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Case No: CL 2018 000824

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2019

Before :

MR. JUSTICE TEARE

- -

Between :

Maroil Trading, Inc. and another	**Claimants**
- and -	
Cally Shipholdings, Inc. and others	**Defendants**

- -
- -

Thomas Grant QC and James Kinman (instructed by **Grosvenor Law**) for the **Claimants**
Jonathan Gaisman QC and Keir Howie (instructed by **Reed Smith LLP**) for the **Defendants**

Hearing date: 29 October 2019

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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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Mr. Justice Teare :

1. There are before the court (a) an application by the Claimants for summary judgment or strike out of certain allegations made by the Defendants and (b) an application by the Defendants for permission to re-amend their Points of Defence. Although the present action was issued in 2018 the parties have been involved in litigation with each other since 2006.

2. The procedural history leading up to the applications before the court has been described by the Claimants as "moderately complicated" and by the Defendants as "complicated". The history involves a number of claims, judgments and settlements. It suffices to state the following, which I take, in the main, from the Defendants' skeleton argument:

   i) The Claimants are owned and controlled by Mr. Wilmer Ruperti, a Venezuelan businessman.

   ii) In 2006 the Defendants (described in the Claimants' skeleton argument as a collection of shipping companies) brought an action against Mr. Ruperti and others alleging the taking of secret profits. In 2012 they obtained judgment for about US$78 million. In September 2013 a settlement was concluded under which Mr. Ruperti was required to pay US$40 million by instalments.

   iii) The Defendants began enforcement proceedings in England, Florida and Switzerland. The last of those involved a criminal prosecution in the course of which the Swiss public prosecutor obtained disclosure of certain documents which he provided to the Defendants. They included a Payment Agreement dated December 2014 between the Claimants and PDVSA, the Venezuelan state-owned oil company, pursuant to which substantial sums were to be paid by PDVSA to the Claimants.

   iv) In March 2015 Mr. Ruperti paid US$25.5 million to the Defendants under the September 2013 settlement agreement.

   v) A dispute arose as to whether Mr. Ruperti had discharged his debt to the Defendants, which dispute was resolved in favour of Mr. Ruperti by Andrew Smith J. in April 2015.

   vi) Permission to appeal was granted by Longmore LJ but in September 2016 the appeal was compromised by another settlement agreement.

   vii) The Claimants' claim in these proceedings is brought under the confidentiality provisions in the 2016 settlement agreement (in particular clause 7.3) which provide as follows:

   > "7. Confidentiality
   >
   > 7.1 Save to the extent required by law, applicable regulation (including any disclosure required in company financial statements) or for the purpose of enforcing this Agreement, the Parties agree to keep confidential the existence

and terms of this Agreement, the background and negotiations leading to it and any correspondence or other documents recording such background and negotiations (the "**Confidential Information**"). No disclosure of Confidential Information shall be made without the prior written consent of the other Parties, such consent not to be unreasonably withheld.

7.2 The Novoship Companies acknowledge that they, including their advisors, lawyers and investigators, have obtained information during the course of the London Proceedings, the Florida Proceedings and the Swiss Proceedings concerning the Ruperti Parties and the Released Parties, which is private and sensitive, including personal, financial and business information (the "**Sensitive Information**").

7.3 The Novoship Companies undertake that they, their servants, agents, advisers and investigators will keep all the Sensitive Information confidential and will not use or disclose Sensitive Information without the prior written consent of Mr. Ruperti save to the extent required by law.

7.4 Each of the Parties shall assert claims to common interest privilege and/or legal professional privilege and/or confidentiality over any Confidential Information or Sensitive Information to the maximum extent permissible by law and shall notify the disclosing Party of any breach or suspected breach of this clause by any person as soon as it becomes aware of it and shall comply with any reasonable request by the disclosing Party to prevent or restrain a breach or suspected breach of this Agreement or any infringement or suspected infringement, whether by court proceedings or otherwise. Nothing in this Agreement and no action taken pursuant to this Agreement shall be taken as waiving any claim by any Party to privilege over any of the Confidential Information or Sensitive Information. No Party shall have the authority to waive any applicable privilege on behalf of the other Parties, nor shall any waiver of an applicable privilege by the conduct of any one Party be construed to apply to the other Parties.

7.5 Each Party hereby irrevocably consents to the other Parties disclosing the terms of this Agreement to their shareholders, legal representatives, auditors, accountants, insurance brokers or other relevant professional advisers and to their insurers, provided in each case that the recipient of the disclosure undertakes to keep those terms confidential subject to the qualifications set out in Clause 7.1.

7.6 Where there has been publication of the Confidential or Sensitive Information in the press or other media, the Parties shall be released from the obligations set out in this clause to

> the extent necessary to comment on the Confidential or Sensitive Information so published in order to protect the reputation of the Party making the comment or to correct or clarify any misinformation that has been published or in order to cause the publication of a rebuttal. For the avoidance of doubt, where the initial publication of the Confidential or Sensitive Information was made with the consent or co-operation of any Party, that Party shall not be released from the obligations set out in this clause nor from any liability to any other Parties for any breach of such obligations.
>
> 7.7 To the extent permitted by law none of the Parties to this Agreement will make any public or private statement that is critical or disparaging of any other Parties.
>
> 7.8 Provided Completion has occurred, the Parties' rights and obligations under this clause shall continue in full force and effect notwithstanding the termination of this Agreement for any reason whatsoever."

viii) In October 2016 a Mr. Hall provided to a Mr. Sargeant copies of documents obtained in the Swiss enforcement proceedings, including the Payment Agreement. Mr. Hall had been engaged by the Defendants in February 2014 to investigate Mr. Ruperti's assets and had obtained copies of the documents in that capacity. However, when he provided copies to Mr. Sargeant he was acting for another client, Mr. Mohammed Al-Saleh, and was no longer acting for the Defendants. (This is not common ground but for the purposes of the present applications it must be assumed to be the case.) There is evidence that in return for the copies Mr. Sargeant provided Mr. Hall with a video of Mr. Sargeant's brother engaged in sexual acts. Mr. Sargeant's brother was in dispute with Mr. Al-Saleh.

ix) The documents provided to Mr. Sargeant led to further proceedings against the Claimants brought by Mr. Sargeant's company, Latin American Investments Limited and another company. In those proceedings it was alleged that by receiving payments from PDVSA the Claimants, who were in a joint venture with Latin American, had made secret profits. A Worldwide Freezing Order (for sums collectively totalling about US$83 million) was obtained and in November 2017 the claims were settled by the Claimants who agreed to pay a substantial sum in three tranches. It is said that only the first tranche was paid, and that a further settlement was concluded thereafter, under which additional payments have been made.

x) The present proceedings have been brought by the Claimants against the Defendants. They allege that when Mr. Hall provided the documents to Mr. Sargeant there was a breach by the Defendants of the 2016 settlement agreement, in particular of clause 7.3, entitling the Claimants to damages in the amount of their liability to Latin American as settled, the costs of those proceedings and the losses caused to the Claimants by the Worldwide Freezing Order. The Defendants deny any breach or liability to the Claimants.

3. It is against that background that the Claimants have issued an application for summary judgment or strike-out and the Defendants have sought permission to re-amend their defence.

4. There are three issues for the court to determine. In essence they are:

   i) Is there a real issue to be tried that, as contended by the Defendants, the disclosure of the Payment Agreement was not a breach of the 2016 settlement agreement because it had ceased to be a private document in April 2015 when it was referred to in evidence before Andrew Smith J. and in his judgment;

   ii) Is there a real issue to be tried that there can be no breach of the 2016 settlement agreement for disclosure made by Mr. Hall when he was not acting as the Defendants' agent or investigator;

   iii) Is there a real issue to be tried that, if the Claimants were in truth liable to Latin American, there was a public interest in the Swiss Proceedings Documents being disclosed such that there has been no breach of the 2016 settlement agreement, or at any rate no enforceable breach.

5. The Claimants' case is that each of these issues is a short point of law and can be determined by this court in their favour on a summary basis. The Defendants' case is that the court is only concerned with the question whether the points raised by the Defendants are not hopeless or fanciful but are properly arguable.

6. I was referred to the decision of Lewison J. in *Easyair Ltd. v Opal Telecom Ltd.* [2009] EWHC 339 (Ch) which set out the principles which determine whether it is appropriate to grant summary judgment. In particular, a realistic defence is one "which carries some conviction" and is "more than merely arguable". Lewison J. said that the court "should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case."

7. I was also referred to the decision of the Court of Appeal in *TFL Management Services v Lloyds TSB Bank plc* [2014] 1 WLR 2006 where Floyd LJ, after referring to *Easyair*, added that

> "the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action …….Moreover, it does not follow from Lewison J.'s seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications……Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy."

The first issue; the public domain point

8. It is necessary to summarise the reference made to the Payment Agreement in open court before Andrew Smith J. and the reference made by the judge to that agreement in his April 2015 judgment. Mr. Ogden of the Defendants' then solicitors referred to and described the Payment Agreement in his witness statement and exhibited the original version in Spanish. There is no dispute that the Payment Agreement was thus referred to in open court. In his judgment Andrew Smith J. recited in paragraph 3 that that "the Ruperti Defendants anticipated that they would receive funds from negotiating a settlement with some unrelated third parties, to whom I shall refer as PDVSA". In paragraph 8 the judge further recited that "on 13 March 2015 the Ruperti Defendants, having received payment under a settlement of the PDVSA matter, transferred US$25,558,345.74 to the account specified in the Settlement Agreement." The judgment was of course a public judgment in the public domain.

9. "Sensitive Information" in clause 7.2 refers to "private and sensitive information, including personal, financial and business information." Thus the obligation in clause 7.3 to keep the information confidential assumes that it remains private. Both parties referred to the observation of Lord Goff in *Attorney-General v Observer Limited* [1990] 1 AC 109 at p.282C-D that confidential information is normally regarded as having entered the public domain when it has become "so generally accessible that, in all the circumstances, it cannot be regarded as confidential." In the absence of any other test the parties addressed the question whether the Payment Agreement and its contents were private by reference to that test.

10. On behalf of the Defendants the "simple" submission was made that something contained in a public judgment cannot sensibly be described as private. Thus, there was no privacy in the fact that Mr. Ruperti had concluded a settlement with PDVSA by early 2015 and had received substantial sums under it. The position was said to be *a fortiori* where, as in this case, a copy of the very agreement had been filed in evidence and referred to in open court and a non-party could seek a copy of it under CPR 5.4C(2).

11. On behalf of the Claimants it was submitted that the judgment did not place the contents of the Payment Agreement into the public domain and that the mere fact that a member of the public could make an application under CPR 5.4C(2) for a copy of the Payment Agreement was not sufficient to place the Payment Agreement into the public domain.

12. I accept that the judgment itself only placed in the public domain the matters referred to in the judgment, namely, that Mr. Ruperti was engaged in negotiations with PDVSA about reaching a settlement, that a settlement with PDVSA was reached and that payments were made under it to Mr. Ruperti. The contents of the settlement with PDVSA were not referred to in the judgment. However, the contents of the Payment Agreement were before the court and had been referred to in open court. Thus a member of the public could make an application for a copy of the Payment Agreement pursuant to CPR 5.4C(2). Any such application would be decided in accordance with the principles explained in *Cape Intermediate Holdings v Dring* [2019] UKSC 38. It is to be noted that in paragraph 46 of Baroness Hale's judgment she said:

> "There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality."

13. I was referred to evidence which showed that in April 2015 the journal Tradewinds reported that Andrew Smith J. had referred to "a settlement deal with state oil company PDVSA" and that that report had led to enquiries being made of Mr. Ruperti by or on behalf of Latin American. Mr. Ruperti apparently said that the report was untrue. Counsel for the Claimants objected that these facts had not been pleaded. But the court, on an application of this nature, is entitled to have regard to such evidence as might be before the court at trial.

14. There is no evidence that an application under CPR 5.4C(2) was made by Latin American (or indeed by anyone). But if such an application had been made by Latin American the basis of the application would have been that it required to see a copy of the Payment Agreement because it was believed to contain evidence that Mr. Ruperti had received money from PDVSA which should have been shared with Latin American pursuant to the terms of a joint venture. It is not known what the court's response would have been in circumstances where Mr. Ruperti may have resisted disclosure. But there must, it seems to me, be a realistic prospect that such an application would have been successful.

15. In those circumstances there is in my judgment a real prospect that at trial the court would hold that by reason of (i) the judgment, (ii) the reference to the Payment Agreement in open court and (iii) the availability of an application under CPR 5.4C(2) for a copy of the Payment Agreement (which application had a real prospect of success), the Payment Agreement was "so generally accessible that, in all the circumstances, it cannot be regarded as confidential" or as "private", within the meaning of the 2016 settlement agreement.

16. Reliance was placed by the Claimants on clause 7.6 of the 2016 settlement agreement. It was suggested that it "expressly contemplates that a party's obligation to keep sensitive information confidential can continue even in circumstances in which that information has been reported in the press or other media." The contrary argument advanced by the Defendants was that "the clause does no more than provide that where Sensitive Information is published in the press, the parties may use Sensitive Information ……to the extent necessary to respond to such a development. This does not imply any general departure from the common law position that there is no confidentiality in material which is in the public domain. Still less does it imply that material can qualify as Sensitive Information where it had entered the public domain before the Settlement Agreement was even concluded."

17. I was left unpersuaded by the Claimants that clause 7.6 had any application where the information in question was, at the inception of the agreement, in the public domain so that it was not private.

18. Reliance was also placed by the Claimants on the "evidence" (in reality the summary of a legal submission) of their solicitor Mr. Hastings that "the parties to the [2016 settlement agreement] were aware at the time at which they entered that agreement

that the Swiss Proceedings Documents (among others) were originally held by the Maroil Parties' bankers (Sparkasse) subject to a duty of confidentiality, the disclosure of which was forcibly compelled by the Swiss authorities to the Novoship Parties, and so the only basis on which the Novoship Parties had obtained copies of the Swiss Proceedings Documents was through compelled disclosure from a party who held them subject to confidentiality duties to the Maroil Parties. Further, at the time the [2016 settlement agreement] was entered into, the Swiss Proceedings Documents remained unknown to the public; the Swiss authorities had not disseminated them wider than providing them to the Novoship parties and as a matter of fact they were unknown to anyone other than a very limited body of people." This background or context was relied upon by counsel to submit that as at the date of the 2016 settlement agreement the status of the Payment Agreement was the same as that of the other Swiss Proceedings Documents. But the context or background relied upon omits mention of the 2015 judgment and of the fact that the Payment Agreement had been referred to in open court.

19. Although this issue is said by the Claimants to be an issue of law it is, in my judgment, a mixed question of law and fact (or at any rate a question of construction to be determined having regard to the factual context). The question is whether, in the light of the judgment of 2015, the Payment Agreement was no longer a private document. I consider that the Defendants' argument that the Payment Agreement was not private as at the date of the 2016 settlement agreement has a realistic prospect of success, that is, it is one which carries some degree of conviction.

20. It is said that all relevant facts are now known but I am reluctant to determine this question on a summary basis in circumstances where much will turn upon an assessment of the factual context. I consider that much the safer course is to determine the matter at trial after all the evidence has been considered (in particular evidence as to Latin American's knowledge of the judgment) and the relevant factual background has been determined by the court.

21. I therefore grant permission for this re-amendment to be made (and, if it is necessary to state, refuse to strike it out).

Issue 2; the capacity point

22. This is described by the Claimants as a "short point of construction". Perhaps it is, but it is also an important one. For, as stated by the Defendants, "determination of this point in favour of the Defendants ….will in fact be dispositive of the entire case" (assuming that Mr. Hall was not acting as an agent of the Defendants at the material time).

23. The court's task is to identify the meaning which clause 7.3 would reasonably be understood to bear having regard to the background reasonably available to both parties. In identifying that meaning it is necessary to consider both the wording of the clause and its commercial consequences; see *Wood v Capita Insurance Services Ltd.* [2017] AC 1173. As the Court of Appeal has recently observed in *Ark Shipping Company LLC v Silverburn Shipping (IOM) Ltd.* [2019] EWCA Civ 1161 at paragraph 41 per Gross LJ it is sufficient to refer to Lord Hodge's "synthesis as to interpretation":

> "41. Rather than adding to an all too well travelled area, it suffices to adopt (with respect) Lord Hodge's synthesis as to interpretation in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, at [10] – [15]:
>
> > "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning……[including] the potential relevance….of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations…..
> >
> > 11. ….Interpretation is….a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…..
> >
> > 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…..
> >
> > 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement…..
> >
> > 15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."
>
> See too, Popplewell J's helpful summary, in *The Ocean Neptune* [2018] EWHC 163 (Comm); [2018] 2 All ER 108, at [8], together with that of Carr J in the present case, at [26]."

24. In support of the Claimants' case on construction reliance was (again) placed, in counsel's oral submissions, on the "evidence" of Mr. Hastings as to the context in which the 2016 settlement agreement was made. I have already summarised that earlier in this judgment. It was then submitted that on the true construction of clause 7.3 the Defendants had agreed to procure that their investigator, Mr. Hall, who had

obtained information during the course of the Swiss Proceedings would keep that information confidential. In support of that construction it was noted that clause 7.1 (which concerned the confidentiality of the 2016 settlement agreement) referred, simply, to "the Parties" agreeing to keep the settlement agreement confidential whereas clauses 7.2 and 7.3 referred not only to the Defendants but also to their advisors, lawyers and investigators (in clause 7.2) and to their servants, agents, advisers and investigators (in clause 7.3). The difference in language between clause 7.1 on the one hand and clauses 7.2 and 7.3 on the other hand was said to indicate that in the case of clause 7.3 the Defendants' obligation was not merely that they would not breach the confidentiality of the Payment Agreement but that they agreed to procure that those investigators who had in fact obtained the confidential information would not disclose it.

25. The contrary argument advanced on behalf of the Defendants was that clause 7.2 was concerned with what the Defendants themselves had received and that clause 7.3 contained an undertaking as to their own conduct. The reference to servants and agents (and others) was explained by the fact that a company can only act through such people. On that basis there would be no breach of clause 7.3 if a person such as Mr. Hall disclosed sensitive information at a time when he was not an agent or investigator acting on behalf of the Defendants. Clause 7.3 did not refer to *former* agents or investigators. That construction was consistent with the common law pursuant to which the Defendants would not be liable for disclosure by a former agent or investigator.

26. Both parties made submissions as to the commercial consequences of the other's interpretation. The Claimants said that, on the Defendants' construction, they would receive no protection if an investigator who had received sensitive information had his own reasons for later disclosing the information to another. The Defendants said that, on the Claimants' construction, the Defendants would assume a responsibility which was unlimited in time, amount or otherwise and would extend to actions of persons over whom they had no control.

27. In circumstances where the drafting of clause 7.2 and 7.3 was arguably sloppy (see the different language of clauses 7.2 and 7.3) it was submitted on behalf of the Defendants that the court should be careful before concluding that the Defendants had assumed the suggested unlimited liability.

28. I consider that, in circumstances where both parties have relied upon the factual context in which the clause falls to be construed, I should decline the invitation to determine this "simple" but important issue of construction now. The Claimants have relied upon the history as to how the Payment Agreement was acquired by Mr. Hall and the Defendants have said that there was in fact scope for further disputes to arise under the 2016 settlement agreement so that it was realistic to suggest that the Defendants might engage third party agents or investigators in the future (which would explain the reference to them in clause 7.3). These matters are likely to be the subject of evidence at the trial with the result that it would not be safe to decide the meaning of clause 7.3 now. Further, any decision now as to the meaning of clause 7.3 would almost certainly lead to an appeal which would disrupt the management of this case towards trial. The safer and more efficient course appears to me to determine the issue of construction in the light of all the evidence which will be available at trial and the findings which will made by the court.

29. It suffices to say that, although there is force in the Claimants' construction, which may well succeed at trial, the Defendants' submission as to the meaning of clause 7.3, though perhaps lacking the force of the Claimants' construction, cannot be said to be no more than fanciful or to carry with it no degree of conviction.

30. I therefore give permission to re-amend in this regard (and refuse to strike out the allegation).

Issue 3; the public policy point

31. The Defendants maintain that the Claimants acted in breach of trust and of fiduciary and other duties by having entered into the Payment Agreement with PDVSA and having kept the proceeds rather than paying them over to the joint ventures in which Latin American was interested. The question for the court is whether that fact (as it must for present purposes be assumed to be) will or may operate to preclude any finding that there has been a breach of the 2016 settlement agreement. The proposition of law relied upon is that there is no confidence as to the disclosure of iniquity; see *Gartside v Outram* (1857) 26 LJ Ch (NS) 113, *Initial services v Putterill* [1968] 1 QB 396, *Beloff v Pressdram* [1973] 1 AER 241, *British Steel Corp. v Granada TV* [1981] AC 1096 and *Lion Laboratories v Evans* [1985] QB 526.

32. These authorities provide support for the Defendants' proposition that "the law will not recognise any enforceable obligation of confidence in respect of serious wrongdoing". This proposition was the foundation of an argument that the natural interpretation of the 2016 settlement agreement is that the parties were referring to information which was *legitimately* private and confidential. Alternatively, if the settlement agreement prohibited the disclosure of serious wrongdoing, such prohibition was unenforceable.

33. Counsel for the Claimants said that there was no scope for reading a proviso into clauses 7.2 and 7.3 to the effect that documents exposing wrongdoing or containing information to which a third party is entitled cannot constitute "sensitive information". This was because the "relationship between the parties ….was one of profound hostility" and that it is not "credible to suggest that, within the context of that relationship, the Claimants would have agreed *sub silentio* to the Defendants being entitled, on their own initiative, to the release of any of the Claimants' confidential information to third parties in any circumstances save those in which the Defendants had literally no other alternative but to do so." Reliance was also placed on clause 7.4 which was said to make clear that release of information to third parties was a last resort. Finally, Mr. Hall was not acting as a whistle-blower but took part in a "grubby exchange for compromising video footage which he thought would be of use to another client."

34. In oral submissions counsel for the Claimants submitted that the proposition relied upon by the Defendants, which was the foundation of both the construction and enforceability arguments, was unsound in the context of completed as opposed to contemplated wrongdoing.

35. Reliance was placed on the decision of the Court of Appeal in *Weld-Blundell v Stephens* [1919] 1 KB 520. In that case the plaintiff had requested the defendant, an accountant, to investigate the affairs of a company. In his letter of instructions to the

defendant the plaintiff libelled the company. A partner of the defendant negligently left the letter at the company's office where it was read. That led to a successful libel action in which the company recovered damages from the plaintiff. The plaintiff then sued the defendant for breach of an implied duty to keep the letter secret. The Court of Appeal held that it was the duty of the defendant to keep the letter secret but that the plaintiff could only recover nominal damages because any substantial damages were in the nature of an indemnity for the consequences of the plaintiff's own wrong.

36. The Court of Appeal was faced with a submission (see p. 526) that there was no duty not to disclose the contents of the letter because any contract to do so would be either an illegal contract or against public policy and consequentially unenforceable. Reliance was placed (see p. 523) on the decision in *Gartside v Outram* (as was done in the present case). This submission was not accepted by the Court of Appeal.

37. Bankes LJ said (at p.527) that the case was one "where the wrong was completed before the communication was disclosed and where public policy is better served by respecting the confidence than by abusing it".

38. Warrington LJ said (at pp.534-5) that the fraud alleged in *Gartside v Outram* "was a systematic fraud pursued by the plaintiff in the course of their business and the disclosure of the evidence in the defendant's possession would tend to prevent such frauds in the future. I doubt whether the Vice-Chancellor would have come to the same conclusion where, as in the present case, the question related to a single document, the writing and publication of which is no doubt a cause of action, but the disclosure of which serves no useful purpose, except to enable the person libelled to recover damages for a libel, the existence of which, but for the defendant's neglect, might never have been known to anyone."

39. Scrutton LJ (at pp.547-8) said of *Gartside v Outram:* "The clients there had committed frauds, which their confidential clerk had known as such confidential clerk. The Court refused to restrain him from disclosing them. The acts were fraudulent, and clearly criminal, and there was no public policy, such as the importance of defence by solicitors, to enforce the agreement: the frauds were not committed in pursuit of any aim supposed to be of public advantage. The Court declined to exercise its equitable jurisdiction and left the claimant to his remedy at law." By contrast, when dealing with the case before the court he said (at p.548): "I think that the public policy of enforcing all agreements, especially agreements such as this, overrides the public as to criminal acts".

40. It seems to me that the reasoning of the Court of Appeal, which led to the conclusion that it was the duty of the defendant to keep the contents of the letter secret, was based upon a balancing exercise between the public policy of enforcing an agreement and the suggested countervailing public policy in revealing the commission of a private wrong. I am not convinced that the Court of Appeal drew a hard and fast line between wrongdoing which was complete and wrongdoing which was contemplated. Of the three appellate judges only Bankes LJ articulated such a distinction but he nevertheless had regard to what best served the public interest; cf the remarks of Lord Denning MR in *Initial Services Ltd. v Putterill* [1968] 1 QB 396 at p.405 F and the discussion in *Gurry on Breach of Confidence* 2nd ed. at paragraphs 16.14 and 16.15.

41. That a balancing exercise between competing public policies is the correct analysis is also indicated by the speech of Lord Goff in *AG v Guardian Newspapers (No.2)* [1990] AC 109 at p. 282 E-G:

> "…although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure…..It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining 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* ……"

42. Lord Goff's "limiting principle" was relied upon by counsel for the Claimants at paragraph 47 of their skeleton argument.

43. However, Counsel for the Claimants said that the Defendants' pleaded case as to construction and unenforceability did not depend upon such a balancing exercise and that there was no prospect that their pleaded case would prevail at trial. He may be right that the balancing exercise has not been pleaded but it is clear from the Defendants' skeleton argument (see paragraph 64) that they maintain that, if, contrary to their submission, a balancing exercise is required that must be a matter for trial. Thus at trial the balancing exercise will be in play; not least because the Claimants say that Lord Goff's limiting principle is the true principle. Whatever the true position in law is I do not consider that in this fact sensitive area it would be appropriate to attempt to reach a concluded view at this hearing as to the correctness in law of the Defendants' arguments as to construction and enforceability. Whilst I can foresee difficulties in way of these arguments I cannot say that the arguments are fanciful or that they do not carry the required degree of conviction to make it appropriate to give permission to re-amend to plead them. The Defendants are seeking, it seems to me, to develop the public policy aspect of this area in the law in such a way as to exclude the need for a balancing exercise. Consideration of the opposing arguments, which concern public policy, should be left to trial and not decided at this stage.

44. Counsel further submitted that the Defendants had no real prospect of establishing that Mr. Hall's disclosures were protected by Lord Goff's limiting principle in circumstances where there was no evidence that either he or the Defendants knew or were aware of any reason to believe that the Payment Agreement exposed wrongdoing on the part of the Claimants. However, counsel for the Defendants suggested that "it is by no means obvious that [Mr. Hall] was unaware of the significance of what he was disclosing" and referred to the evidence of Mr. Preston (the solicitor who acted for Latin American) which suggested that Mr. Hall had offered to provide information "that would assist [Latin American] in their claims against Maroil". Mr. Hall has been joined as a third party to these proceedings by the Defendants and so may have evidence to give on this issue at trial. In those

circumstances it would be unwise to assume at this summary stage that Mr. Hall was unaware that the Payment Agreement exposed wrongdoing by the Claimants.

45. Counsel for the Claimants identified a further reason for suggesting that the Defendants had no real prospect of establishing that Mr. Hall's disclosures were protected by Lord Goff's principle, namely, that his motive for his disclosure was to barter the documents for a sex tape. In support counsel referred to passages in *Initial Services v Putterill* [1968] 1 QB 396, *Schering Chemicals v Falkman* [1982] QB 1 and *W v Edgell* [1990] Ch.359 which suggested that "mercenary" betrayals of confidence would not be protected by the law. In response counsel for the Defendants said that the facts were not yet fully known and that there is likely to be further evidence on this topic at trial. That seems to me to be likely and a good reason for the court not to pre-judge the balancing exercise at this summary stage of the action.

46. I have therefore concluded that permission to re-amend to plead the public policy point should be granted.

Conclusion

47. The Defendants have permission to re-amend to plead the public domain, capacity and public policy points. The Claimants' application for summary judgment or strike out is dismissed.