IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

3BM30478

Civil Justice Centre,
Bull Street,
Birmingham.

27th February 2015

Before:

MR. JUSTICE NEWEY

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WARWICKSHIRE COUNTY COUNCIL

-v-

AMIT MATALIA

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MISS ANYA NEWMAN appeared on behalf of the Claimant.
MR. OLIVER HYAMS appeared on behalf of the Defendant.

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**APPROVED REDACTED JUDGMENT**

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MR. JUSTICE NEWEY:

1. The county of Warwickshire still has six grammar schools. Decisions as to which children should be offered places at the schools are made on the basis of their performance in an 11 Plus test. While each of the schools is an "own admission authority school", the 11 Plus test is administered for all six by Warwickshire County Council, the claimant in the present proceedings. In recent years, the Council has commissioned Durham University's Centre for Evaluation and Monitoring (or "CEM") to provide the test papers. The university retains the copyright in the material, but the content and intellectual property rights are licensed to the Council.

2. The 11 Plus test comprises two papers. The time allowed for each paper is between 45 and 60 minutes, and each contains between 100 and 125 questions. Content varies somewhat from year to year.

3. Familiarisation sheets are distributed to candidates in advance of the test. These are designed to indicate the appearance of the test papers, the range of disciplines that will be tested and the types of answer format used in the test. No past papers or previous questions are ever made publicly available.

4. Candidates do not all sit the test on the same day. In 2013, the year with which I am principally concerned, 1,671 students sat the test on Saturday 7 September, but another 267 were tested on the following Saturday and 67 more on the Tuesday after that. Small numbers of children have continued to take the test in subsequent months. In fact, the test may still be used up to the end of the current academic year on 31 August.

5. A major reason for candidates taking the exam later than the first sitting has been that the test for Birmingham's grammar schools has been held on the same day. Children will also sometimes sit on supplementary dates if they are unwell or have conflicting family commitments on the main date. Children moving into the area may need to take the test later as well. When determining last year an objection relating to one of Warwickshire's grammar schools, the Office of the Schools Adjudicator expressed the view that "it would be unreasonable and unfair not to offer additional days for those who cannot, for good reason, take the test on the first day provided".

6. I was told by Mr Craig Pratt, the Council's lead officer for pupil and student services, that various factors make it difficult for the Council and Birmingham to hold their 11 Plus tests on different days. The Council is now, however, in negotiation with Birmingham to see if the two authorities can agree on a joint test which could be sat on a single day.

7. Mr Pratt also explained why the Council uses the same test for its different 11 Plus sittings. This, he said, helps to ensure that children are tested consistently against the same standard. On top of that, it would be costly and time-consuming to commission a new test every time one was needed (e.g. because a child had moved into the area).

8. The trial bundles include materials casting light on approaches that have been adopted to similar problems elsewhere. It seems that there is only one sitting for the Harvey Grammar School in Folkestone; no late tests are offered. In other areas, however, 11 Plus exams are sat on more than one day. Buckinghamshire County Council has said that its "tests schedule has been designed to offer as little time and opportunity for second sitting session pupils to be informed about the content of the test from the first sitting pupils as possible" and "[l]ate testing dates are only agreed where there is evidence of moving or where there is evidence of illness on the main test date". The Slough consortium of grammar schools has assessment sessions in the morning and afternoon of the same day.

9. 11 Plus tests are the subject of discussion on a number of websites. On Monday 9 September 2013, the Council was told by the moderator of one such site that information about the content of that year's test, which had been sat for the first time on the preceding Saturday, had been posted on the website then at www.cem11plus.co.uk ("the CEM 11 Plus website"), of which the defendant, Mr Amit Matalia, was the registered owner.

10. The relevant page of the CEM 11 Plus website was headed, "Warwickshire 11+ Review 7th September, 2013 also (14th & 17th September 2013)". After stating, "We make no guarantee that the following information is correct or comprised of the test content was or what the duration of the sections were" and "This should be used as a guide only", it gave the following information:

> "**[REDACTED]**"

11. While the Council has, for readily understandable reasons, been unwilling to produce its 2013 11 Plus papers in their entirety, it has disclosed certain pages from the tests. It can be seen from these that **[REDACTED]**. The information on the CEM 11 Plus website about **[REDACTED]** also, it is evident, contained truth. In an email of 10 September 2013, Durham University told Mr Pratt that there were "**[REDACTED]**".

12. Early in the afternoon of 9 September 2013, the Council emailed Mr Matalia to instruct him to remove all details of the 11 Plus paper from the CEM 11 Plus website and warned him that, if he did not do so, the Council would bring legal proceedings. Mr Matalia replied that he had "never seen a copy of the Warwickshire 11+ paper and thus … could not have copied any content". However, he also, and on the face of it

inconsistently, said that he was "simply levelling the playing field". The Council later became aware that the text of its email had been added to the relevant page of the CEM 11 Plus website.

13. On Wednesday 11 September 2013, the Council made a without notice application to Judge Barker QC, sitting as a Judge of the High Court, for injunctive relief against Mr Matalia. Judge Barker made an order which, among other things, required Mr Matalia to remove information posted on the CEM 11 Plus website.

14. Attempts were made to serve the papers on Mr Matalia on the evening of 11 September 2013, but the process server was told by Mr Matalia's wife that he was not there. A copy of the order was posted through Mr Matalia's letter box the next morning, but personal service was not achieved until Friday 13 September.

15. By then, Mr Matalia had removed the relevant information from the CEM 11 Plus website. Mr Matalia has said that he gave instructions for the material to be removed before he knew of the injunction, but I think that unlikely.

16. In an email of 13 September 2013, Mr Matalia inquired whether the Council would be open to an "amicable agreement" under which he would "not publish an overview of the test content until the test is no longer used" and the Council would "agree to investigate the merits of holding the test on the same day as Birmingham, increasing the numbers sitting the test late and how tuition centres recreate questions from the first sitting and pass them on to child sitting the test late". The Council replied that it would accept full payment of its costs and agreement from Mr Matalia that the information would not be disclosed at any point.

17. The matter came back before the Court on 7 October 2013, when Mr Matalia was represented by counsel. Judge Cooke, sitting as a Judge of the High Court, granted further injunctive relief.

18. In advance of the hearing on 7 October 2013, Mr Matalia made a witness statement in which, among other things, he said this about the circumstances in which he came to learn about the contents of the 2013 11 Plus papers:

> "On [Saturday 7 September] I was at King Edward Stratford (my younger son was due to start at the school on the Monday) looking round, finding out where to park, pick up my son etc. When the test was over the content clearly entered the public domain. I heard children discussing the test amongst themselves and even saying **[REDACTED]**. When I returned home I received calls from some parents asking if I had any test feedback, but I did not disclose my information. One caller disclosed content and stated it was by now well known by

> parents, family, friends and tutors (who has begun recreating). Children were discussing content with friends on Skype and Facetime."

19. I have to say that this passage gave, at best, a very misleading picture. Mr Matalia accepted in cross-examination that his sister's son sat the 11 Plus test at King Edward VI School in Stratford on 7 September 2013 and that he spent the afternoon with his sister. He said that he was in the hall when his nephew took the test and that his nephew had told him about **[REDACTED]** (although he claimed to have learned of **[REDACTED]** from another source as well).

20. It transpires that Mr Matalia's nephew, who lived in Hertfordshire, had already, in July 2013, sat the 11 Plus test set for Shropshire, Walsall and Wolverhampton. I gather that Mr Matalia had accompanied his sister and nephew to that exam too, and the following was posted on the CEM 11 Plus website under the heading "Walsall 10+/11+ Review 2nd July, 2013":

> "This included synonyms; long maths (including a Ferry timetable and ratio questions based upon currency) and jumbled up sentences. There were many short sections including 2 comprehension passages (fair ground and driver); roundabout numbers for quick maths and equations (missing numbers) as well as a very short cloze passage. NVR questions included shape addition and subtraction as well as shape sequences in a different format than the norm. A mock paper with a similar format is available from the shop."

21. In the event, Mr Matalia's nephew has, I understand, gained admission to a grammar school in Berkhamsted after achieving success in Hertfordshire's selection test. Mr Matalia said in cross-examination that his nephew had sat 11 Plus tests in Walsall and Stratford as mock exams.

22. I have already quoted from Durham University's 10 September email to Mr Pratt. The author also said "I have gone through the papers and most of what has been reported on CEM11plus isn't an issue and won't confer any real advantage to children who may have seen it (although there is still a perceived advantage)" and "I can identify one verbal question (1 mark) that is definitely compromised". Mr Pratt explained in evidence that a single "raw" mark can, when standardised, account for as many as six marks and increase a child's ranking significantly.

23. Mr Matalia maintains that the information about the Warwickshire test that was posted after it had been sat on 7 September 2013 largely reflected predictions that he had made and posted in advance. To substantiate this claim, he has produced screenshots that he says were made on, respectively, 2 and 4 September 2013 of pages on the CEM 11 Plus website and

another site associated with him, CoolCleverKids. The CEM 11 Plus version reads as follows:

> "Warwickshire 11+ Prediction
>
> 7th September, 2013
>
> CEM11plus.co.uk prediction of content of the test is based upon our own analysis and thought. We could be completely wrong. This should be used as a guide only.
>
> 2 Papers
>
> Paper 1
>
> **[REDACTED]**
>
> Paper 2
>
> A. **[REDACTED]**
>
> B. Synonyms (words included in WB lists: **[REDACTED]**). Perhaps 15 minutes.
>
> C. **[REDACTED]**
>
> D. **[REDACTED]**"

24. "WB" refers to a further site linked to Mr Matalia, "WordBuilder". This has an 11 Plus section that includes numerous synonyms and antonyms. Mr Matalia spoke of that section of the site containing something of the order of 1,000 words.

25. In this context, it is relevant to quote a passage from Mr Matalia's witness statement of 23 September 2013. He said there:

> "Prior to the Warwickshire test, on the website CoolCleverKids (which is registered to me), I uploaded a prediction of the Warwickshire 11+. This included **[REDACTED]** and three words that may appear written as (words included in WB lists: **[REDACTED]**)…. I thought there would be **[REDACTED]**. These maths topics were common. I also had detailed knowledge of the summer's Walsall 10+/11+ test. Data was edited after the test, including **[REDACTED]**. The synonym section was edited and 'in WB lists' deleted and **[REDACTED]** was added. These synonyms remained guesses…. One can usually guess a few synonyms every year…. It is likely one can predict perhaps 5 words in a test, if lucky…. The words **[REDACTED]** were guesses before the test and contained in the word lists that can be purchased from the website as well as WordBuilder word lists…."

26. The Council takes issue with this evidence and the genuineness of the screenshots that Mr Matalia has produced. On balance, I think it justified in doing so. Mr Matalia's claims that "[o]ne can usually guess a few synonyms every year" and that "[i]t is likely one can predict perhaps 5 words in a test" are, as it seems to me, obvious nonsense. The chances of successfully guessing any of the particular synonyms used in an 11 Plus test must be tiny. Moreover, it is, as Miss Anya Newman (who appears for the Council) pointed out, a striking fact that Mr Matalia did not say in his 23 September 2013 witness statement that he had taken the screenshots on which he now relies; there was, it seems, no reference to the screenshots until late last year. It is also noteworthy that Mr Matalia spoke in his September 2013 witness statement of uploading a prediction to the *CoolCleverKids* website. There was, so far as I can see, no suggestion that he had also uploaded a prediction to the CEM 11 Plus website, yet he now claims to have a screenshot for that site, too. The likelihood, as it seems to me, is that Mr Matalia created the screenshots only in the course of these proceedings and that he had not posted the predictions shown on the screenshots. I do not think that the fact that Mr Matalia has now had to change the CEM 11 Plus website's name indicates otherwise.

27. Be that as it may, however, by 9 September 2013 Mr Matalia had posted on the CEM 11 Plus website information which purported to be, and was in fact, derived from the actual 11 Plus test that had been sat on 7 September. In this connection, I should mention that I do not accept Mr Matalia's evidence that he was not aware that **[REDACTED]** featured in the test. The CEM 11 Plus website gave the impression that they did, and that, I think, was because Mr Matalia had been told that that was the case.

28. Moving on to April 2014, an email of 11 April from Mr Matalia to Ms Kate Hillier of the Council included this:

> "I believe I have made my position clear, but I will repeat myself. I do not agree to any undertakings. I expect to win the case and recover costs. In any case, it is financially advantageous for me to go to trial and the publicity and media details will be invaluable for my sites. There is now no reason for me to settle."

Mr Matalia also said:

> "I understand there is a surprise waiting for WCC [i.e. the Council] for this years' 11+ exams. I won't spoil the fun, suffice to say various regional independent support groups have contacted me to offer support. I did not ask for help, have no involvement, direct or indirect and no contact numbers. No action can be taken against me. I understand the content on my site last year will be insignificant in comparison. It's all about

> jurisdiction. I suggest you research jurisdiction and understand you need to apply for a High Court injunction against the major ISP to block access to a site which is unknown, yet this would not apply to all ISP and there are easy ways around a block ….”

29. The Council now seeks a permanent injunction against Mr Matalia. It claims to be entitled to one to restrain breach of confidence or (and, to my mind, more ambitiously) pursuant to section 222 of the Local Government Act 1972.

30. I shall take the breach of confidence claim first. In *Coco v A. N. Clark (Engineers) Ltd* [1969] RPC 41, Megarry J identified (at 47) three elements as normally being 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.”

31. With regard to the first element, Megarry J said (at 47) that, “[h]owever confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge”. The fact, though, that some members of the public may know the information is not necessarily fatal to a breach of confidence claim. In *Stephens v Avery* [1988] Ch 449, Browne-Wilkinson V-C noted (at 454), “Information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people”. Similarly, in *Mills v News Group Newspapers Ltd* [2001] EMLR 41 Lawrence Collins J said (at paragraph 25):

> “Information which has entered the public domain is not subject to confidentiality. But all that means is that there may be circumstances in which the information is so generally accessible that, in the circumstances it cannot be regarded as confidential: see *Att.-Gen. v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 281, per Lord Goff of Chieveley. So the fact that information may be known to a limited number of members of the public does not of itself prevent it having and retaining the character of confidentiality, or even that it has previously been very widely available….”

In *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB), [2005] EMLR 31, Tugendhat J said of information about certain addresses that it was “not in the public domain to the extent, or in the sense, that republication could have no significant

effect, or that the information is not eligible for protection at all" (see paragraph 81).

32. As for the second element, Megarry J said (at 48):

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

It has since become clear that the law of confidence can apply to cases where the defendant came by the relevant information without the claimant's consent (see *Tchenguiz v Imerman* [2010] EWCA Civ 908, [2011] Fam 116, at paragraph 64). In *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, Lord Goff took it (at 281) that the law of confidence could be invoked where, for example, "an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or … is dropped in a public place, and is then picked up by a passer-by".

33. Mr Oliver Hyams, who appears for Mr Matalia, was inclined to accept that information about the contents of Warwickshire's 11 Plus test was initially confidential. It seems to me that that was clearly the case. Mr Pratt referred to the "extreme care" that is taken to ensure that the content of the papers is not disclosed before students take them.

34. It appears to me, too, that it would have been obvious to Mr Matalia, and to any other reasonable person, that the Council did not want information about the contents of the 11 Plus test to be disseminated. In this context, the Council's 27 April 2011 response to an email from Mr Matalia (using the email address xxxx@xxxxxxxxxx.xx.xx) is relevant. Miss Amy Taylor, who was then the Council's 11 Plus admissions officer, said:

> "In our experience, it would be very very difficult for a child to remember any of the questions in enough detail to pass on to children who are yet to take the test in order for that child to be at any significant advantage. We also aim to monitor all internet based forum activity where discussion of the test papers and questions could be made public, although we do strive to keep the test papers in secure units with limited access so that they are not distributed within the public domain."

35. Mr Hyams argued that, while the test might have been confidential originally, it ceased to be so after the 7 September 2013 sitting. In my view, however, the contents of the test did not become "so generally accessible that … it cannot be regarded as confidential". It is doubtless the case

that some of the children who sat the test on 7 September will have told their parents, and perhaps others, something about it, but there is no good reason to think that any, let alone much, information about the contents has become generally known or available. The materials that Mr Matalia has produced certainly do not demonstrate that information about the contents of the test is widely known or available, and Miss Taylor said in evidence that she has not seen test content published on other websites or forums to such a degree or with such accuracy. Further, Miss Taylor explained that it is her personal experience that children do not in normal circumstances remember much specific content, and Mr Pratt thought that the fierce competition for grammar school places would reduce the chances of children or parents passing on information to anyone yet to sit the test.

36. The next point to make is that the posting of information about the contents of the 11 Plus test on the CEM 11 Plus website was plainly unauthorised. There may well be room for argument about whether the Council would, even theoretically, have been entitled to complain about a child telling a parent something about the test or the parent then discussing it with another parent. Posting material on a public website is, however, very different. Mr Matalia, and any reasonable person, would have realised that the Council did not want, and was not authorising, that.

37. Mr Hyams argued that Mr Matalia has a public interest defence. Mr Matalia was, he said, trying to do something about a compromised testing system. That is not Mr Matalia's only possible motivation: he has clashed with the Council on other matters as well, and in cross-examination he spoke of this litigation being advantageous to his websites. Be all that as it may, however, I do not consider that there is any question of Mr Matalia having a public interest defence. It cannot have been for Mr Matalia to seek to impose his views as to how the Council should undertake 11 Plus testing, and it could hardly have been fair on those who had sat the test on 7 September 2013 for those sitting the test later to be given information about its contents.

38. Next, Mr Hyams argued that the Council should be denied injunctive relief because it had been guilty of non-disclosure as regards the application to Judge Barker on 11 September 2013. In this connection, I was referred to the guidance to be found in the White Book at 25.3.6 and *Memory Corporation plc v Sidhu (No 2)* [2000] 1 WLR 1443.

39. One of Mr Hyams' complaints is that the particulars of claim put before Judge Barker referred to the Council as the admissions authority when (as was explained in the witness statement of Mr Pratt that was also before Judge Barker) the Council merely administered the test on behalf of the grammar schools. A second complaint was to the effect that the Council did not tell Judge Barker that on the previous day Durham University had expressed the view that *most* of what Mr Matalia

had posted was not an issue and would not confer any real advantage. At least the first of these points has, however, been addressed, and dismissed, by the Court on an earlier occasion. In any case, I do not think that either point makes it appropriate for me to deny the Council injunctive relief.

40. I consider, moreover, that the circumstances are such that I ought to grant an injunction. Mr Matalia did not take down the information he had posted when first asked to do so, but only after Judge Barker had granted an injunction. It is true that on 13 September 2013 Mr Matalia expressed willingness to agree not to publish information about the test, but only on a conditional basis, and by April 2014 he was speaking of a forthcoming "surprise" in relation to the 2014 test and refusing to agree to any undertaking. He continues to maintain that he has done nothing wrong, and it appears from his evidence that he is in a position to reveal more information about the 11 Plus papers. Injunctive relief is called for. The fact that the disclosures Mr Matalia has thus far made may not have compromised the 2013 test, at least seriously, does not in any way, to my mind, obviate the need for an injunction.

41. As I have already mentioned, Miss Newman also claimed to be entitled to relief pursuant to section 222 of the Local Government Act 1972. That provision states that, where a local authority considers it expedient for the promotion or protection of the interests of the inhabitants of the area, it may "prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name".

42. In support of her submissions, Miss Newman referred me to sections 13 and 13A of the Education Act 1996. Section 13 states that a local authority "shall (so far as their powers enable them to do so) contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education and secondary education … are available to meet the needs of the population of their area". By section 13A, a local authority in England "must ensure that their relevant education functions and their relevant training functions are (so far as they are capable of being so exercised) exercised by the authority with a view to", among other things, "ensuring fair access to opportunity for education and training". The expression "relevant training function" is defined to include "a function relating to the provision of education for … persons of compulsory school age (whether at school or not)". I was taken, too, to section 88M of the School Standards Framework Act 1998, under which regulations have been made requiring local authorities to formulate "qualifying schemes" to co-ordinate arrangements for the admission of pupils to maintained schools in their areas, so that parents apply to their home local authority (irrespective of where the school might be) and receive one offer of a school place (see regulation 26 of the School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2012).

43. Miss Newman submitted that interference with the administration of Warwickshire's 11 Plus test constitutes interference with the Council's responsibilities pursuant to its arrangement with the grammar schools and therefore an interference with the qualifying scheme for co-ordinating the admission of pupils. That, she argued, founded an entitlement to injunctive relief.

44. A key authority in this context is *Broadmoor Special Hospital Authority v Robinson* [2000] Q.B. 775. The question in that case was whether Broadmoor Hospital Authority could obtain an injunction to restrain the dissemination of a book written by a patient in the hospital. The Court of Appeal unanimously concluded that no injunctive relief should be granted. While, however, Morritt LJ considered that the Court lacked jurisdiction to grant such an injunction, the other members of the Court took a broader view of the Court's powers. Lord Woolf MR said (in paragraph 25):

> "if a public body is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the courts should grant such an application when 'it appears to the court to be just and convenient to do so.'"

For his part, Waller LJ endorsed this formulation and continued (in paragraph 56):

> "It seems to me that if someone interferes with the carrying out by a statutory authority of its statutory duty, there should be no reason in principle why the court should not come to the assistance of the statutory authority, and, if the circumstances make it 'just and convenient,' grant an injunction. Thus, for example, if a third party were to set out to frustrate the authority in its treatment of a patient, I can see no reason why the court should not grant an injunction to prevent that conduct. If a third party attempted to interfere with the discipline at Broadmoor, I would see no reason why the court should not assist the authority by injunction if necessary. The example of someone sending in letters designed to hinder the treatment of a patient, or to encourage breaches of discipline, seem to me to be situations where the court might well interfere."

45. On the other hand, Clarke MR and Rix LJ observed in *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, [2009] 1 WLR 1961 (at paragraph 22) that "it has long been recognised that the court's power to grant relief by way of injunction is to be exercised only in support of some legal or equitable right".

Clarke MR and Rix LJ also explained that the purpose of section 222 of the Local Government Act was to enable local authorities to bring and defend proceedings relating to public rights in their own names without the involvement of the Attorney General. Accordingly, as Clarke MR and Rix LJ said in paragraph 24, it was "common ground that section 222 does not give councils substantive powers": it is "simply a procedural section which gives them powers formerly vested in the Attorney General".

46. The decision of the Divisional Court in *R v Inner London Education Authority ex p Ali* [1990] 2 Admin LR 822 is also relevant. The duty imposed on a local education authority by section 8 of the Education Act 1944 "to secure that there shall be available for their area sufficient schools" was there characterised as a "target duty". I agree with Mr Hyams that there is a good case for viewing the statutory duties on which Miss Newman relies in the same way.

47. In all the circumstances, I doubt whether the general duties imposed on the Council by the Education Act 1996 and pursuant to the School Standards Framework Act 1998 can entitle the Council to injunctive relief against Mr Matalia (on whom Parliament has not obviously imposed any duties). Given, however, my conclusions on the breach of confidence claim, I do not need to arrive at a final conclusion on the point.

48. The upshot is that I shall grant the Council an injunction against Mr Matalia.

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