term customers and also because it had been widely reported for many years without any steps being taken by the Claimants to maintain its secrecy. Nor is it "data". And the words "the dealings, transactions or affairs" of the parties does not naturally connote the contract itself as otherwise the extension in clause 26.2 to the negotiation and terms of the Agreement would have been unnecessary. The Defendants say, next, that the monthly reporting of the DMTU discount is not a "term" of the contract or part of the negotiations of the contract so is not in the extended definition in clause 26.2.

86. I have carefully considered the rival contentions of the parties on the questions of interpretation. The contractual provisions are not well drafted but I think, on balance, that the Claimants are likely to establish at trial that the DMTU discount is "a document or thing" "relating to the dealings, transactions or affairs" of the Claimants.

87. As to the Defendants' argument that the LTCs cannot be dealings, transactions or affairs of the Seller, as that would render cl. 26.2 unnecessary, like most arguments from redundancy it carries only limited weight. This is particularly so given the low calibre of the drafting. I also note that cl. 26.2 does not purport to add to the general definition of Confidential Information; it says that the concept "includes" the negotiations and terms of the Agreement, and it can therefore be read as merely putting the matter beyond doubt.

88. In any event the argument does not go far. The DMTU discount is provided to *all* Buyers under LTCs, and it must therefore relate to "dealings" or "transactions" of the Seller (even if those are not read as references to the Agreement itself).

89. I also think this reading accords with a common-sense commercial expectation that notices passing under the LTCs should be covered by (mutual) confidentiality provisions. As well as the DMTU discount, the notices give information about dates of delivery, quantities, grades and freight rates. A reasonable reader would expect both parties to want to keep such information confidential. That is achieved by

reading the documents relating to the "dealings, affairs or transactions" of the parties as covering the monthly notices provided under the LTCs.

90. There is some force in the Defendants' argument that the terms are the same in the spot contracts and LTCs (so there is no "stark contrast" between the two). The way Ms Stabler's evidence on this point was expressed gave a potentially inaccurate impression. But, in the end, the point does not go far. It is clear as a matter of contractual interpretation that the terms of the spot contracts (which include the price) are confidential. The fact that spot prices may have been disclosed by FMG does not detract from that (even if it put them in breach of contract with their own spot customers).

91. I do not think that the fact that FMG's DMTU discounts have been disclosed by PRAs since 2014 assists significantly in the interpretation of the clauses. The evidence shows that FMG has not disclosed its discounts to the PRAs (or indeed anyone other than the LTC customers). FMG may only recently have taken steps to protect the confidence of the communications, but it does not follow that the contracts do not create a relevant obligation. A similar point may be made about the other producers' discounts. Indeed, some of the PRAs' articles in which such discounts are discussed make the point that the terms of the contracts are confidential.

92. There are then the references to the DMTU discount as an "official" discount, to be "announced" by FMG. Again, I do not think this carries things much further. The discount is official in the sense that it is FMG's set discount provided to all buyers under LTCs. It is announced in the sense of being set each month. FMG has never announced the discount in the sense of publishing it to the world at large. The evidence also shows that it was common in the LTC market generally for producers to use generic discounts in their pricing formulae and, as with FMG, those other producers do not publish their discounts other than to their customers (or potential customers). I do not think that a reasonable reader, knowing this background, would be likely to read the references to an "official" discount, "announced" each month, as referring to anything more than the provision of the same, single, monthly discount to all customers.

93. Having carefully weighed the parties' rival cases, I conclude that the Claimants are more likely than not to establish that the contractual provisions cover the DMTU discount.

94. The Claimants also say that, even if the contract did not create the relevant obligation, the buyers under the LTCs came under a non-contractual obligation of confidence in equity. They need in any case to establish that prospective buyers came under such a duty, since they are (by definition) not covered by the contractual provisions.

95. I have already described the way the case was initially advanced (that steps were taken from December 2019 to protect the information from disclosure). As the case has developed, it has emerged that the Claimants rely principally on two rounds of emails, written in March and April 2020 to their Chinese clients in respect of the April and May prices respectively. As the substance of the emails in each month was the same, I shall refer to contents of the April 2020 emails as representative of both rounds.

96. The Claimants say that the emails were sent to their current and prospective LTC customers. On 20 April 2020 FMG sent an email before sending the DMTU discount for May 2020. It was headed "Confidentiality" and stated:

> "You may be aware that our confidential contract pricing and discount details for April 2020 were published by a certain PRA. We are taking steps to address this and we are reinforcing the measures we have put in place to ensure this does not happen again. In advance of notifying our customers of our May pricing we are writing to all our customers to remind them that it is essential that any information we provide you in relation to our contract pricing (which includes our May pricing and all future pricing) is confidential and must be kept confidential."

97. On 26 April 2020 FMG sent a further email headed "commercial in confidence" which gave several pieces of information including the laycan days, quantities, freight rates, the DMTU discount and the final price. The email drew attention to FMG's standard confidentiality obligations, which were then set out (in the same terms as those I have quoted above). The email continued:

> "Conveying prices or discounts to third parties is a breach of confidentiality and, where we have a contract with you, would also be in breach of your obligation of confidentiality under the express contract terms. Any unauthorised disclosure is likely to cause loss and damage to FMG, so please ensure that our prices and discounts are only passed to the relevant person(s) within your company/department and remind them as a recipient that they must not disseminate our prices or discounts to third parties."

98. The Claimants assert that as a result of these emails (and the similar March 2020 ones) the recipients came under a duty of confidence in respect of prices and discounts.

99. At the time of the hearing on 12-13 May 2020 the Claimants' evidence included a handful of emails in which existing customers (and one prospective customer) acknowledged receipt of the March emails and confirmed that they would maintain confidence in the information provided by FMG. I specifically checked with counsel for the Claimants that the evidence was restricted to those cases.

100. Almost a week after the hearing, on 19 May 2020, the Claimants' solicitors informed the Court by letter that all the customers (actual and prospective) to which the March emails were sent had acknowledged them and agreed to maintain confidence in the information. No witness statement was provided. At the time of the letter I was about to provide this judgment in draft.

101. This was something that, if it was to be relied upon, clearly ought to have been put in evidence during or immediately following the hearing. I invited representations from the Defendants. They submitted that I should proceed on the basis of the evidence that was before the Court on 12-13 May 2020. They pointed out that they were being prohibited in the meantime from disclosing the information and that there was therefore real urgency in resolving the application. The cases show indeed that news is evanescent and that decisions of this kind should be given as soon as possible (see for instance The Observer and the Guardian v United Kingdom (1992) 14 EHRR 153 at [60]). If further evidence is served the Defendants will need to answer it and there

may be the need for a further hearing, all of which will cause yet more delay. The Claimants did not suggest that there was a need for further witness statements on the point and invited me to determine the application on the evidence properly before the court.

102. I shall follow the course urged by all parties and determine the application on the basis of the evidence as it stood at the hearing of 12-13 May 2020, disregarding the further material referred to in the Claimant's solicitors' letter of 19 May 2020.

103. I have already addressed the position of buyers under existing contracts. As I have decided that the Claimants are likely to establish that they are under contractual duties of confidence I need not decide whether they fall under an equitable duty too.

104. Then there are the prospective customers who had not yet entered a contract with the Claimants at the time they received the March 2020 emails. The first of the emails stated that the information to be provided would be confidential. There was then a gap before the information was provided under emails which again made clear that the information was confidential. The recipients did not demur from the assertion of confidentiality or say that they were not prepared to receive it on those terms. I consider that these probably constitute circumstances of confidence. As earlier explained, the Claimants are likely to establish the information (the DMTU discount) had a quality of confidence, even if not a particularly pronounced one. I consider that the Claimants are likely (in the Cream Holdings sense) to be able to show that the prospective LTC customers were under a duty of confidence.

Detriment

105. As I have explained there is some debate in the cases and textbooks as to whether detriment is a requirement of a claim for breach of confidence. I have set out the relevant authorities above and, on balance, I agree with the Claimants that detriment is probably not strictly a requirement of the claim. I also think that if detriment was an element of the claim, assuming they are able to establish a duty of confidence at trial, the Claimants will probably be able to satisfy the threshold set out in the cases.

Public domain

106. As I have already explained, where information has entered the public domain it is no longer capable of being confidential: see the first limiting principle set out by Lord Goff in Spycatcher.

107. Under s.12(4)(a)(i), where the proceedings relate to journalistic material the Court is expressly required to have particular regard to the extent to which the material has or is about to become available to the public.

108. The evidence before me shows that the DMTU discount has regularly been published each month before April 2020 on the Weibo platform and WeChat site.

109. The Weibo platform is an open access site similar to Twitter with hundreds of millions of users. The relevant posts on it have been made from two accounts. They are publicly available and between them the two accounts have thousands of followers. Anyone can follow them.

110. The WeChat chat room is different; its contents are shared with members of a group.

111. The Defendants say that the posting of the information on Chinese social media put it into the public domain. They say that there is a clear pattern of posts, with the monthly DMTU discount being posted on the Weibo accounts shortly after being set by FMG and sent to customers. This is true for all months other than the May 2020 discount. The Defendants say that this is the anomaly. They say that the Court should infer that, as with previous months the May DMTU discount and later ones will be published on Chinese social media.

112. The Claimants do not accept that the posting of the DMTU discounts placed them into the public domain. But they take the more basic point that their application is about the May 2020 and later months' discounts and that the Court must consider the future and not the past pattern of posts. They say that it is striking that the May 2020 DTMU discount has not been published on Chinese social media sites to date and, as the Claimants submitted, this may well be the result of steps taken by them since March 2020 to prevent further publication.

113. I agree with the Claimants on this point. I do not consider that I can properly conclude (applying the test in s.12 of the HRA) that the May 2020 and later DMTU discounts are about to become available to the public. It is therefore unnecessary to resolve (even provisionally) the question whether publication on Chinese social media in the past would have been a sufficient ground for refusing a restraint.

Public interest

114. Under s.12(4)(a)(ii) the Court is required to have regard to the extent to which it is or would be in the public interest for the material to be published.

115. I have already summarised the authorities on the interplay between the public interest and duties of confidence. The balancing exercise requires the Court to undertake an intense scrutiny on the competing public interests. As part of this the Court must consider the general importance of freedom of the press in a democratic society and the importance given to freedom of expression under the Convention. The Court has also to give proper weight to the public interest in obligations of confidence. The weight to be given to these factors is highly sensitive to the facts. Relevant factors include the nature of the information and what it relates to, the value of the information to the public, and the nature of the specific duty of confidence and the importance of upholding it.

116. The Defendants submit that there is a public interest in the provision of information about the iron ore markets. They argue in summary as follows. The Claimants are the largest producers of lower grade iron ores and one of the four largest producers of iron ores in the world. This is a hugely important market. In contrast to the spot market, which constitutes about 15% of total iron ore markets, the LTC market is comparatively opaque. The market intelligence and analysis produced by the Defendants assists in providing market participants with intelligence about these markets, and part of the information the PRAs rely on in building their analysis is the various discounts to the indices given to LTC customers by FMG and other large producers. They analyse trends in the discounts and whether they are widening or narrowing from month to month. They have been publishing this material and

analysis for many years. If they are now restrained from doing so, it will eliminate a significant source of information about an important segment of the market. Though spot prices are transparent, this is not the case for LTC prices. The iron ore markets are of great economic strategic importance; indeed, they are said by some commentators to be second only in significance to the oil market.

117. The Claimants say that the question is not whether there is any public interest in the provision of this information. They say (basing themselves on the authorities I have already referred to) that the proper inquiry is whether there is a public interest in a publication which involves a breach of confidence. That is the approach I shall follow.

118. They say that if there is any public interest in the information being published, it is speculative and limited. They observe that the PRAs do not use the LTC prices in compiling their indices. They say that PRAs will therefore continue to be able to produce spot price indices from on-platform and off-platform sales data and restraining them from reporting the discounts will not affect this. They say that the PRAs will also be able to continue to gather intelligence about the iron ore markets. They emphasise the public interest in parties to bilateral contracts being able to keep information relating to their contracts to themselves.

119. The Claimants and the Second Defendant have served expert evidence concerning market transparency. The Second Defendant's expert, Mr Price, says that the ability of the PRAs to provide information and commentary about the DMTU discount assists in providing information to participants in the iron ore markets. He says that the market's knowledge of the discounts affects the price at which spot deals take place, as it is an indicator of expected prices. The Claimants' experts, Mr Bishop and Mr Bradley, take issue with Mr Price. They do not accept that the DMTU discounts have much of an influence on spot prices, which change from day to day. They say it is important that parties to bilateral contracts should be able to maintain confidence in their communications, including about price. Mr Bishop also says that in some markets or some market conditions, transparency may undermine competition as uncertainty about the prices being charged by others can lead to firms each setting their prices at a similar level rather than seeking a competitive advantage by cutting prices.

120. None of the experts or factual witnesses was cross-examined and I cannot reach any concluded views. I must however make a provisional evaluation, based on an assessment of the current evidence and the parties' arguments. My task is to carry out the balancing exercise as explained in the Prince of Wales case and Brevan Howard.

121. There is in my view an important and weighty public interest in the provision of well-informed analysis and data by publications such as those of the Defendants about the iron ore markets. The iron ore market is of enormous economic and strategic importance, second only to the oil markets. The DMTU discount and the similar discounts given by other large producers have, for many years, been a key source of information used by the Defendants in carrying out their analysis. The PRAs do not publish the actual terms of LTCs, but the amount of the DMTU discount does provide buyers with important information about market trends. Large buyers (and prospective buyers) are able to find out the amount of the current DMTU discount from FMG itself, but smaller spot buyers are not in the same position. The

information provided by the PRAs is used by very wide range of readers, from buyers and sellers, to governments, regulators and academics. Their decisions depend on being well informed, and that depends on reporters having access to the widest possible range of data. The Claimants say that, even if restrained, the Defendants will still be able to publish analysis and intelligence about the iron ore markets. That may be so up to a point, but they would be disabled from using a significant source of data. I also think that the submission underestimates the importance in a democratic society of the press having access to as wide a range as possible of data points and using their own journalistic and editorial judgments.

122. This is not a case where publication of the DMTU discount would expose any wrongdoing or hypocrisy or misconduct on the part of the Claimants. This has some relevance, but these are not necessary ingredients for journalists to claim a public interest in publication.

123. To be set on the other side of the balance is the public interest in the maintenance of confidentiality. As Popplewell J explained in Brevan Howard, there is a general public interest in maintaining confidences. Confidences should generally be respected, and I give due weight to this.

124. But this consideration cannot be enough on its own, as otherwise a duty of confidence would trump the public interest every time. The Court is instead required in each case to undertake a careful scrutiny of the competing interests on the particular facts, guided by the concepts of proportionality and necessity. That is why Popplewell J went on in [43] of Brevan Howard to consider the specific duty of confidence before him and the consequences of a breach of it. He held that it was highly desirable that funds in the position of the claimant felt able to give full and candid disclosure to investors. It was very much in the interests of the investors (as recipients of the information) that they should be given the full picture. That would not happen if there was a risk of disclosure. In the Prince of Wales case there was an obvious and compelling public interest in the enforcement by injunction of the confidential obligations of the Prince's trusted employees. It was crucial to the proper functioning of his office that confidences should be upheld and enforced by a restraining order.

125. In the present case the Claimants contend that, as well as the general public interest in upholding confidentiality, there is a particular public interest in parties to bilateral commercial transactions being able to rely on duties of confidence. They say that this is needed to enable them to negotiate openly and properly. I accept that there is indeed a public interest in commercial parties being able to negotiate openly, but I think it has been overstated on the facts in this case. The DMTU discount is not negotiated; it is a generic figure. The PRAs do not, by including analysis of the discount in their stories, disclose the specific, negotiated, terms of any of the LTCs. They are not seeking to do so. There is no reason to think that, by publishing the discounts, they will make it more difficult for the Claimants (or other producers) to negotiate new deals.

126. I also think it is important when assessing the alleged public interest in enforcing the confidentiality obligations that the DMTU discount has been published without complaint or action by the Claimants for many years. There is no evidence that this has prevented the Claimants from dealing with their counterparties or providing the monthly discount information to those counterparties. The Claimants have said that

their business model has shifted more towards LTCs (their pleaded case is that they started this process in 2018); yet they only started sending out confidentiality notices to their Chinese customers in March 2020. A period of well over a year of inaction does not suggest that the enforcement of confidentiality was of any great moment to them during that period.

127. The Claimants' real concern appears to be not so much that disclosure of the DMTU discount would hinder their ability to negotiate new contracts or perform existing contracts with customers. It is that the Claimants would prefer their competitors not to know their DMTU discount as this might lead to undercutting. But this again has to be seen against the backdrop of a long history of publication. There is no evidence to suggest that the Claimants have actually been damaged to date by the disclosure of the DMTU discount. As the Claimants themselves point out, long-term iron ore contracts comprise a package of terms concerning quantities, delivery dates, the length of term for which the parties are committed and other things. The parties negotiate over all of these things and they have to decide whether they want the whole package. A competitor cannot offer a lower price and win the deal. The contracts are far more complex than that. Moreover, the DMTU discount set by FMG changes significantly from month to month, so knowledge of a given month's discount cannot tell prospective buyers what price they will have to pay for the life of the contract (or even the following month). Under the pricing formulae the price changes month by month. As I have already said, there is no evidence to suggest that publication of their discount to date has led to customers taking their business elsewhere or to actual undercutting. Moreover, even if it were the case that disclosure had led to competitive behaviour by other producers, that could well be considered to be in the interests of their potential customers.

128. For these reasons, while I give due weight to the general public interest in enforcing contractual obligations of confidence, I do not think on the facts of this case the public interest in favour of restraint is nearly as powerful or compelling as in cases such as Prince of Wales or Brevan Howard.

129. I return then to the balancing exercise. The burden on the public interest element of the case will be on the Defendants at trial. I take this into account in my overall assessment. It is (following the guidance in Prince of Wales) for the Defendants to show that it is in the public interest to allow publication in breach of the buyers' obligations of confidence. But it is the Claimants who, at this stage, are seeking an interim restraint against journalistic publication, and the exercise I am required to conduct under s.12 is to ask whether the Claimants are likely to succeed at trial preventing publication (taking into account potential defences). Having carried out the balancing exercise required by the authorities I am not satisfied that the Claimants are likely to prevail on this issue at trial.

Conclusion

130. The Claimants have not established, as required by s.12 of the HRA, that they are more likely than not to obtain a permanent injunction at trial. Their application for a continuation of the interim restraining order is dismissed.