OUTER HOUSE, COURT OF SESSION

[2018] CSOH 46

P430/18

OPINION OF LORD TYRE

In the cause

BILFINGER CONSTRUCTION UK LIMITED

Petitioner

against

THE RIGHT HONOURABLE THE LORD HARDIE OF BLACKFORD QC, CHAIRMAN OF THE EDINBURGH TRAM INQUIRY

Respondent

Petitioner: Borland QC, Byrne, Manson; Pinsent Masons LLP
Respondent: Lake QC, McLelland; Edinburgh Tram Inquiry

8 May 2018

Introduction

[1] The petitioner is a core participant in the Edinburgh Tram Inquiry. The respondent is the chairman of the Inquiry. On 6 February 2018, the respondent issued a notice to the petitioner in accordance with section 21(2) of the Inquiries Act 2005 ("the Act") requiring the petitioner to produce certain documents to the Inquiry. The documents were duly produced. On 12 March 2018, the petitioner made an application under section 19 of the Act requesting a restriction order preventing publication of what was said to be confidential information in the documents. On 25 April 2018 the respondent issued a decision refusing the petitioner's

request and confirming that the documents would be published unredacted on the Inquiry website. In this application the petitioner seeks *inter alia* (i) suspension of that decision, and (ii) interdict against the respondent or anyone acting on his behalf in connection with the Inquiry or otherwise from publishing or disclosing in any way (including publishing on the Inquiry website) the confidential information in the documents. The matter came before me for hearing of the petitioner's motion for interim suspension and interim interdict.

Background to the petitioner's application

[2] The documents which, according to the petitioner, contain commercially sensitive information, are monthly reports made during the tram project by the petitioner to Bilfinger Group management at its headquarters in Germany. Their existence was mentioned by Mr Martin Foerder, a former employee of the petitioner who was its project director between 2009 and 2014, while giving oral evidence to the Inquiry on 5 December 2017. On 11 December 2017, Mr Nicholas Duffy, a solicitor in the Inquiry team, emailed the petitioner's agents requesting sight of monthly reports written between October 2007 and the date of completion of the tram project, and stating that "In addition to any additional text, they may also provide a contemporaneous account of your client's perspective of events at that time". This request was followed by a notice by the respondent under section 21(2) of the Act requiring the petitioner to provide, not later than 12 February 2018, the following documents:

> "all of the monthly progress reports as such reports are referred to in a letter dated 17 January 2018 sent from Pinsent Masons solicitors to the Inquiry, or as such reports are referred to in the oral evidence given to the Inquiry by Martin Foerder on 5 December 2017…"

[3] On 6 March 2018, Mr Duffy gave an undertaking on behalf of the Inquiry to the petitioner that it would not disclose any report to any person outwith the Inquiry team before

17.00 on 12 March 2018, or, if an application for a restriction order was received, before the expiry of 24 hours from the time when it first advised the petitioner's legal representative of the Inquiry panel's determination of that application.

The petitioner's application

[4] On 12 March 2018, the petitioner submitted an application for a restriction order under section 19(2)(b) of the Act in respect of "highly sensitive confidential information" contained within the monthly reports. The application did not seek to prevent disclosure or publication of the reports in full (although it was stated that that would have been the preference of the petitioner and its ultimate parent company). Instead the petitioner applied for certain restrictions on the content disclosed or published, in the form of redaction of the information said to be commercially sensitive. Versions of the reports with the proposed redactions were provided to the respondent along with the application.

[5] At the hearing before me, I was provided with a sample of an unredacted monthly report, along with its redacted counterpart. Parties were agreed that these could be regarded as representative of all of the reports in issue. The report, running to 27 pages, consisted mainly of charts and tables, with, among others, the following headings:

- Project overview charts
- Performance sheets
- Weighted result with chances and risks
- Cost reconciliation and forecast
- Overview movements of contingencies
- Commentary
- Approved change orders

- Unapproved changes

The petitioner's application included a brief description of the information contained in the report under each of these headings. (The application also noted that certain sensitive personal information, such as names of individuals, had been redacted. No issue arises in relation to this redaction.)

[6] The application went on to set out reasons for granting a restriction order. The petitioner's position was summarised at paragraph 4.2 of the application, where it was stated that:

> "The Reports contain highly sensitive, confidential commercial information in relation to the Bilfinger Group's pricing strategy, tendering, operating costs, procurement and general commercial strategy. This information is highly confidential within the Bilfinger Group business and is not widely available within the business."

From the subsequent paragraphs of the application, it can be seen that the petitioner's objection to publication of the information had two general strands: firstly, that the information contained in the reports was commercially sensitive, and, secondly, that the format and structure of the reports was a proprietary tool developed by the Bilfinger Group which itself constituted a trade secret. These strands were developed with particular reference to information in the reports under each of the headings listed above. I need not set out the reasons for non-disclosure given for every one of those headings. By way of example, the reasons given with regard to "Performance sheets" were as follows:

> "…BCUK's approach to the management of project budgets and finance is a key commercial tool in Bilfinger's strategic financial management of projects. The Performance Sheets demonstrate BCUK's internal calculation and assessment of project performance, taking into account factors such as the costs to complete the works (actual and forecast), general project management costs, and contingencies in order to determine the project result. This information is used internally for project management analysis purposes. This methodology is applied by all Bilfinger Group subsidiaries in collating and reporting financial data, and projecting forecast project results for major projects. It is critical to the continued financial management and

> economic success of current and future projects. Such information is therefore highly sensitive and would assist Bilfinger's competitors in competing against Bilfinger in future bids, or seeking to undermine Bilfinger's commercial position in current projects."

[7] The petitioner then set out the harm and damage which publication risked creating, and which could be avoided or reduced by imposing restrictions. Again, this may be summarised as the weakening of the petitioner's commercial advantage as a consequence of disclosure without redaction both of the data contained in the reports and of the methodology employed in preparing the reports. In particular, it was said that

- Without redaction, Bilfinger's competitors would have access to and potentially benefit from insight into Bilfinger's internal project management;
- The information in the reports would enable a third party to compute Bilfinger's rates for work on current or future projects;
- Information regarding the petitioner's subcontractors and consultants would be of value to competitors of those subcontractors and consultants;
- Analysis of the reports in isolation might result in a misleading assessment of the petitioner's commercial result from the tram project, which could be damaging to Bilfinger's working relationships with employers and competitors on current and future projects;
- Any incorrect assumptions drawn from analysis of the reports could damage Bilfinger's prospects of success in future bids and tenders.

For these reasons, it was contended, disclosure or publication of the commercially sensitive information in the reports would create a very real risk of significant harm and damage to the Bilfinger Group if the restrictions were not granted.

[8] The petitioner made two additional points. Firstly, it contended that the information in relation to which restrictions were sought was not relevant to the Inquiry's terms of reference. Mr Duffy's email of 11 December 2017 had indicated the limited purpose for which the reports were sought, which was not inconsistent with the imposition of the proposed restrictions. Secondly, reference was made to an application for a restriction order that had been made by Siemens, one of the other core participants, and granted by the respondent. The petitioner requested equivalent treatment.

[9] The petitioner's application was accompanied by a document entitled "Statement of Bilfinger SE" signed by Mr Swen Kellerman, Head of M&A, Corporate Finance, Legal, and Mr Christoph Puschke, Head of Compliance Legal, of the petitioner's ultimate parent company. It is apparent that this statement provided the basis for many of the assertions in the application itself. The statement did, however, separate out with a greater degree of clarity the two strands of the petitioner's argument. Paragraph 5 set out the contention in relation to substantive content of the reports:

> "The Monthly Reports contain highly sensitive confidential commercial information in relation to BCUK's pricing, tendering, margins, operating costs, commercial strategy and procurement. This information is not only relevant to the BCUK business, but to the Bilfinger business on a worldwide basis. If the confidential information were to become publically available, it would reveal sensitive commercial information which would be extremely harmful and damaging to the Bilfinger Group's business efforts around the world. This is because if confidential information such as this is disclosed, it would assist its competitors by providing corporate information in relation to pricing, tendering and Bilfinger's strategic corporate approach to Projects which would significantly harm and damage the economic interest of BCUK and the Bilfinger business across the world.

[10] Paragraph 6 dealt with the methodology of presentation:

> "The format and structure of the Monthly Reports, and the way in which project financial data is collated, evaluated and presented in the Monthly Reports, is a management toolkit developed internally by the Bilfinger Group for project management purposes. It was developed as a sophisticated means of collating, reporting and assessing the financial status of major projects for management

> purposes. The reporting toolkit is still used today by the global business as a method of costing and monitoring major projects at management level, assessing key performance indicators and reflects Bilfinger's strategy on the pricing of projects generally. To this day companies within the Bilfinger Group apply this toolkit for major project management reporting from the site management to the superior management board. This reporting methodology is treated as commercially confidential by the Bilfinger Group and it is, essentially, a trade secret. What this means is that while the underlying information is also commercially sensitive, the reality is that the system of reporting is, in and of itself, confidential."

The respondent's decision

[11] By letter dated 25 April 2018, the respondent refused the application. He noted the terms of the relevant statutory provisions (which I summarise below) and his assessment that the monthly reports were relevant to the Inquiry's terms of reference in a number of respects. He observed that there was a strong public interest in their release as contributing to understanding the reasons for the conclusions that the Inquiry might reach. The respondent continued (paragraph 16):

> "…I am also required to consider whether restrictions are necessary in the public interest, having regard, in particular, to BCUK's claim that the restrictions sought could avoid or reduce any risk of harm or damage caused by disclosure of commercially sensitive information. There is a clear public interest in the prevention of harm due to the release of commercially sensitive information, and the Act envisages that in some circumstances the public interest in such cases will be enough to overcome the public interest in the publication of documents submitted to the Inquiry. Having considered the Application, I am not satisfied that the redactions sought contain commercially sensitive information, the disclosure of which would give rise to a risk of harm or damage. In particular:
>
> - The Application is at a high level of generality and little or no specification (with examples) is given of why, or to whom, the information that is sought to be redacted is commercially sensitive.
> - Similarly, little or no specification (with examples) is given of the type of harm or damage that may be suffered.
> - It is not obvious that the information that is sought to be redacted is truly commercially sensitive, rather than the type of information, largely relating to income and expenditure, that one would expect to see reported in any large infrastructure project.

- It is not obvious that there is anything commercially sensitive in the way that the information in the reports is presented; rather it is presented in a way that one would expect to see in many such projects.
- Little or no explanation is given as to why financial information in relation to this project, given its particular facts and circumstances, and given the passage of time, is relevant to other projects that the Bilfinger group has a commercial interest in.
- The reality is that the information contained in the reports, including the way in which the information is presented, will, in any event, have been available to individuals no longer employed by Bilfinger and it is unrealistic to suggest that that information remains wholly within the control of Bilfinger.
- As no particular explanation is given as to why the method of reporting is different to that reported by others carrying out similar projects, I do not accept the likelihood… that the data will be so misunderstood as to cause financial harm or damage to the commercial interests of Bilfinger."

[12] The respondent also rejected the contention that the granting of an order to Siemens required the same treatment to be accorded to the petitioner's application. He observed that "…the success, or otherwise, of other applications cannot be the test to be applied in determining an application for redaction. Each application is determined objectively on its own merits and having regard to the particular circumstances of each case".

The relevant provisions of the Act

[13] Section 17(1) of the Act states the general rule that the procedure and conduct of an inquiry are to be such as the chairman may direct. Section 17(3) requires the chairman to act with fairness in making any decision as to procedure or conduct. Under section 18(1), the chairman must (subject to any restrictions imposed under section 19) take such steps as he considers reasonable to secure that members of the public are able to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

[14] Section 19 deals with restrictions on public access, and permits restrictions to be imposed on the disclosure or publication of any evidence or documents given, produced or provided to an inquiry. One of the methods by which restrictions may be imposed is by a

restriction order made by the chairman during the inquiry. Such an order must specify only such restrictions as the chairman "considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4)". Those matters include:

> "(a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
> (b) any risk of harm or damage that could be avoided or reduced by any such restriction…"

"Harm or damage" is stated in section 19(5) to include damage caused by disclosure of commercially sensitive information.

[15] It is apparent from the above that, as submitted by senior counsel for the respondent, the chairman, when determining an application under section 19, must conduct a balancing exercise between, on the one hand, the public interest in publication of documents provided to the inquiry, and, on the other hand, the public interest in avoiding risk of harm or damage caused by disclosure of commercially sensitive information. The fact that, in terms of section 19(3), the chairman may only specify such restrictions as he or she considers *inter alia* to be *necessary* in the public interest, having regard to the matters mentioned in subsection (4), indicates, in my opinion, that it is for the applicant for a restriction order to satisfy the chairman that there is a risk of harm or damage that could be avoided or reduced by the imposition of the restriction sought.

Argument for the petitioner

[16] On behalf of the petitioner it was submitted that the interim orders sought should be pronounced. The petitioner had made out a *prima facie* case that the respondent's decision to refuse to make a restriction order:

- had no proper evidential basis;
- failed to take into account relevant material (the statement by Mr Kellerman and Mr Puschke);
- was irrational;
- was procedurally unfair and unreasonable; and
- was one that no decision maker could reasonably have made.

The petitioner's arguments were presented both at common law and under Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1").

[17] The case at common law was presented under four heads. Firstly, the respondent had been requested to, but had failed to, explain any purpose of disclosure of the information that was alternative or additional to the reason stated in the email of 11 December 2017. The petitioner was accordingly deprived of any opportunity to make representations on use of the material before the decision was made. That amounted to procedural unfairness. The respondent's invitation by email to the petitioner to make further submissions was a hollow one because at that time the petitioner did not know what uses the respondent intended to make of the information. Secondly, the petitioner had a legitimate expectation that it would be treated equally with Siemens as regards the making of a restriction order. No explanation had been provided for different treatment. The two applications gave rise to the same issue, were concerned with the same kind of confidential information, and were likely to cause the same kind of harm.

[18] Thirdly, the reasons given by the respondent for refusing the application were irrational and unreasonable. The petitioner had provided a very detailed explanation of why and to whom the information was commercially sensitive. The type of harm was clearly identified. The respondent had given no reason for rejecting the evidence of

Mr Kellerman and Mr Puschke that the information was highly commercially sensitive, and that the methodology was a trade secret; in fact he had failed to refer to their statement at all. The reason why there was continuing confidentiality had also been explained in the application. The point about the information being available to individuals no longer employed within the Bilfinger Group had no evidential basis. The reasons for concerns about misunderstanding were fully explained in the application. Fourthly, the procedure adopted had been unfair because the decision had been intimated less than 48 hours before the deadline for final written submissions to the Inquiry and the material in the reports could not therefore be addressed by the petitioner in its submission if disclosure were permitted.

[19] With regard to A1P1, two questions required to be answered: firstly, does a proposed interference with a person's peaceful enjoyment of his possessions have a legitimate aim? Secondly, if so, is the interference proportionate? There was no doubt that confidential information could constitute a "possession" for the purposes of A1P1. In the circumstances of the present case, public disclosure would constitute interference as the value of the data would be irremediably diminished. The interference had no legitimate aim: the information at issue was irrelevant to the purpose for which the monthly reports had been sought. It did not bear on the Inquiry's terms of reference. There was no real and substantive public interest in its disclosure. Even if there was a legitimate aim, the interference was disproportionate. A fair balance had to be struck, and would be struck if publication were restricted to the redacted reports. Damage to the petitioner was likely to be substantial and irreversible. There was no mechanism for compensation, so the petitioner was left without a remedy. Interference without compensation could not be justified save in exceptional circumstances.

[20] As regards balance of convenience, it was submitted that the balance was strongly in the petitioner's favour. The potential damage from publication was irreversible and incapable of compensation. The only realistic remedy was prevention. There was no substantial prejudice to the respondent or the Inquiry in the preservation of the *status quo* for the time being.

Argument for the respondent

[21] On behalf of the respondent it was submitted that the petitioner had failed to make out a *prima facie* case for suspending the respondent's decision or interdicting publication of the unredacted monthly reports on the Inquiry website. The petitioner had failed, in its application, to provide an explanation sufficient to overcome the statutory presumption in favour of publication. The application proceeded on the basis of bare assertion without the necessary explanations of what information might be used by competitors or how this might harm the petitioner or other members of the group. Such an explanation was especially necessary when the information said to be commercially sensitive was several years old. When one examined the unredacted monthly report, it was entirely unclear what was commercially sensitive, either as regards the substance of the report or the methodology. It might be commercially sensitive in either of those respects, but the onus lay on the petitioner to explain why this was so when submitting the application for a restriction order. The petitioner had failed to do so, and it was not for the respondent (or the court) to attempt to guess.

[22] The same criticisms fell to be made of the petitioner's complaint that publication would cause irreparable loss, which likewise did not rise above the level of assertion. There was, for example, no explanation of what it was in the report that demonstrated commercial

strategy, or gave insight into project management strategy. The continuing significance of historical information to current projects called out for explanation, as did the description of the methodology as a proprietary toolkit. The complaints regarding potential misunderstanding by future clients and competitors, were inconsistent with the complaints regarding use of the information to reach accurate conclusions regarding the petitioner's pricing and profit margins. The statement by Mr Kellerman and Mr Puschke had in fact been taken into account but did not advance matters as it consisted of high level assertions without substantiation.

[23] When making the decision under challenge, the respondent had not reached the stage of balancing the public interest in publication against the public interest in protection of commercially sensitive information, because the petitioner had failed to discharge the onus of satisfying him that there was anything by way of commercially sensitive information to protect. That was a conclusion that the respondent had been entitled to reach on the material placed before him.

[24] With regard to the petitioner's arguments at common law, the use made of the information provided was irrelevant provided (as was the case) the respondent had been satisfied that it was relevant to the Inquiry. The petitioner was not entitled to fetter its use by the respondent or by other core participants. The offer to the petitioner on 27 March 2018 had not been taken up. Secondly, as regards equality with Siemens, the circumstances underlying the two applications were different. When the documents produced by Siemens had been examined in the context of an application for a restriction order, it was determined that they were of little relevance to Inquiry issues. In contrast, the petitioner's documents related to issues central to the Inquiry. The two were not comparable, and the obligation incumbent upon the respondent was to address each application on its own merits. Thirdly,

the respondent's reasons for not being satisfied that the redacted information was commercially sensitive were plainly correct, although for present purposes it was sufficient that his conclusion had been one that was reasonably open to him to reach. Fourthly, any complaint as to the use to which the information might be put was irrelevant to the confidentiality issue.

[25] The protection afforded by A1P1 to possessions was not absolute (*Sporrong & Lönnroth* v *Sweden* (1983) 5 EHRR 35). The notion of a fair balance was inherent in the Convention, and in particular in A1P1. Here the public interest in disclosure was weighed against the interference with enjoyment, and the requirements of A1P1 were satisfied.

[26] As regards balance of convenience, it was accepted that once the information was published this could not be reversed. But the court was entitled to take the strength or weakness of a *prima facie* case into account. Moreover, it appeared from the petitioner's 2016 accounts that it had "stepped out of" engineering and contracting business, and so would not in fact be tendering or pricing in future. The Bilfinger Group's 2017 accounts also suggested a move away from contracting into provision of "industrial services".

Decision

Prima facie case

[27] The first question that I have to address is whether the petitioner has made out a *prima facie* case that the respondent's decision to refuse the restriction order sought was irrational and unreasonable, and/or that it had no proper evidential basis, and/or that it failed to take into account relevant material, and/or that it was procedurally unfair. I am mindful that if I hold that no *prima facie* case has been made out, and publication follows, refusal of the interim orders sought will have effectively determined the outcome of the

petition against the petitioner. I am, nevertheless, satisfied that I should refuse the petitioner's motion on the ground that no *prima facie* case has been demonstrated.

[28] I address firstly what seems to me to be the central issue of whether the petitioner has made out a case that the respondent's decision was irrational and unreasonable. For the petition to succeed, the court would require to be satisfied not only that the respondent's decision was wrong but that it was one that no chairman could reasonably have reached on the basis of the material presented to him. In my opinion, no such *prima facie* case has been made out. It is clear from the terms of the decision, especially paragraph 16 thereof, that the respondent was aware of the statutory test that had to be addressed, and in particular that he required to consider the potentially conflicting considerations of the public interest in the publication of documents provided to the Inquiry and the public interest in preventing harm or damage caused by disclosure of commercially sensitive information. I have already noted that section 18 of the Act, read short, imposes a duty on the chairman of an inquiry to take such steps as he considers reasonable to secure that members of the public are able to view documents provided to the inquiry. That duty is subject to section 19, but a restriction on publication may only be imposed by the chairman in a restriction order if he considers it to be necessary in the public interest, having regard *inter alia* to the risk of harm or damage caused by disclosure of commercially sensitive information. It is obvious that before the chairman can make a decision as to whether a restriction order is necessary for this reason, he must first be satisfied that the information whose publication is sought to be prevented is indeed commercially sensitive. In some cases, the commercial sensitivity of material may be readily apparent; in others it may not. In any event, the onus of satisfying the chairman of the necessity of making a restriction order rests upon the applicant.

[29] In the present case, the respondent was not satisfied that the redactions sought by the petitioner contained commercially sensitive information in either of the respects asserted. He took the view that it was not obvious that either the substantive content of the reports or the manner of its presentation was commercially sensitive, and that no adequate explanation had been given of why or to whom the information was commercially sensitive or of the type of harm or damage that might be suffered following publication of it. In my opinion, the petitioner has failed to state a *prima facie* case that no chairman could reasonably have taken that view. As the respondent observed, the application was at a high level of generality with little or no specification, and no examples, of either the commercial sensitivity of the material or the anticipated harm. Paragraph 4 of the petitioner's application was lengthy but repetitive and assertive. In my view it did no more than assert without explanation that the material in the reports and their methodology were commercially sensitive. Having had the benefit of examining the unredacted version of one of the monthly reports, I find myself at just as much of a loss as the respondent as to why either the substance or the methodology of the report has a continuing commercial sensitivity whose publication would cause damage to the petitioner or to the Bilfinger Group more widely. It may be that either or both of these contentions could be properly explained, but that was not, in my view, done by the petitioner when the application was made. Sub-paragraph 4.8.2 of the application, dealing with the heading "Performance sheets" that I have quoted at paragraph [6] above, gives a flavour of the application as a whole. In so far as it does not consist of a description of the material and of its internal uses, it consists merely of assertion of sensitivity. Repeated assertions that the Bilfinger Group's competitors would be assisted by disclosure takes the matter no further: that is simply a reiteration of what would render any material commercially sensitive in the first place.

[30] The assertions in the application of harm or damage are in no better position. Again one has descriptions of ways in which it said that competitors would be benefited without any explanation of how publication of either the information or the methodology could have that consequence. Such a lack of explanation is compounded by internal inconsistencies in the assertions: in some paragraphs it is asserted that the Bilfinger Group will be damaged because competitors and others will be able accurately to estimate their rates and profit margins; in other paragraphs it is asserted that the Group will be damaged because the information in the reports is insufficient to enable accurate estimates to be made.

[31] Returning to the question that I must address in deciding whether to grant the interim orders sought, can it be said, in the circumstances described above, that the petitioner has made out a *prima facie* case that no inquiry chairman could reasonably have failed to be satisfied that the material whose redaction was sought was commercially sensitive information whose disclosure would give rise to a risk of harm or damage? For the reasons I have given, I answer that question in the negative.

[32] I can deal with the other grounds upon which review of the decision is sought somewhat more briefly. As regards the contention that it had no evidential basis, it is clear from the terms of the decision that it was not reached by balancing information supplied by the applicant against something else without a proper basis. The reason why the application failed was rather that the petitioner had failed to provide the information required to enable the respondent to assess whether or not it should succeed in the statutory balancing exercise. Again, in my view, no *prima facie* case has been made out for challenging the decision on this basis. A particular point was made in relation to the sixth of the seven reasons (see paragraph [11] above) given by the respondent for rejecting the application, namely that the information sought to be protected was already available to individuals no longer employed

by Bilfinger. I have some sympathy with this argument: it seems to me that if information or methodology is commercially sensitive then *ex hypothesi* it is likely to be subject to legal or contractual protection against exploitation by former employees. I do not, however, read this reason as having been central to the respondent's decision which was based primarily upon the petitioner's failure to satisfy him that the information was commercially sensitive.

[33] The contention by the petitioner that the respondent had failed to take into account relevant material was founded upon the absence of any reference in the decision to the statement by Mr Kellerman and Mr Puschke. This point might have had some *prima facie* force if the statement had contained anything additional to the application itself. The reverse is, however, the case: the two paragraphs from the statement that I have quoted above seem to have formed the basis of many of the repetitive assertions in the application, and I find it impossible to discern anything in the statements which, arguably, might not have been taken into account by the respondent when dealing with the application.

[34] I turn next to procedural unfairness. The first ground alleged is the absence of reasonable opportunity to make submissions regarding the use to which the material in the reports may be put. Despite the assertion by senior counsel for the petitioner that the petitioner's concern related to unfairness in the procedure preceding the respondent's decision, I have difficulty seeing how this argument relates to commercial sensitivity. If (and I express no view on this) there is procedural unfairness arising either from the decision being given very shortly before the last date for submissions to the Inquiry, or from use by the respondent of information in the monthly reports for purposes in respect of which submissions have not been made by parties to the Inquiry, that would be a matter for a different challenge. It does not affect the reasoning of the decision in relation to the

restriction order, which is based upon failure by the petitioner to overcome the statutory presumption in favour of publication.

[35] The second ground of alleged procedural unfairness concerns the difference in treatment of the petitioner and Siemens respectively. Senior counsel for the petitioner acknowledged that because a restriction order had been made in relation to the Siemens documents, he was unaware of the contents thereof that had been the subject of the order, but nevertheless maintained his submission that the two core participants were in the same position and had to be treated equally. In my opinion the argument presented on this basis does not amount to a *prima facie* case. The petitioner's averment that "there is no proper justification for the proposed unequal treatment of [Siemens and the petitioner]" is no more than an unsubstantiated assertion. The same goes for the submission made by senior counsel for the petitioner at the hearing that the petitioner's assertion that the applications related to the same matters raised an issue of disputed fact that could not be resolved at a hearing for interim orders. I accept the submission on behalf of the respondent that his duty was to address each application on its merits, and that no factual basis was pled for the proposition that that necessitated reaching the same decision in relation to both applications.

[36] I do not consider that the argument founded upon A1P1 adds anything to the petitioner's case. I accept, as submitted by senior counsel for the petitioner, that when considering issues of proportionality under the Convention, the court must go beyond the domestic law approach to judicial review and make its own value judgment by reference to circumstances prevailing at the material time (*R (SB)* v *Governors of Denbigh High School* [2007] 1 AC 100 at paragraph 30). It is not disputed that commercially sensitive information is a possession for the purposes of A1P1. It cannot, however, be said that publication would constitute a disproportionate interference with the petitioner's peaceful enjoyment of its

possession in circumstances where it failed to discharge the onus of establishing that issues of commercial sensitivity arose at all.

Balance of convenience

[37] On the view that I have taken in relation to the petitioner's failure to state a *prima facie* case, the question of balance of convenience does not arise. Had it arisen, however, I would have found that the balance of convenience favoured the granting of the interim orders sought. There is, in my view, some substance to the respondent's contention that, at least so far as the petitioner itself is concerned, it is difficult to see how publication would cause loss and damage, having regard to the terms of the petitioner's published report and financial statements dated 31 December 2016, in which it is stated that "the group" had stepped out of the construction and civil engineering business and that the petitioner would not seek to acquire any new projects. The reference to "the group" appears to be a reference to companies under the ultimate control of Bilfinger SE, and it was submitted by senior counsel for the respondent that it was apparent, having regard also to Bilfinger SE's annual report for 2017, that the group was transferring its focus to provision of "industrial services". Although a statement was provided to the court by Mr Wolfgang Eder, the petitioner's managing director, in which it was said that it was "not inconceivable" that at some point in the future the petitioner might decide to re-enter the construction and civil engineering business in the UK, the risk of harm or damage to the petitioner caused by publication of the monthly reports seems remote. There may however be a greater risk of harm to other members of the group; it is not entirely clear to me what is encompassed within the expression "industrial services", but I note that at page 58 of the 2017 annual report the group's portfolio is stated to include *inter alia* consulting, engineering and

construction. I would not, therefore, be prepared to proceed at this stage on an assumption that, on the hypothesis that the monthly reports did contain commercially sensitive information, publication could not cause harm or damage to any member of the group. If such damage were to occur as a consequence of publication, it would be irreversible and, as senior counsel for the petitioner submitted, not amenable to compensation. It was not submitted on behalf of the respondent that any particular prejudice would result from delaying publication pending the outcome of these proceedings. For those reasons I would have held that the balance of convenience favoured maintaining the *status quo* by granting the orders sought.

[38] I shall, however, pronounce an interlocutor refusing both interim suspension and interim interdict.