Neutral Citation Number: [2019] EWHC 3496 (QB)

Case No: QB-2019-003557

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2019

Before :

MR JUSTICE NICOL

- -

Between :

HML PM Ltd	**Claimant**
- and -	
(1) Canary Riverside Estate Management Ltd. **(2) Octagon Overseas Ltd**	**Defendants**

- -
- -

Guy Vassall-Adams QC, Jonathan McNae and Ben Silverstone (instructed by **Kennedys**) for the **Claimant**
Thomas Grant QC and Ryan Turner (instructed by **Freeths LLP**) for the **Defendants**

Hearing dates: 26th, 27th & 28th November 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.

....

MR JUSTICE NICOL

Mr Justice Nicol:

1. This is an application for an interim injunction to restrain the defendants from making use of what is said to be confidential information and in which (to some extent at least) it is said that the Claimant enjoys legal professional privilege.

Factual Background

2. On the banks of the River Thames as part of Canary Wharf there is a mixed-use development known as the Canary Riverside Estate ('the Estate'). The Estate includes 280 residential flats, a hotel, a gym, a car park, a casino, restaurants and drycleaners. The 2nd Defendant ('Octagon') is the freehold owner of the Estate. The 1st Defendant ('CREM') is the head lessee of the Estate. CREM had appointed Marathon Estates Ltd ('Marathon') as managing agents for the Estate. The residential units are held under sub-leases, as are the commercial premises.

3. Some of the residential sub-tenants were dissatisfied with the management of the Estate and the Service Charges that they were obliged to pay. The Landlord and Tenant Act 1987 s.24 confers on the First-tier Tribunal ('Ft-T') (Property Chamber) the power to appoint a manager in respect of certain premises. Some of the residential sub-tenants made an application to the Ft-T for such an order. A leading part in these activities was taken by Ms. Angela Jezard. Ms Jezard is not herself a sub-tenant, but she lives with Dr Ashley Steel who is. From time to time, Ms Jezard has received assistance and encouragement from Mr Martin Boyd of Leasehold Knowledge Partnership. The resident/applicants asked for Mr Alan Coates of HML Andertons to be named as the manager. HML Andertons is the previous name of the Claimant by which it was known until September 2017. Mr Coates is now and has been at all material times both an employee and a director of the Claimant. In a decision dated 5th August 2016 the Ft-T agreed to the appointment of Mr Coates as the manager of the residential units on the Estate ('the Management Order'). At [108] of its decision of that date the Tribunal said,

> 'Mr Coates of HML Andertons has been put forward by the applicants as their chosen manager. It was evident to the tribunal that Mr Coates is really a service manager, and the tribunal considers that this is actually what the estate required, a manager who can set budgets, arrange for repairs and maintenance and services to be provided, and then provide financial information to the leaseholders and involve them in decisions involving their homes. Mr Coates does not however have experience of commercial property management and therefore the tribunal orders that the revised draft management order be drafted so as to exclude the management of the commercial properties from Mr Coates' control, save where that management relates to the shared services on the estate.'

4. Mr Coates' appointment was for an initial term of three years with effect from 1st October 2016 and it was therefore due to expire on 30th September 2019. The Defendants had opposed the application for the appointment of a manager. The hearing which led to his appointment took some 5 days. Following the F-tT's decision, the Defendants applied for permission to appeal and a stay. Those applications were refused by the F-tT on 15th or 29th September 2016 when the Tribunal also reviewed and amended its decision. It seems that the renewed applications for a stay and for permission to appeal were refused by Martin Rodger

QC in the Upper Tribunal (Lands Chamber) on 30th September 2016. The Defendants applied for judicial review of the decisions of the F-tT and the Upper Tribunal, but on 6th February 2017 Lavender J. refused permission to apply for judicial review. Because the application had been made under CPR r.54.7A, there was no right to renew the application for permission at an oral hearing.

5. In July 2018 the F-tT extended Mr Coates's term of appointment so that it ran for 5 years from 1st October 2016 (i.e. until 30th September 2021), but, on 6th June 2019 the Tribunal agreed that his appointment should expire at the original date of 30th September 2019. It was anticipated that another manager would be appointed for the Estate in his place. I am told that this has occurred. The present manager has nothing to do with the present Claimant.

6. A great many other matters were subsequently litigated between the parties in the F-tT and, on occasions the Upper Tribunal, and, as I shall show, in other fora as well.

7. On 20th March 2018 Mr Coates suffered a burglary from his home. The only item taken was a laptop on which he had stored some documents relating to his role as manager of the Estate.

8. On 30th April 2019 a 'Mr Smith' wrote by email to the F-tT, copied to Angus Storar of Downs, solicitors for Mr Coates, and to David Marsden of Freeths, the Defendants' solicitors. In the email 'Mr Smith' was claimed to be a pseudonym for employees of HML Andertons (which, as I have already said, was the previous name of the Claimant). The author or authors of the email claimed to have worked with Mr Coates and were being asked

> 'to carry out tasks which we suggest are breaches of employment law, abuses of court processes and acts, which in the circumstances, would be subject to criminal proceedings, all of which we have very serious concerns with.'

In summary 'Mr Smith' alleged that:

i) They had 'unequivocal material that Alan Coates and other members of the HML team... have brought these legal cases into disrepute'.

ii) Prior to his appointment Mr Coates had been in collusion with barristers representing Bruce Ritchie of Residential Land (in an associated case) and Mr Ritchie had been or was providing financial backing to the residents of the Estate with their application for the appointment of Mr Coates.

iii) Mr Ritchie had sources within the Tribunal who had been providing him with insider information.

iv) Since Mr Coates's appointment he had been distributing 'confidential material of HML Andertons and very sensitive and confidential material of [CREM] to non-associated parties, thus breaching data protection law of which can be seen to be a criminal offence.'

v) Mr Coates had released confidential material to Angela Jezard of the Residents Association of Canary Riverside ('RACR').

vi) Mr Coates, with the assistance of Mr Storar had committed perjury.

vii) HML were mismanaging other sites under their control.

9. It is the Claimant's primary case that 'Mr Smith' is not a pseudonym for employees of HML Andertons, but the information has been derived from the stolen laptop or, possibly, hacking into Mr Coates's email accounts. Nonetheless, it is convenient to continue to refer to this correspondent as 'Mr Smith'.

10. On 1st May 2019, Mr Marsden of Freeths replied to 'Mr Smith' saying

> 'Thank you for your email. Are you able to provide documentation to support what you say about Canary Riverside?'

11. On 2nd May 2019, Mr Storar of Downs wrote to the F-tT (copied to Mr Marsden) and said,

> 'We are outraged by the contents of this email and consider this as a distressing attempt to interfere with due legal process. As you are aware, we do not know from whom the email comes. There is no David Smith at HML and our client does not believe HML employees would have written such an email. ... In any event this should have no part to play in the proceedings due to be heard in June 2019 before this Tribunal.'

12. Mr Marsden wrote a chasing email to 'Mr Smith' on 15th May 2019. In response 'Mr Smith' wrote on 16th May 2019 that the delivery of the material was being prepared.

13. On 11th June 2019 'Mr Smith' sent to Mr Marsden three emails attaching the first batch of documents with which this application is concerned. The parties have referred to these collectively as the 'Smith Documents 1'. Attached to the two emails was a series of scans. Again, the parties have conveniently numbered these scans and it is sensible to use that numbering, although in some cases, a single scan includes a number of different emails or documents. Smith Documents 1 comprised 14 scans with a total of 95 pages.

14. On 13th June 2019 Mr Marsden forwarded what he had received from Mr Smith to Mr Storar. In any event, it seems that 'Mr Smith' had, by a separate email on 11th June 2019 also sent the Smith Documents 1 to Mr Storar.

15. On 14th June 2019 CREM emailed a large number of the Smith Documents 1 to the residential sub-tenants and the commercial sub-tenants (what was sent were all of the scans except for Scans 2, 3, 8,13 and 14). In its cover email, CREM said,

> 'one of the Landlord's major concerns is the fairness and impartiality of the FTT appointed manager – Alan Coates. It is clearly a requirement of the Management Order that Alan Coates "act fairly and impartially in his dealings." Please see the attached emails which we have recently received confirming the Landlord's concerns all along.'

16. On 14th June 2019 Mr Storar emailed the F-tT (copying in Mr Marsden and others) commenting that the Smith Documents 1 appeared to derive from Mr Coates' stolen laptop and asserting that many of the documents were subject to legal professional

privilege. Mr Storar also expressed concern that some of the documents had been disseminated by CREM to the leaseholders on the Estate. He asked the F-tT to delete or destroy any copies which it had.

17. On 17th June 2019, Mr Marsden wrote to the F-tT. He said that the Tribunal would have been aware from 'Mr Smith''s email of 30th April 2019 that 'Mr Smith' had made serious allegations but, initially, had provided no proof. Mr Marsden, on behalf of his clients was interested in whether such proof existed. The first email from 'Mr Smith' had not indicated that the documents were privileged and the Defendants were entitled to pursue this inquiry. Having seen the Smith Documents 1, Mr Marsden agreed that two were privileged. He said they would not be relied upon and would be destroyed. The vast majority were not privileged and were in the public domain. Mr Marsden alleged that the documents showed that Mr Coates had been partial in the discharge of his duties as manager.

18. On 17th June 2019 as well, Mr Coates wrote to the sub-tenants on the Estate commenting,

> 'It is quite extraordinary that CREM have now disseminated some of the documents to all Leaseholders of [the Estate]... I assume the intent by placing of these in the public domain would be damaging to me and support the nonsensical conspiracy theory proposed by CREM.'

He made further comments on some of the documents which had been circulated.

19. On 18th June 2019 the FtT wrote to Freeths to say that the attachments to the email from 'Mr Smith' had not been read. It enquired whether Mr Coates would be applying to the Tribunal for an order under the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No. 1169 r. 17. This gives the Tribunal power to make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings before the Tribunal. So far as I am aware, Mr Coates has made no such application.

20. On 28th June 2019 Mr Storar wrote to Freeths maintaining that the Smith Documents 1 had come, not from employees of HML Andertons, but from Mr Coates's stolen laptop and asking for an undertaking from the Defendants not to make any further use of the documents, failing which either Mr Coates or HML would seek urgent injunctive relief against the Defendants and Freeths themselves. In a second letter of the same date, Mr Storar denied that Mr Coates had behaved improperly.

21. On 1st July 2019 Freeths responded that neither they nor their clients had behaved wrongly and they intended to rely on the non-privileged documents in support of an application for the appointment of a new manager by 4th July 2019.

22. On 4th July 2019 Mr Marsden of Freeths made a witness statement in F-tT proceedings which were then underway and referred to some of the Smith Documents 1.

The procedural background to the present hearing

23. The Claimant first issued an application notice on 5th July 2019. It sought an order restraining any further use of information contained in the Smith Documents 1 amongst other relief.

24. The application was to be made *ex parte*. On 4th July at about 1.00pm, Kennedys (who are the Claimant's solicitors) spoke to Mr Marsden and said that the Claimant intended to go that afternoon before Whipple J. in Court 37. At that stage no documentation was served on Freeths or the Defendants. Mr Marsden said that he was on his way to court in another matter. In the event, the Claimant was unable to be heard on 4th July 2019. At 17.44 that afternoon, Kennedys emailed Freeths to say that they had not been able to be heard. They had instructions to go the following morning.

25. At 9.39 on 5th July 2019, Kennedys emailed to Freeths the 1st witness statement of Mr Coates (dated 5th July 2019) and the application notice, among other documents, and said they would be attending before Whipple J. in Court 37 in the urgent applications list at 10.00am. Mr Grant QC, on behalf of the Defendants, asks me to note that Freeths are based in Birmingham. The application was due to be made at the Royal Courts of Justice in London.

26. In the event, the application was heard on 5th July 2019 by Mr Peter Marquand, sitting as a Deputy Judge of the High Court. The Defendants were not present or represented, but Circus Apartments Ltd, ('Circus') as an Interested Party, were represented by Tom Croxford QC. Circus is the under-tenant (from CREM) of a block of 45 serviced apartments on the Estate. Circus claimed that in one of the Smith Documents1 they had a common interest litigation privilege. This was an email exchange in May 2016 (and so in the course of the application by certain residents for the appointment of Mr Coates as manager). The exchange had included Ms Amanda Gourlay, counsel then acting for the tenant applicants, and David Stevens of Norton Rose Fulbright, solicitors for Circus.

27. I have seen a transcript of Mr Marquand's judgment on 5th July. He asked himself the questions required by *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and so first considered whether there was a serious issue to be tried. He had been directed to the requirements in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41. He was not satisfied on the evidence before him that the information in question had the necessary quality of confidence. On closer consideration, he said, the test might be satisfied, but for the purposes of an interim injunction he was not satisfied since 'the cat might already be out of the bag'. He was also not satisfied that damages would be an inadequate remedy. He refused the injunction on the evidence before him, which injunction he was also reluctant to make in the absence of the Defendants, but rather than dismiss the application, he directed that there should be no order and the Claimant had permission to re-submit or re-present the application on 2 clear days notice to the Defendants.

28. Mr Vassall-Adams QC, on behalf of the Claimant, accepts that Mr Marquand was not given all the assistance that he ought to have been by his junior, Mr McNae, who represented the Claimant at that hearing. Mr Marquand was not told of the potential relevance of Human Rights Act 1998 s.12(2), which limits the circumstances in which relief which impinges on the right of freedom of expression in Article 10 of the

European Convention on Human Rights can be granted *ex parte.* Nor was Mr Marquand's attention drawn to s.12(3).

29. So far as material, s.12 of the 1998 Act says,

> '(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied –
>
> > (a) That the applicant has taken all practicable steps to notify the respondent; or
> >
> > (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.'

30. The effect of s.12(3) was considered by the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253. Subject to immaterial qualifications, the subsection means that the Claimant has to show, before being granted such interim relief, that it is more likely than not that he or it will succeed in obtaining such an injunction at trial.

31. Pursuant to the liberty which Mr Marquand had granted the Claimant, it re-presented the application on 24th July 2019, though the draft order which it then sought was in somewhat different terms. Before it served the further evidence on which it wished to rely, it sought undertakings from the Defendants about the use which they would make of that evidence. The Defendants refused to give any such undertakings and the Claimant did, in the event, serve the Defendants on 2nd August 2019 with the 2nd witness statement of Mr Coates (dated 24th July 2019), the witness statement of David Stevens (dated 19th July 2019) (Mr Stevens is a solicitor with Norton Rose Fulbright who are solicitors for Circus Apartments Ltd), the first witness statement of Matthew Blanshard (dated 24th July 2019) (Mr Blanshard is the IT and Infrastructure Manager for the Claimant).

32. On 15th August 2019 CREM wrote to 'Mr Smith' saying,

> 'Thank you for your information sent to our lawyers which is very interesting. Do you have anything else which is not privileged i.e. not between solicitors and their client?'

33. On 4th September 'Mr Smith' provided a further batch of documents to Freeths and CREM ('Smith Documents 2'). Smith Documents 2 comprised 64 scans extending over 227 pages.

34. In a third witness statement (dated 4th October 2019) Mr Christou, who is an in-house solicitor of the Defendants, has explained that Freeths asked a separate solicitor (Mr

Hoskins) to review the Smith Documents 2 to consider whether any of them were privileged. Mr Hoskins identified 6 documents which he considered to be privileged. Those were set aside. The remainder were given to Mr Marsden. On 6th September 2019 Mr Marsden emailed Mr Storar to notify him that Freeths had received further documents from 'Mr Smith'. Mr Marsden similarly informed Kennedys and included a list of the Smith Documents 2. There was further correspondence from Mr Storar and Kennedys asserting confidentiality and privilege in the Smith Documents 2.

35. The hearing of the Claimant's re-presented application was first listed for one day on either 4th or 5th September 2019.

36. On 30th August the Defendants served two witness statements (both dated 30th August 2019) from Chris Christou. By consent the hearing listed for 4th or 5th September was ordered by Lavender J. to be vacated and re-listed for the first available date after 7th October 2019.

37. On 7th October 2019 the Claim Form was issued. It was served on 21st October 2019.

38. Mr Coates has made two further witness statements: his 3rd dated 25th October 2019 and his 4th (also dated 25th October 2019). Mr Blanshard made a 2nd witness statement on 25th October. The Claimants on 25th October 2019 also provided a draft of the order in the form which they now seek.

39. Particulars of Claim followed the Claim Form on 4th November 2019. Since they are relatively recent there is, as yet, no defence.

40. Mr Christou has made a 4th witness statement dated 14th November 2019. Mr Vassall-Adams contends that Lavender J. on 6th November 2019 had given the Defendants permission only to serve any further evidence in relation to the second set of documents and he alleges that Mr Christou's 4th witness statement exceeds that purpose.

41. Skeleton arguments were exchanged on 20th November 2019.

42. The hearing of the application before me began on 26th November 2019. At the Claimant's request and without opposition from the Defendants, I made a temporary order under Contempt of Court Act 1981 s.4(2) prohibiting the publication of any report of the proceedings until further order. The purpose was to prevent the whole purpose of the Claimant's application being undermined before I had had the opportunity to consider its merits. With that order in place, it was possible for the great bulk of the hearing to take place in open court (save for short periods when we sat *in camera* while I heard submissions on the contents of the documents themselves). The hearing was originally listed for two days. During the hearing it became apparent that this was too short a time to do justice to the parties, therefore the hearing continued into a third day.

Further litigation

43. Three days after his appointment took effect (so on 4th October 2016) Mr Coates issued proceedings in the County Court against the Defendants requiring them to comply with the Management Order. On 4th October 2016 in the Central London

County Court HHJ Madge made an *ex parte* order restraining the Defendants from: changing any locks to the premises; removing any property from the premises; and interfering with the manager's exercise of his functions under the management order. The order was continued on 7th October 2016. On 18th April 2017 HHJ Walden-Smith, sitting as a Deputy Judge of the High Court, allowed the Defendants' appeal – see *Octagon Overseas Ltd and Canary Riverside Estate Management Ltd v Alan Coates* [2017] EWHC 877 (Ch). Among the Judge's reasons were that any application to enforce the Tribunal's order should have been made to the Tribunal; the county court's order had been unreasonably wide; and there was not sufficient urgency to justify the initial order. Mr Coates was ordered to pay the costs of the County Court and High Court proceedings.

44. As part of the hand-over of the management of the Estate, CREM provided Mr Coates with the only proxy card machine and all of the spare security cards for premises on the Estate. Mr Coates used these to block CREM's access to the Estate premises. As part of her judgment on the appeal against Judge Madge's order Judge Walden-Smith made clear the Management Order of the F-tT did not preclude CREM from having access to their property.

45. Prior to Judge Walden-Smith's comments, the Defendants began High Court proceedings ('the Access proceedings'). In part these were resolved by a consent order made by Mr Murray Rosen QC, sitting as a Deputy Judge of the High Court on 16th December 2016. The remainder of the claim was transferred to the Central London County Court. The Defendants applied to amend their claim form and particulars of claim to seek a declaration that Mr Coates was not acting fairly and impartially in his role as manager. On 22nd September 2017 Mr Recorder Lawrence Cohen QC gave the Defendants permission to amend. Mr Coates filed an Amended Defence and Counterclaim in which he stated that he had acted independently and had not taken instructions from the residents of the Estate. The same order of 22nd September 2017 required Mr Coates to make standard disclosure by 27th October 2017.

46. Mr Coates did not comply with the disclosure order. Instead, he applied to strike out the amendments for which Mr Recorder Cohen had given permission and applied for a stay of the order for disclosure. CREM applied for an 'unless' disclosure order, which was granted by HHJ Bailey on 8th January 2018. A specific disclosure order was also made. However, on 15th January 2018 Judge Bailey, on Mr Coates's application, set his specific disclosure order aside.

47. At a hearing in the Central London County Court on 22nd January 2018 HHJ Gerald considered Mr Coates's strike out application. Mr Coates abandoned his defence to much of the claim (except for the allegation that he had failed to act impartially). He was ordered to bear the bulk of the Defendants' costs up to that stage. At a later hearing on 9th May 2018 HHJ Gerald ordered that all further proceedings (including Mr Coates's counterclaim) in Claim D10CL312 should be stayed. The present Defendants were ordered to pay Mr Coates's costs after the January order.

48. In yet further High Court proceedings, the Defendants took action against Mr Coates in relation to a fire enforcement notice which had been issued and which, they said, he had not complied with. The proceedings were resolved by agreement except for costs.

By an order of Master Teverson sealed on 4th June 2019, Mr Coates was ordered to pay the bulk of the costs.

49. In the course of proceedings in the F-tT Mr Coates and the Defendants made an agreement whereby Mr Coates would provide copies of certain documents. The Defendants alleged that Mr Coates did not abide by that agreement and, in January 2019, issued proceedings in the Birmingham County Court to enforce that agreement. In his defence dated February 2019 Mr Coates denied that he was in breach of the disclosure agreement. It is part of the Defendants' case that the Smith documents show that this part of Mr Coates's defence in the Birmingham proceedings was wrong.

50. In his 4th witness statement in the present proceedings, Mr Coates addresses these allegations. He says,

> '104. Mr Christou claims that I have failed to comply with the disclosure obligations set out in the recitals to order of Judge Vance of 18 July 2018. I accept there is a certain amount of truth in this accusation.
>
> 105. These issues are subject to ongoing litigation that has been brought by the Respondents [i.e. the Defendants]. The claim is subject to a summary judgment application, which has been listed for 5 December 2019. The Respondents anticipate a 3 day trial, listed in Autumn 2020. I hope the Court will understand that I do not propose to say too much about these issues in this statement.
>
> 106. However, what can be said is as follows:
>
> a. The relevant FTT proceedings concerned an application to vary the Management order. We spent 3 days at the FTT.
>
> b. A compromise was attempted to be agreed, which was presented to the FTT as part of an order on the third day.
>
> c. This resulted in. amongst other things, an agreement to give certain disclosure.
>
> d. I gave disclosure which I considered satisfied my obligations under this recital.
>
> e. A dispute arose as to whether I had given full disclosure. There is a point on interpretation of the recital between the parties (whether the qualification after the second limb applies to both limbs); and whether privileged or otherwise non-inspectable documents fall within the terms of the recital. There is also an issue as to who should pay for the process.
>
> f. The Respondents have pointed out that certain documents that they now have seen should have been disclosed within my initial disclosure irrespective of the points in issue.
>
> g. I agree that these (limited) documents should have been disclosed.

h. The reason why these documents were not disclosed was because they were not picked up during the electronic search carried out as an early part of the process of giving this disclosure.

107. Therefore, I have concluded that the initial disclosure process was imperfect. I have made an open offer to re-do this disclosure process, and also to withdraw any argument about where costs should fall. At the time of finalising this statement, discussions are ongoing. I hope that my offer will narrow the issues sufficiently to allow for an outbreak of common sense that will have the effect of resolving these proceedings.'

51. There was some lack of clarity in the submissions made by Mr Vassall-Adams and his junior, Mr McNae at the hearing. I asked for the position of the Claimant to be clarified in a post-hearing note. Mr Vassall-Adams responded on 5th December 2019. The Claimant's case was that Mr Coates was referring in this section of his witness statement to the Smith 1 and Smith 2 Documents. There were, though only four (or five as Mr Vassall-Adams put it in his Note) of those documents which ought to have been disclosed in accordance with the recitals to the F-tT order.

52. There is also before me a separate application notice issued by the Defendants seeking permission to make use of Mr Coates's 4th witness statement in these County Court proceedings 'or generally'. It became clear during the course of the present hearing that there would not be time to deal with that matter. I agreed that the matter should be reserved to me if, after seeing this judgment, the application remained contentious.

53. On 20th November 2018 Palm Tree Holdings Ltd (a sub-tenant of a residential flat on the Estate) applied to remove Mr Coates as manager of the Estate. Mr Coates, in turn applied to discharge himself. Other applications have been made to the F-tT for the appointment of a new manager, and I understand that a new manager, unconnected with Mr Coates and HML has been appointed.

The Claimant's standing to bring this claim

54. The Claimant in these proceedings is HML PM Ltd. Mr Coates himself is not a party. It is the Defendants' case that HML PM Ltd is not able to assert that *it* may protect any confidence which exists in the information whose use it seeks to restrain.

55. In *Fraser v Evans* [1969] 1QB 349 CA the Plaintiff was a public relations consultant to the Greek government. He prepared a report on a public relations exercise for his client. A copy of the report was leaked to the 'Sunday Times'. The newspaper also interviewed Mr Fraser. In advance of publication, Mr Fraser sought an injunction against, among others, the editor of the *Sunday Times* to restrain what was feared to be material defamatory of him and a breach of confidence. Shaw J. granted an *ex parte* injunction. On the return date, Crichton J. refused relief in defamation (on the basis of the well-known rule against prior restraint in *Bonnard v Perryman* [1891] 2 Ch 269 CA), but granted an injunction on breach of confidence grounds. The defendants' appeal was allowed by the Court of Appeal (Lord Denning M.R., Davies and Widgery LJJ). Lord Denning referred to *Albert (Prince) v Strange* (1849) 1 Mac & G 25 and *Argyll v Argyll* [1967] Ch. 302 and said at p.361,

‘Those cases show that the court will in a proper case restrain the publication of confidential information. The jurisdiction is based not so much on property or contract as on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence. *But the party complaining must be the person who is entitled to the confidence and to have it respected. He must be the person to whom the duty of good faith is owed*.’ [emphasis added]

56. It was the Greek Government and not Mr Fraser to whom the duty of confidence was owed. There was evidence before the Court that the Greek Government would not be happy if publication took place and that they would, as a matter of practice, keep the material confidential. Lord Denning added (also at p.361),

‘But that policy still leaves them free, in point of law, to circulate the documents or their contents to anyone whom they pleased. The information was obtained for them by Mr Fraser under a contract with them. They paid for it. They were the people to say aye or no whether it should be communicated elsewhere, or be published generally. It follows that they alone have any standing to complain if anyone obtains the information surreptitiously or proposes to publish it. And they did not complain of the publication now proposed. At any rate, they have not come to the court to complain.’

57. Davies LJ gave a short judgment agreeing with Lord Denning and Widgery LJ agreed with both.

58. Although *Fraser v Evans* was decided over 50 years ago, the parties were agreed that it still represented the law.

59. The Claimant’s skeleton argument had said little in regard to standing, but, on the first day of the hearing, Mr Vassall-Adams produced a note on the issue dated 26th November 2019. He argued in his Note and orally as follows:

i) The Claimant had a proper interest in the information contained in the Smith documents.

ii) The information in them was covered by the duties of confidence which Mr Coates owed to the Claimant as

a) Their employee, and

b) As a director of the Claimant.

iii) He owed a contractual duty of confidence as an employee and equitable duties as both an employee and as a director. Much of the information in the Smith Documents had concerned the Claimant’s working practices and commercial and financial information concerning the Claimant’s business activities.

iv) The application by the sub-tenants for the appointment of Mr Coates as manager had referred to him as ‘Mr Coates of HML Andertons’ (see paragraph

8 of the F-tT's decision of 5th August 2016). HML Andertons had prepared a briefing document which supported the sub-tenants' application for Mr Coates to be appointed as manager and explained that he would be supported by a team of other HML employees. Mr Coates himself agreed to his name going forward as Manager in a document headed 'Proposal for Appointment of Receiver Manager at Canary Riverside – Alan Coates MIRPM MBIFM as Director of HML Andertons Ltd.' In Paragraph 1.1 of that document he said,

> 'Following a meeting with the Residents Association, I have been asked as a Director of HML Andertons to be considered for the role of Receiver Manager for Canary Riverside, London E14 8RP. This document has been prepared in order to summarise how I, supported by HML Andertons Ltd would approach the role and outline the nature of the services that would be provided.'

v) The F-tT's decision to appoint him, likewise, described him as 'Alan Coates MIBFM MIRPM of Messrs HML Andertons' (see paragraphs 1, 8 and 108 of the decision of 5th August 2016). Similarly, the Management Order of July 2018 (which extended his appointment to 2021) referred to him as 'Alan Coates MIRFM MIRPM of HML PM Ltd, 94 Park Lane, Croydon, Surrey CR0 1JB'.

vi) The July 2018 Management Order authorised Mr Coates to

> 'delegate to other employees of HML PM Ltd to appoint solicitors, accountants, architects, engineers, surveyors and other professionally qualified persons as he may reasonably require to assist him in the performance of his functions.'

vii) Mr Coates worked closely with other staff of the Claimant.

viii) Many of the documents in Smith Documents 1 and Smith Documents 2 had a confidentiality notice which said,

> 'This email including any attachments is confidential and may be legally privileged. If you have received it in error please advise sender immediately by return and then delete it from your system. This email is from a unit or subsidiary of HML Holdings plc, 9-11 The Quadrant, Richmond, Surrey TW9 1BP...'

ix) Thus, Mr Vassall-Adams submits that Mr Coates's activities as Manager were inextricably linked to his employment by and directorship of the Claimant.

x) 'Mr Smith' claimed to be an employee or employees of the Claimant. If that were so then 'Mr Smith' would also owe contractual and fiduciary obligations of confidence to the Claimant.

xi) There is no reason in principle why duties of confidence could not be owed to more than one person.

60. While these arguments were ably advanced by Mr Vassall-Adams, I do not accept them. Since the relief which the Claimant is seeking might (at the very least) affect the exercise of the Defendants' right to freedom of expression, s.12(3) of the Human Rights Act 1998 prohibits the Court from granting interim relief unless the Claimant is likely to establish at trial that publication would not be allowed. In the present context that means or includes that the Claimant must show at this stage that it is more likely than not to establish that it has standing to complain of breaches of confidence. In my view, it has not established that this is the case.

    i) The nature of a Manager's role is that responsibility for managing the premises in question is given to a particular individual.

    ii) That is reflected in the appointment made by the F-tT here. It was not the Claimant who was made the manager of the Estate, but Mr Coates. I recognise that Mr Coates was described as 'of HML Anderton', but that was a means of identifying him. In the same way the Management Order in July 2018 gave Mr Coates's address (as did the draft Management Order in August 2016). That, too, was by way of identification. It remained the case that it was Mr Coates individually, and only Mr Coates, and not the Claimant, who was the manager of the Estate.

    iii) It was, indeed, anticipated by the Claimant that other of its employees would have a role in supporting Mr Coates, but that does not detract from the proposition that it was he who was the Tribunal-appointed Manager and the other employees were acting under his direction. As Mr Coates said in his proposal for his appointment,

    > 'This document has been prepared in order to summarise how *I, supported by HML Andertons Ltd* would approach the role and outline the nature of the services that would be provided [my emphasis].'

    I agree with Mr Grant that, as and when Mr Coates's made use of his power under paragraph 4(g) of the July 2018 version of the Management Order 'to delegate to other employees of HML PM Ltd to appoint solicitors, accountants etc', it was Mr Coates who was the principal and the other employees of HML PM Ltd who were his agents.

    iv) I also agree with Mr Grant that it is significant that the decision appointing Mr Coates included (at paragraph 4(h) of the July 2018 version of the Order),

    > 'The power in his own name (or in relation to existing contracts or litigation with the permission of the Landlord), to bring, defend or continue any legal action or other legal proceedings...'

    As will have been apparent, Mr Coates made use of this power. Consistently with it, when he did so he brought proceedings as 'Alan Coates' and he used his own solicitor, Angus Storar of Downs. Mr Grant also rightly draws attention to paragraph 4(j) of the order which provides,

    > 'The Manager shall be entitled to an indemnity for his own costs reasonably incurred and for any adverse costs order out of the service charge account.'

v) It is not entirely clear whether the Tribunal could have appointed the Claimant (a company) as manager of the Estate. When a Court appoints a receiver, it must name an individual. There is an express rule to that effect – see CPR r.69.2(2). There is not (so far as I am aware) any equivalent express restriction in the Landlord and Tenant Act 1987. Philip Rainey *Service Charges and Management* (Sweet and Maxwell 4th ed 2018) says at paragraph 23-37

> 'Landlord and Tenant Act 1987 Part II does not state that a manager must be an individual, as opposed to a firm or a company. However, it seems implicit in the status of a manager as an officer of the tribunal that he or she must be an individual. Tribunal decisions where a firm or company has been appointed are probably wrong.'

Grant and Mumford on *Civil Fraud* (Sweet and Maxwell 2018) suggest a wider principle lies behind the restriction. They say,

> 'This is because the receiver is an officer of the court and, as such, has personal duties to the court.'

They cite *Gardner v London Chatham and Dover Railway (No.1)* (1867) LR 2 Ch. App. 201 at 211. Mr Coates was certainly the officer of the Tribunal and, as such, owed a personal responsibility to discharge his duties. 'Guidance Note AO8 – Appointment of a Manager' of the Association of Residential Managing Agents Ltd' says,

> 'The FTT usually wishes to appoint persons, not a company, to ensure accountability' which suggests that there is not an absolute prohibition on the appointment of a company as manager.

But whether the Tribunal *could have* appointed the Claimant as the manager is beside the point, since in my view that is not what they did.

vi) I accept that, in principle, obligations to keep information confidential may be owed to more than one person, but I agree with Mr Grant that the present situation is not one of those cases. As Lord Denning said in *Fraser v Evans*, the beneficiary of an obligation of confidence is the person who has the power to say aye or no whether it should be communicated elsewhere. The same point was made in *Immerman v Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116 CA where Lord Neuberger MR said at [69],

> 'It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms to reveal the information which has the protection of confidence.'

I agree with Mr Grant that the corollary of Mr Vassall-Adams' argument is (a) that the Claimant could veto the further dissemination of information, even if Mr Coates thought that would be appropriate; and (b) that the Claimant could insist on dissemination even if Mr Coates thought it inappropriate. It seems to me that neither consequence is compatible with Mr Coates's personal responsibility to the Tribunal as to the manner in which he discharges his functions. It may be said that, on the facts of the present case, Mr Coates is

content with the course which the Claimant is advancing. In my view that is no answer. In *Fraser v Evans* the Greek government was content with the case being advanced by its PR consultant. But that did not alter the fact that the Plaintiff before the Court lacked standing to advance the claim.

vii) The Claimant is not assisted by the guise which 'Mr Smith' adopted of being a group of employees of HML Andertons. If 'Mr Smith' was an employee or more than one employee of the Claimant, it may be that this would give the Claimant standing to protect 'its' information. However, Mr Coates and Mr Blanshard (who is an employee of the Claimant and an IT expert) give sound reasons why 'Mr Smith' is unlikely to be an employee or a group of employees and these are summarised in paragraph 14 of the Particulars of Claim. Mr Vassall-Adams' primary case is that the documents came from Mr Coates's stolen laptop or from a hack of his email account. Of course, a Claimant may advance alternative cases, but sometimes more is less. In this case, the very strength of Mr Vassall-Adams's primary contention means that he is unlikely to succeed at trial on his secondary alternative.

viii) The confidentiality notice cannot make good this deficiency in the Claimant's case. Such a notice can be a useful means of alerting recipients to a justified claim in confidence, but it cannot itself generate an obligation of confidence if none exists, or none at the instance of the party who relies upon it.

ix) I have no doubt that, in his other work for the Claimant, Mr Coates will continue to owe contractual and equitable duties of confidence to his employer and the company of which he is a director. However, since HML put him forward for this role, it must have accepted that his obligations to them would have been qualified by his new role and responsibility to the Tribunal. All of the Smith documents were exclusively concerned with the Estate and Mr Coates's role as manager.

x) Mr Grant relied on *Maunder Taylor v Blaquiere* [2002] EWCA Civ 1633, [2003] 1 WLR 379 CA. That was a claim where a manager who had been appointed under Landlord and Tenant Act 1987 s.24 (so like Mr Coates) brought a claim against a tenant in respect of repairs and services. The tenant sought to set off claims for damages which he would have had against the landlord for breach of covenant. The Court of Appeal held that such a set off could not be raised. It said at [41],

> 'The manager carries out those functions in his own right as a court-appointed official. He is not appointed as the manager of the landlord or even of the landlord's obligations under the lease. That being so, Mr Maunder Taylor was a court-appointed manager appointed to carry out those duties required by the order appointing him. He did not carry on the business of Guernsey [the landlord]. His claims were made in his capacity as manager.'

It seems to me that this case is dealing with a separate point. Since the manager was not carrying on the business of the landlord, the claim which the tenant would have had against the landlord did not impeach the manager's right to the service charge. As such, it does not assist Mr Grant, but, for the

other reasons which I have given, I do agree with his ultimate conclusion that the Claimant has no standing to bring this claim.

Another case cited by Mr Grant was *Burnden Holdings (UK) Ltd (In Liquidation) and others v Fielding and Griffins* [2019] EWHC 2995 (Ch). In that case a liquidator had brought proceedings which had failed. One of the issues in the judgment was whether Griffins, the firm of which the liquidator was a partner, could be made liable for the costs. Zacaroli J. held the firm was liable to a third party costs order, but on the basis that it had funded the litigation at a particular time and not as a result of the liquidator's affiliation with it.. He said at [46],

> 'Since the appointment of liquidator is personal to the individual, it is wrong to characterise the individual's firm as asserting control over the liquidation merely by reason of the fact that the individual is a partner in the firm.'

While the case emphasises the personal character of the appointment of a liquidator (and I accept the appointment of a manager is likewise personal to him), I am not sure this authority takes the argument much further.

Privilege

61. The Claimant also alleges that the Smith documents (or at least some of them) are protected by legal professional privilege. More specifically, it is said that they are covered by litigation privilege. The Defendants accept that some (fewer in number than the Claimant claims) would be protected by litigation privilege, but they deny that even in those cases, this gives the Claimant a right to the injunction which it seeks.

62. In my judgment, the Defendants are right in this regard. The core purpose of legal professional privilege is to allow a litigant (or someone who expects to be a litigant) to speak candidly to a lawyer in order to obtain informed advice about his rights (or lack of them) – see for instance *R v Derby Magistrates' Court ex parte B* [1996] 1 AC 487 per Lord Taylor CJ at p.507D. None of the Smith Documents were brought into existence with the dominant purpose of the *Claimant* seeking such advice. I accept that there may be occasions when a person other than the immediate beneficiary of the privilege may choose to assert it (or, on occasions, may be obliged to assert it) in response to an attempt by a third party to compel disclosure. In such circumstances, another person's privilege is relied on as a shield. But that is not what the Claimant is trying to do in these proceedings. Rather, it is seeking to use another person's privilege as a sword. For that purpose, it must establish its own right to the remedy which it seeks. I have considered and rejected the asserted right based on breach of confidence. That being so, another person's privilege, even if it exists, is no substitute. Mr Vassall-Adams could show me no authority for the proposition that another person's privilege may be used as a sword where no other right existed.

63. He did submit that the Court should nonetheless intervene, even at the instance of HML rather than Mr Coates. Quite what the basis for such intervention would be was rather opaque. In any event, however, the Defendants have disavowed any intention to use the information in those documents in which they accept *Mr Coates* would have

litigation privilege. I have considered the wider category of documents which the Claimant maintains are also privileged. In my view, even setting aside the distinction between Mr Coates and the Claimant, the argument is unfounded. I have considered each of the scans in which this claim is made individually. It is not appropriate to give my detailed reasons, save to say this. For the most part, litigation privilege concerns communications between a lawyer and a client. That goes back to the purpose of the privilege which is to allow the client to be open and frank with his or her lawyer and the lawyer to be uninhibited in rehearsing his or her client's instructions. There are limited circumstances when the privilege may extend beyond such lawyer/client communications (litigation privilege may, for instance, extend to communications with third parties, where that is for the purpose obtaining information or advice in connection with existing or contemplated litigation – see for instance *Three Rivers DC v Governors of the Bank of England (No.6)* [2005] 1 AC 610 at [102]), but I agree with Mr Grant that none of the contentious communications in which Mr Coates asserts privilege come within that limited category. Mr Coates's evidence on this topic regarding the Smith Documents 2 was summarised in a schedule (Annex 1 to Mr Coates's third witness statement, as updated for the hearing). Where privilege is claimed it is said to be on the basis that the document in question was 'made for the dominant purpose of litigation'. But that is not a sufficient basis for a document to be privileged. In *Rawlinson and Hunters Trustees SA v Akers* [2014] EWCA Civ 136, [2014] 4 All ER627 CA at [13] Tomlinson LJ cited Thanki *The Law of Privilege* (2nd ed 2011) para. 3.68ff for the principle that 'For a communication to be subject to litigation privilege it must have been made with the dominant purpose of being used *in aid of or obtaining legal advice from a lawyer* about actual or contemplated litigation [emphasis added].' Likewise, in *Re Barings plc, Secretary of State for Trade and Industry v Baker* [1998] Ch. 356 at 366, the Court said,

> 'There was no general privilege that attached to documents brought into existence for the purposes of litigation independent of the need to keep inviolate communications between client and legal adviser. If documents for which privilege was sought did not relate in some fashion to communications between client and legal adviser there was no element of public interest that could override the ordinary rights of discovery and no privilege.'

As Mr Grant also observes, with one qualification, it is only Mr Coates who provides evidence on this topic. The qualification is that the Claimant does rely on the witness statement of Mr David Stevens of Norton Rose Fulbright. They were, or are, solicitors for Circus Apartments Ltd who had their own interest in the application to the F-tT (the order appointing Mr Coates as manager of the Estate excluded Circus Apartments' holding). Mr Stevens claims that one of the scans is subject to common interest privilege. The scan in question concerns a series of emails in May 2016 (and so prior to the decision of the F-tT appointing Mr Coates as manager). Common interest privilege may arise when two (or more) parties share an interest in the matter being discussed in the communication so that both have an interest in controlling its disclosure. I recognise that Circus may indeed have been able to assert privilege and, indeed, there may have been a duty of confidence owed to them in respect of that series of emails. However, Mr Grant told me that, although Circus had at one stage threatened litigation, it has never taken action. It is not a party to the present proceedings (even though, for reasons which are not entirely clear, it was able to be represented at the hearing before Mr Peter Marquand). One of the people included in

some of the emails was Ms Amanda Gourlay. At the time she was counsel for the resident applicants for the s.24 order. It may be that there was a common interest privilege enjoyed by the resident applicants (as Norton Rose suggested in their letter of 3rd July 2019), but the resident applicants are not asserting privilege and they are not party to the present proceedings. So far as it is said that the Claimant had a common interest in such privilege as existed, I reject the argument.

64. There is one document in the Smith Documents 1 group which deserves separate mention. Scan 2 includes some notes. The author of the notes is not identified. Mr Vassall-Adams submitted that Mr Coates had attached to his email a note regarding disclosure which Mr Coates said in a witness statement had been prepared by Angus Storar, who is Mr Coates's own solicitor and whose firm is Downs. Mr Grant is entitled to comment that the notes are unsigned and, in themselves are not attributed to a solicitor. Mr Storar has not provided a witness statement confirming the fact. Ordinarily, if the client says that the document was prepared by his solicitor, that might be sufficient, but I agree with Mr Grant that the tactics proposed in the document are such that that ordinary course is not sufficient. Thus, at one point the author of the document says,

> 'Giving them a document dump will give them a headache, especially if we can drive the pace with very short timetable in the directions. Who knows they may miss the more iffy emails. Even better we can give them dvds of documents and let them print them off!'

Mr Christou's 2nd witness statement of 30th August 2019 expressed incredulity that a solicitor could give such advice. The absence of evidence in response from Mr Storar is marked.

65. I have said above that the Defendants have disavowed any intention to make use of the information in the documents which they accept are privileged (although not privileged for the benefit of the Claimant). Mr Vassall-Adams invites me not to accept that assertion. He observes that the Defendants had also agreed to destroy the documents which they agreed were privileged, but they have not done so. Mr Grant relies on the evidence of Mr Christou (the Defendants' in-house lawyer). He says that the Smith Documents were received as attachments to a cover email. It is not possible to delete the selected attachments and leave the cover email. Mr Christou says that the Defendants have no hard copies or printouts of the documents which they accept are privileged. Mr Vassall-Adams submitted that an email from Freeths dated 10th September 2019 is inconsistent with that proposition since Mr Marsden there suggests that individual documents can be separated out. In my view the email in question will not bear the weight that Mr Vassall-Adams sought to put on it. There is no evidence to rebut this part of Mr Christou's evidence and I see no reason to reject it. Indeed, the Claimant has served two witness statements from Matthew Blanshard, its IT Infrastructure Manager. Mr Blanshard does not address this issue. The evidence as to the difficulty in deleting only some attachments from an email was made by Mr Christou in his 4th witness statement on 14th November 2019. That was a month after Mr Blanshard's second statement. There has, however, been no application by the Claimant to file further evidence in response. The failure of the Defendants to destroy those parts of the emails is not therefore a reason to doubt the reliability of their intentions not to make further use of the documents which they accept are privileged. I also agree with Mr Grant that an order for the destruction of documents would

hardly be an interim measure. It would in effect be an application for summary judgment on that part of the relief which the Claimant is seeking. There is no such application before me.

66. In view of my conclusions regarding the Claimant's lack of standing, it follows that the application for an injunction fails.

67. That being the case it is not strictly necessary for me to consider the other grounds on which Mr Grant sought to resist the application. In the circumstances, it is sufficient if I briefly give my views on them.

Public domain

68. Mr Vassall-Adams accepted that it was a necessary condition for the Claimant to establish a claim in breach of confidence that the material was still confidential. Mr Grant argued that the Smith Documents 1 lacked that characteristic. The Defendants had circulated those documents to the residential and commercial sub-tenants on the Estate. If that action was in breach of the Claimant's right, it might expose them to liability in damages, but it did not detract from the argument that an injunction against the Defendants would be futile. It was a case of the cat already being out of the bag. Mr Coates in his own letter to the sub-tenants on the Estate had spoken of the circulated documents now being in the 'public domain'. He was right.

69. I am in partial agreement with Mr Grant. I agree that it is not material for the purposes of deciding whether injunctive relief should be granted if such confidentiality as the information had has been lost through the actions of the Defendants themselves (see *Vestergaard Frandsen v Bestnet Europe Ltd* [2009] EWHC 1456 (Ch), [2010] FSR 2 at [76] and *BBC v HarperCollins Publishers Ltd*. [2010] EWHC 2424 (Ch), [2011] EMLR 6 at [62]. After all, the Defendants' rights of freedom of expression can only be curtailed consistently with Article 10(2) of the European Convention on Human Rights if the restriction is 'necessary in a democratic society.' Consistently with this, the Human Rights Act 1998 s.12(4) requires the Court to consider the extent to which the material in question has already become available to the public. Some 300 copies of most of the Smith Documents 1 have been distributed on the Estate. That was not to the world at large, but it was a distribution to those who are most likely to be interested in the information. Furthermore, even if the injunction is granted against these Defendants, the recipients of the earlier copies will not, as such, be restricted from making use of the information. I also see the force of Mr Grant's point that on 17th June 2019 Mr Coates himself circulated an email to the residents of the Estate. This, amongst his other comments, engaged with the substance of the case which the Defendants were making. It gave fresh currency to the disclosure.

70. However, while I go this far in agreement with Mr Grant, I agree with Mr Vassall-Adams that the Defendants' distribution would not have been a complete answer. First, it is only the Smith Documents 1 which were distributed by the Defendants. They did not take a similar course with the Smith Documents 2. Secondly, when faced with similar arguments over prior publication in the past, the Courts have looked closely at the nature of the publication or distribution which has already taken place. The issue which must be confronted is not whether there has been some prior publication, but whether its nature is so great and so extensive that an injunction

would serve no further purpose. Viewed in this light, I agree with Mr Vassall-Adams that it cannot be said that the prior distribution has reached that level.

Public interest

71. The parties were agreed that, in this regard, the law has developed from its Victorian origins. In *Gartside v Outram* (1857) 26 LJ Ch (NS) 113, 114 it was said that ‘there is no confidence in iniquity’. Now the test is broader and more nuanced. The Court must consider whether the public interest in dissemination of the information outweighs the public interest in protecting the confidentiality of the information.

72. The Defendants argue that is so. They submit that the Smith documents show that Mr Coates has behaved in a partial manner, that, contrary to what he has said in pleadings and witness statements in various litigation in which he has been engaged, he has taken instructions from Ms Jezard, and other residents and from Mr Martin Boyd (of an organisation called Leasehold Knowledge Partnership). They submit that the Smith documents show that Mr Coates failed to make all the disclosure that he should have done either in consequence of the agreement to make disclosure in the F-tT proceedings or because of the court order of Mr Recorder Cohen in the County Court proceedings that I have described above. They would have wished to use the Smith Documents (or some of them) to bring contempt proceedings against Mr Coates.

73. Had it been necessary, I would have been unpersuaded by these arguments. They may very well have supported qualifications to a general restraint on the use of the information so as to allow the Defendants to deploy them in the fora which would have the responsibility for deciding whether the Defendants’ allegations are well-founded. I make it clear Mr Coates vigorously denies that he has carried out his duties as manager in a biased or partial manner. He denies that he has taken instructions from any of the residents or from Mr Boyd. He denies that he was in contempt or is guilty of any other impropriety. He accepts that he had not fully complied with his disclosure obligations, but he has made an open offer to re-do the disclosure exercise. I emphasise that it is not for me to resolve these disputes. I have said that the arguments to do with public interest which Mr Grant raises would be the responsibility of the F-tT or the Court in which the Defendants allege that Mr Coates has misbehaved. The problem for the Defendants in their public interest argument is that they do not merely seek a qualification to the requested injunction to allow them to deploy the relevant Smith documents in Court or Tribunal which would have the task of determining their complaints, but wish to be free to use them more generally. Mr Grant submits that the wider community of tenants on the Estate also have a right to this information. To some extent, they already have it in the form of the Smith Documents 1 which were sent to them by the Defendants. Had it been necessary, I would not have been persuaded that their interest in the right to receive the Smith Documents 2 or a repetition of the Smith Documents 1 was sufficiently great to outbalance the remaining interest of confidentiality.

Discretion

74. Had the Claimant been able to establish standing and had it been successful in showing that it was more likely than not to succeed in rebutting the putative defences of public domain and public interest, it would still have had to show that the Court should exercise discretion in its favour - see for instance *Linklaters LLP v Frank*

Mellish [2019] EWHC 177 (QB) at [31]. Mr Grant made two particular arguments as to why the Court should not have exercised discretion in the Claimant's favour: delay; and failure to comply with its duty of full and frank disclosure at the *ex parte* hearing before Mr Marquand. I agree that individually and in combination, those are factors which would have been formidable obstacles to the Claimant being granted the relief which it sought.

Delay

75. The Claimant was aware on or about 14th June 2019 that the Defendants had received the Smith Documents 1. It was not until 4th July 2019 that it first sought injunctive relief. While some time could properly be taken in establishing whether the Defendants were willing to give appropriate undertakings, this is not the pace of litigation with which the Court is used to encountering when relief is needed to prevent the dissemination of confidential information.

76. After the hearing before Mr Marquand, Mr Grant is justified in describing the Claimant's pace as 'leisurely'. Mr Marquand allowed the Claimant to return to Court on two days' notice to the Defendants. The Claimant re-presented its application on 24th July 2019, although it did not serve the further evidence (beyond the 1st witness statement of Mr Coates) on which it relied until 2nd August 2019. In order for the *inter partes* hearing to allow both sides to present their arguments fully, three hearing days were necessary. Of course, it is not easy for the Court to accommodate such a lengthy application, but the Claimant did not seek holding relief. In *Cream Holdings v Banerjee* (above) the House of Lords recognised that a flexible approach was needed to the test in Human Rights Act 1998 s.12(3). One reason for not insisting that the Claimant establish that it was more likely to succeed at trial than not, was if interim relief was needed in advance of the Court being able to hear full argument: see *Cream Holdings v Banerjee* at [16]-[18].

77. It is also remarkable that the Claim Form was not issued until 7th October 2019. Practice Direction 25A to Part 25 of the CPR says at paragraph 4.4

> 'Applications made before the issue of a claim form:
>
> In addition to the provisions set out at 4.3 above, unless the court orders otherwise, either the applicant must undertake to the court to issue a claim form immediately or the court will give directions for the commencement of the claim.'

78. No such undertaking was given by Mr McNae on the Claimant's behalf nor was one incorporated into the order which Mr Marquand made (although it is fair to note that the draft order attached to the application did include such an undertaking). No directions were made by him, but it does not seem (from the transcript of the hearing) as though the Practice Direction was drawn to his attention. It is right that Mr Marquand granted no positive relief. CPR r.25.2(3) says that 'Where it grants an interim remedy before a claim has been commenced, the court should give directions requiring a claim to be commenced.' The rule thus conditions the obligation on the grant of relief, but the Practice Direction is not so limited. In any event, the delay in issuing the claim form (and serving the particulars of claim) means that the time for service of defence had not expired by the time that the hearing before me took place.

There was some delay in listing the hearing in September (when it was first due to be heard), I accept that that hearing went off by consent because of the service of substantial additional evidence by the Defendants.

79. Nonetheless, all of this has meant that the first *inter partes* hearing took place some 5 months after the distribution of material to the residents of the Estate by the Defendants. By any measure that is a remarkable length of time for the hearing of an application for measures for which there is said to be a 'pressing social need' and which are said to be 'necessary in a democratic society'.

Failure to comply with the obligations on a party making an ex parte application

80. Mr Grant lists these as follows:

i) Failure to draw Mr Marquand's attention to Human Rights Act 1998 s.12(2) (limited circumstances in which relief impinging on freedom of expression can be granted *ex parte*). Mr Vassall-Adams accepted that this should have been and was not done.

ii) Failure to draw Mr Marquand's attention to Human Rights Act 1998 s.12(3) (the appropriate test where interim relief will impinge on freedom of expression, more demanding than *American Cyanamid*). Mr Vassall-Adams accepts this should have been and was not done.

iii) Failure to draw attention to the extent of distribution which had taken place of the Smith Documents 1. Mr Vassall-Adams submitted that this was unclear and, in any event the point was made in the correspondence from Freeths and led to the Deputy Judge not granting substantive relief.

iv) Failure to draw attention to Mr Coates's distribution of a 'counter-circular' to the sub-tenants on 17th June 2019. Mr Vassall-Adams did not comment on this, but it was not mentioned in Mr Coates's witness statement that was before the Deputy Judge. I agree it should have been.

v) I would add the failure of the Claimant to draw attention to the applicable part of the Practice Direction to Part 25 where a claim form has not been issued.

81. Mr Vassall-Adams submitted that any deficiencies in this regard had no effect since Mr Marquand granted no relief. I agree with Mr Grant that, while Mr Marquand granted no substantive relief, he did not dismiss the application but permitted the Claimant to re-present the application on at least 2 days notice to the Defendants. That was of some advantage to the Claimant since it meant that the Defendants could not argue that a repeated application seeking the same relief was a second bite at the cherry and therefore an abuse of process.

82. In the event, the Claimant's application fails anyway, but, as I have said, I agree that if it had otherwise been sound, delay and the shortcomings of the hearing before Mr Marquand would have been formidable obstacles to the grant of relief. Mr Vassall-Adams argues that, on the other hand, when the balance came to be struck, would have been other factors: that these documents derived from wrongdoing – the theft of Mr Coates's laptop or the hacking of his email account; the Defendants were on

notice as to the Claimant's claims to confidence and privilege; the Defendants took steps to undermine the confidentiality and privilege by (a) distributing some of the Smith Documents 1 to residents on the Estate and (b) by exhibiting them to a witness statement which Mr Marsden made for the purpose of proceedings in the F-tT on 4th July 2019; the Defendants solicited further disclosure which led to the Smith Documents 2 being disclosed to them; Mr Vassall-Adams alleged that the Defendants were pursuing a vendetta against Mr Coates; in the course of his appointment Mr Coates has suffered from the stress and strains of the appointment including a heart attack in 2018. Guidance as to the way these factors should be weighed was given by Andrew Smith J. in *Dar Al Arkan Real Estate Development Co v Al Refai* [2012] EWHC 3539 (Comm) particularly [149]. I recognise that there are such competing considerations (although some would have been open to argument. Mr Grant, for instance, did not accept that there had been a vendetta against Mr Coates and the costs orders which have been made against him lend some force to that contention). The ultimate balance may not have been easy to strike and it is not necessary for me now to do so.

83. In the circumstances it is not necessary for me to determine a further issue canvassed between the parties, namely whether it was necessary for a claimant advancing a claim for breach of confidence had to show that disclosure of the information would be to its detriment.

84. The hearing of this application concluded on 28th November 2019. I reserved judgment. I had nearly completed the draft of this judgment when, on 8th December 2019 my clerk received a consent order of that date. The Consent order recorded that the application had been withdrawn by the Claimant and various provisions had been made as to the costs of the application. In the circumstances I invited submissions as to whether I should, nonetheless, exercise my power to hand down the judgment anyway (see *Prudential Assurance Co. Ltd. v McBains Cooper* [2000] 1 WLR 2000 CA).

85. Both parties replied on 10th December 2019. The Claimant said it was content to leave the matter to me. The Defendants urged me to hand down the judgment. On the same date I also received a notice of discontinuance of the underlying which had been entered that day by the Claimant.

86. Guidance as to when a Court should hand down a judgment, notwithstanding the settlement of the dispute between the parties was given by Lord Neuberger MR in *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2012] 1 All ER (Comm) 912 CA at [74]-[77]. Among the relevant considerations were:

    i) Whether the case raised a point of law of potential general interest;

    ii) How far the preparation of the judgment had got.

    iii) The concerns of the parties.

87. In this case:

    i) I consider that the case does raise a number of points of potential general interest.

ii) Preparation of the judgment was far advanced, indeed almost complete.

iii) One of the parties has not expressed a view on whether the judgment should be handed down and the other is keen that it should be.

88. In all the circumstances, I decided that the judgment should be handed down.

Conclusion

89. The Claimant's application is dismissed.