

Whose confidential information is it anyway?



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THE RECENT CASE OF *JONES v IDS (RUK) Ltd & anor* [2012] concerned a claim for damages for breach of a confidentiality agreement. In the opening paragraph of his judgment, His Honour Judge Hodge QC identified three 'interesting issues of law' that he needed to decide, namely:

- 1) the nature of the interest that claimants must establish in 'confidential information' before they can properly maintain a claim for breach of confidence;
- 2) the interplay between a claim in contract for damages for the loss of a chance and the 'minimum performance' or 'least onerous obligation' principle; and
- 3) the availability of a claim for *Wrotham Park* damages in a claim for breach of confidence.

This article considers the judge's answers to those questions.

BACKGROUND FACTS

The claimant, Mr Jones, established his own company, CMP, in 1994. CMP acted as an intermediary between the user of photocopying, printing and scanning equipment and the supplier. The defendant, Ricoh, was CMP's main supplier. Ricoh was part of a larger worldwide network of companies providing photocopying, printing and scanning hardware and related services. CMP dealt with Ricoh's UK arm. Their relationship was governed by a trading agreement entered into in 1998.

Understandably, Mr Jones became increasingly aware of the importance of Ricoh to his business and appreciated that CMP was, as the middleman, vulnerable to being cut out of the picture. To mitigate this risk, CMP entered into a confidentiality agreement with Ricoh. The confidentiality agreement purported to restrict the use Ricoh could make of 'confidential information', which was broadly defined to include, among other things, all information received by Ricoh about CMP and its clients (other than information that was already in the public domain).

In 2003, one of CMP's UK clients, Bombardier, decided to issue a tender for its global photocopying, printing and

scanning (not just its UK needs). It invited both CMP and Ricoh to tender for the work in the expectation that they would submit a joint bid. However, in the event, Ricoh submitted its own tender through RIA (a separate corporate vehicle, which co-ordinated the major European and global contracts for the Ricoh group). CMP joined forces with Toshiba and also submitted a bid.

RIA's bid was unsuccessful. CMP/Toshiba won the bid and an agreement was drafted for Toshiba to supply equipment to Bombardier. However, for a variety of reasons, this agreement was never implemented and Bombardier subsequently issued another tender for the work in 2007. By this time, CMP was no longer pitching for new business and RIA (which had by then changed its name to RGSE) submitted another bid – this time successfully.

In 2008, RIA/RGSE and Bombardier decided to replace all the equipment that CMP/Ricoh had previously supplied to Bombardier in the UK. This brought CMP's relationship with Bombardier to an end.

THE CLAIM

Mr Jones, having taken an assignment of CMP's cause of action, alleged that Ricoh had breached the terms of the confidentiality agreement by disclosing confidential information, supplied by CMP to Ricoh for the purposes of the UK contract with Bombardier, to other Ricoh group entities. Mr Jones further alleged that this confidential information had then been used for the purposes of the bids made in 2003 and 2007 and in 2008 when RIA/RGSE had used it to speed up the process of implementing its agreement with Bombardier in the UK.

Mr Jones claimed damages for these breaches on two bases. First, he said that, had Ricoh not misused CMP's confidential information for the purposes of the 2003 bid, RIA would have submitted a joint bid with CMP. This, Mr Jones argued, gave rise to a claim for the loss of the chance that this joint bid would have been successful and profitable in a way that CMP's successful bid with Toshiba proved not to be. Second, Mr Jones argued that he was entitled to *Wrotham Park* damages for the breaches in 2003, 2007 and 2008, meaning that

damages should be calculated by reference to the price that Ricoh ought reasonably to have paid for a release from its obligations under the confidentiality agreement.

THE NATURE OF THE INTEREST THAT A CLAIMANT MUST ESTABLISH IN 'CONFIDENTIAL INFORMATION'

Ricoh claimed that the confidentiality agreement only protected confidential information belonging to CMP, such that CMP would have the right to call for the delivery up of that information. For the information to be 'CMP's confidential information', it needed to be 'owned' by CMP. While the judgment does not make this explicit, it appears that the argument was that the confidential information, in respect of which Mr Jones was suing, belonged to Bombardier, and not CMP. Furthermore, Ricoh said that CMP must be entitled to the information it sought to protect as principal, not as agent for a third party such as Ricoh or Bombardier.

Mr Jones argued that the notion of 'title' to confidential information was a complete 'red herring': the issue was not who owned the information, but whether a duty of confidence was owed by one person to another. Ricoh had, in the confidentiality agreement, accepted an obligation not to use the information supplied to it, save for the purposes of the supply, installation, servicing and billing of devices, and it had breached that obligation as soon as it started disclosing that information to third parties (ie other Ricoh group entities), and as soon as it started to use it for its own purposes.

His Honour Judge Hodge QC agreed with Mr Jones on this point. He referred to what he described as the 'classic statement of the law' by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1968] that the three essential elements of a claim for breach of confidence are as follows:

- 1) the information must have the necessary quality of confidence;
- 2) the information must have been imparted in circumstances importing an obligation of confidence; and
- 3) there must be an unauthorised use of the information to the detriment of the party communicating it.

'The issue was not who owned the information, but whether a duty of confidence was owed by one person to another.'

However, the judge also identified a fourth essential ingredient, derived from *Fraser v Evans* [1969], which Megarry J had omitted, 'no doubt because he considered it to be so obvious that it did not merit express articulation', namely that the complainant must be the person who is entitled to the confidence and to have it respected. In order for a claimant to satisfy this element of the test, he would have to show that that he had a 'sufficient interest in the information to entitle him to maintain an action to restrain its unauthorised dissemination or use.'

That meant that, when considering whether information was CMPs confidential information', the appropriate inquiry should be directed, not at whether CMP owned that information, but at whether it had made a sufficient contribution to the creation of the relevant confidential information, in the furtherance of its own commercial interests, to justify the imposition of a duty owed to CMP (and thus to the claimant) to keep that information secret and entitling them to restrain its unauthorised use.

Applying that test, the judge accepted the claimant's submission that valuable confidential information that CMP had generated as a result of its own: skill and labour; audits and relationship with Bombardier (such as the choice of devices, their location and contact information); and customer-specific device and service pricing information, was capable of constituting CMP's confidential information.

DID RICOH BREACH THE CONFIDENTIALITY AGREEMENT?

The judge conducted a detailed factual investigation into the information that had been provided to Ricoh and the extent to which it had had been used in the two bids and in the implementation of the contract with Bombardier in 2008. In very broad terms he found that:

- i) In 2003, Ricoh had circulated to RIA a spreadsheet (known as the Hoskins

spreadsheet), which identified the particular models of the devices that CMP had recommended to Bombardier in order to satisfy its specific copying and printing requirements in identified locations. CMP had made a sufficient contribution to the creation of this information, in the furtherance of its own commercial interests, for it to be capable of protection. However, while the unauthorised disclosure of the Hoskins spreadsheet to RIA was a breach of the confidentiality agreement, this would not give rise to a successful claim for damages (there being no loss) unless Mr Jones could establish that the information had been used for the purposes of the 2003 bid. The judge found, on the facts, that this had not happened.

- ii) In 2007, Ricoh had not, contrary to Mr Jones' assertions, disclosed to other Ricoh group entities details of the service price negotiated by CMP, and charged to Bombardier, in respect of devices supplied and serviced by Ricoh. The judge went on to say that, while this information was, in principle, capable of constituting CMP's confidential information, he had serious reservations as to whether such information would still be regarded as CMP's confidential information in 2007, given that in 2006 CMP had stopped pitching for new work. At that point, the judge said, the confidential information ceased to have any commercial value to CMP sufficient to justify its continuing protection.
- iii) The only commercially valuable information used in 2008 to speed up the replacement of all the existing equipment at Bombardier's UK sites was taken from meter readings, which provided information about the print volumes being produced by the existing CMP devices at those sites. However, this information did not constitute CMP's confidential information because

'The judge's finding that there had been no misuse of CMP's confidential information in 2003 was fatal to this claim.'

CMP had not made a sufficiently relevant contribution to the creation of it. To put this finding in context, it is worth noting that, under the trading agreement between CMP and Ricoh, it was Ricoh's responsibility to take the meter readings. Ricoh had not always fulfilled this obligation, leaving CMP to collect this information itself. While this failing on the part of Ricoh might have given CMP a claim in damages, it did not render the meter readings themselves CMP's confidential information.

CLAIM FOR LOSS OF A CHANCE

Mr Jones' loss of chance claim was based on his allegation that Ricoh had disclosed CMP's confidential information to RIA for the purposes of the 2003 bid. Had Ricoh not done this, Mr Jones argued, RIA would have made a joint bid with CMP. He, therefore, claimed damages for the loss of the chance of a successful bid (in accordance with the Court of Appeal's decision in *Allied Maples Group Ltd v Simmons & Simmons* [1995]), calculated by reference to the loss of profits that CMP would have made from such a successful bid.

The judge's finding (see para i)) that there had been no misuse of CMP's confidential information in 2003 was fatal to this claim. Nevertheless, the judge decided to deal with this issue, in case his conclusions were relevant to an appeal, on the hypothesis that (contrary to his actual findings) there had been misuse of CMP's confidential information in 2003.

Ricoh argued that Mr Jones' claim for loss of a chance was impermissible as a matter of law because of the 'minimum performance principle'. This provides that a party is entitled to perform a contract in the manner least onerous to it and will only be liable for a failure to fulfil its contractual obligations. There is no liability on a contract breaker for failing to take steps it was not obliged to take. In this case, there was no obligation on Ricoh to make a joint bid. Therefore, Ricoh

argued, it could not be liable for its failure to do so.

The judge rejected this argument. Quoting from *Chitty on Contracts* (30th ed 2008), he summarised the law applicable to the assessment of damages for the loss of a chance as follows:

'Where the claimant claims that, in the absence of the breach of contract by the defendant, a *third party* would have acted in a particular way, so as to benefit the claimant, he need not prove that hypothetical action on the balance of probabilities. Provided that the claimant can prove that in the absence of the breach there was a "real" or "substantial" (not a speculative) chance of the *third party's* action, the court must assess the chance of that action resulting (usually as a percentage) and then discount the claimant's damages for his loss by reference to that percentage.' (emphasis added)

Loss of chance claims, therefore, are concerned with the hypothetical actions of a third party. The 'minimum performance principle', on the other hand, is concerned with the hypothetical actions of a defendant contract breaker. In this case, the allegation was that a third party, RIA, would have made a joint bid – not that the defendant, Ricoh, would have done so. The 'minimum performance principle', therefore, was not engaged and Mr Jones was, in principle, entitled to bring his claim for a loss of a chance.

However, that was the limit of Mr Jones' success because the next point for the judge to consider was whether there was a real or substantial (and not a speculative) chance of a joint RIA/CMP bid. He found, on the facts, that there was not. Therefore, while this section of the judgment provides a helpful analysis of the relationship between claims for loss of a chance and the minimum performance principle in

the context of a corporate structure, the judge's conclusions ultimately proved of no assistance to Mr Jones.

WROTHAM PARK DAMAGES

The judge's findings that there had been no misuse of CMP's confidential information (see paras i) to iii) under 'Did Ricoh breach the confidentiality agreement?') were also fatal to Mr Jones's claim for *Wrotham Park* damages. However, as with the claim for loss of a chance, the judge decided to deal with this issue in case it was relevant to an appeal and he proceeded (contrary to his actual findings) on the hypothesis that there had been such misuse.

The purpose of *Wrotham Park* damages is to compensate a claimant for the loss of a bargaining opportunity. They are particularly helpful to claimants who cannot demonstrate that they have suffered a loss, assessed on the traditional basis. The principle is that the court may award damages to claimants to represent the price they could reasonably have exacted for requiring a licence payment in return for permitting defendants to do what they have done. That price will be calculated by reference to a hypothetical negotiation between the parties (usually at the time of the breach) and what would have occurred with the two parties acting reasonably.

In this case, Mr Jones claimed *Wrotham Park* damages, to be assessed by reference to the price that Ricoh ought reasonably to have paid in order to be released from its obligations under the confidentiality agreement, so that the information could be used for the purposes of the two bids and in the implementation of the contract with Bombardier.

In the circumstances of this case, the judge concluded that in any hypothetical negotiation the payment of any fee for the use of the Hoskins spreadsheet for the purposes of the 2003 tender would have been conditional upon either: i) RIA's bid being accepted; or ii) at the very least, CMP's bid being rejected. Because neither of those things in fact happened, no hypothetical fee would have been payable. This approach is interesting because it suggests that, when a claim for *Wrotham Park* damages is made, the judge need not only consider the figure that the parties would have agreed

following a hypothetical negotiation; they can also consider what the other terms of the agreement would have been and, in particular, whether payment of the agreed sum would be conditional upon the happening of certain events.

In relation to the pricing information for the 2007 tender, in reality that information was of no use to CMP. As such, the award of any *Wrotham Park* damages would be unjust.

In relation to the information used for the 2008 replacements, the judge found that 'any *Wrotham Park* damages must proceed on the basis of a hypothetical negotiation that is founded upon the underlying realities of the situation against which it falls to be undertaken'. In this case, the reality was that had a negotiation been undertaken, RIA would have been dismissive of the value of the information and simply decided to make no use of the shortcut available. There would not, therefore, have been any hypothetical negotiation or any fees paid.

KEY POINTS

- 1) When bringing a claim for breach of confidence (whether in contract or in equity), claimants must be able to establish that they had sufficient interest in the information to entitle them to maintain an action to restrain its unauthorised dissemination or use. They do not need to show that the information 'belonged' to them.
- 2) The 'minimum performance' principle relates to the actions of a defendant contract breaker and has no application where the assessment of damages is based on the hypothetical actions of a third party. A claimant is entitled to claim damages for the loss of the chance that a third party would have taken a particular step, even if, as in this case, that third party was an entity within the same corporate group as the defendant contract breaker.
- 3) On the judge's analysis, in a claim for *Wrotham Park* damages, the court is

not limited to considering the price that a defendant would have paid for a release from a particular contractual obligation – it can also consider whether the payment of that price would have been conditional on the happening of other events.

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Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602

Coco v A N Clark (Engineers) Ltd [1968] FSR 415

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Jones v IOS (RUK) Ltd & anor [2012] EWHC 348 (Ch)

Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 789