

Article

Judgment on Injunction Application for Breach of Confidence Published by English High Court Despite Parties Settling

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In *HML PM Ltd v. Canary Riverside Estate Management Ltd* and another *EWHC*, [2019] 3496 (QB) the High Court dismissed an application for an interim injunction to restrain defendants from using allegedly confidential and privileged documents. Proceedings settled after the application was heard and prior to the publication of the judgment but the court published the judgment anyway. The case highlights the fact that a claimant must have standing to advance the actual claim underpinning the injunctive relief sought, the correct claimant in a breach of confidence case being the person with the power to say whether the information should be communicated elsewhere. The decision to publish the judgment notwithstanding settlement is another example of the court publishing judgments where the case raises points of general interest.

The First-tier Tribunal (Property chamber) had appointed an employee and director of the claimant, HML PM Ltd (HML), Mr Coates, to manage a residential estate in Canary Wharf following an application by residential sub-tenants complaining about estate management and the level of service charges. The first defendant (D1) was the head lessee and the second defendant the freehold owner. Mr Coates replaced D1's managing agents. HML sought injunctive relief after D1 sent allegedly confidential and, in some cases, privileged documents concerning Mr Coates' role as estate manager to the residential sub-tenants. D1 also referred to some of the documents in the tribunal proceedings. An unidentified person had sent the documents (seemingly after the theft of Mr Coates' laptop), to D1 as evidence of alleged misconduct by Mr Coates.

The court held that HML lacked standing to bring the underlying breach of confidence claim. The duties of confidence were owed to Mr Coates (not HML as his employer), Mr Coates having been appointed as an individual. The beneficiary of an obligation of confidence concerning information was the person with the power to say whether it should be communicated elsewhere (*Fraser v. Evans* [1969] 1 QB 349). It would be inconsistent with Mr Coates' personal responsibility to the tribunal if HML could veto or insist on dissemination of confidential material related to Mr Coates' role. Furthermore, even if some documents were subject to litigation privilege, HML was not entitled to an injunction, as they were not created with the dominant purpose of HML seeking legal advice in connection with litigation. Sometimes, someone other than the immediate beneficiary of the privilege might choose (or be obliged) to assert privilege as a shield against a third party's attempt to compel disclosure. However, HML sought here to use Mr Coates' privilege as a sword without establishing its own right to the remedy sought.

Although proceedings settled after the application was heard and before judgment was handed down, Nicol J followed guidance in *Barclays Bank plc v. Nylon Capital LLP* [2011] EWCA Civ 826 and gave judgment in any event. The guidance in *Barclays Bank* states that relevant considerations for a court in deciding whether to hand down a judgment notwithstanding the settlement of the dispute are whether the case raised a point of general interest, how far preparation of the judgment had got and the concerns of the parties. Nicol J published the judgment as he considered the case raised points of potential general interest, he had almost completed the judgment when settlement occurred, HML was neutral regarding its handing down and D1 was keen that it should happen.

Practitioners will recall that despite the late protestations of the petitioners in *Re Torchlight Fund L.P FSD 103 of 2015 (RMJ)*, where the parties settled the case after possibly the longest running trial of a just and equitable winding-up petition, the Grand Court chose to deliver judgment. McMillan J similarly followed the guidance laid down in *Barclays Bank plc v. Nylon Capital LLP* [2011] EWCA Civ 826 considering that the merits of publication were overwhelming. A number of issues in law arose which were significant to both the legal

profession and the public at large and, as a matter of justice, individuals whose professional standing had been consistently impugned throughout the trial were entitled to know, as should the public, that the court completely exonerated them¹. Litigating parties are well advised to remember that settlement is no guarantee to keeping a judgment from being handed down and published for the world to see.

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¹ <https://www.conyers.com/publications/view/grand-court-delivers-366-page-judgment-in-in-re-torchlight-fund-l-p/>