

Confidence in Chinese Walls and Italian cuisine

CF PARTNERS (UK) LLP v (1) BARCLAYS BANK PLC (2) BRYGGPIPAN AB (formerly known as TRICORONA AB) (2014)

A High Court judge has ruled that a bank, in purchasing a company, misused confidential information relating to the acquired company, because that information had been provided to the bank by one of its clients in support of a loan application.

The decision is of interest as it deals with the issue of confidence in a comprehensive manner, with particular focus on the duties owed by parties following the conclusion of an unsuccessful collaboration.

Background

The Claimant approached the Defendant bank for a loan in 2008 to finance its proposed acquisition of a carbon trading house. The Defendant bank set up a Chinese Wall to protect the information it received from the Claimant during the course of the negotiations, which the Defendant bank titled, "Project Carbonara". The scope of the Chinese Wall policy was a matter of dispute between the parties, however, in general terms, the Wall was erected to prevent information received from the Claimant being disseminated to employees of the Defendant bank not directly involved in Project Carbonara.

The Claimant knew that the carbon trading house was undervalued on the stock market. In support of its loan application, the Claimant shared this information with the Defendant bank, in addition to technical information about the content of the carbon trading house's mine, and the means by which the mine's value might be realised.

The Claimant initially made contact with the Defendant bank through a third party (IVC International Ltd), which had an existing relationship with the Defendant bank. IVC International Ltd and the Defendant bank entered into a confidentiality agreement in relation to Project Carbonara, which, amongst other things, limited the duty of confidence between the Defendant bank and IVC International Ltd to one year.

Ultimately, Project Carbonara failed. The Defendant bank subsequently acquired the carbon trading house in 2010, before selling it in 2012 for a large profit.

The Claimant brought proceedings, claiming compensation from the Defendant bank and the carbon trading house for misuse of confidential information and breach of an exclusivity agreement. (This article does not address the allegation of breach of an exclusivity agreement.)

Decision

The Court found that the Claimant telling the Defendant bank that the carbon trading house was undervalued on the stock market was not, in itself, a communication of confidential information. However, the Claimant had demonstrated a route for the realisation of value by sharing information which was not publicly available. In addition, the Judge decided that the Claimant could assert its ownership of technical information provided to the Defendant bank during Project Carbonara, and that such information was of considerable value because it enabled the Defendant bank to have a materially more accurate perception of the carbon trading house's worth.

By using the information for a purpose other than that for which it had been provided, the Court inferred that the Defendant bank had misused the information.

Notwithstanding the fact that during the course of the proceedings it became common ground that the case concerned an equitable duty of confidentiality, and not a contractual one, the Defendant bank contended that any obligation of confidentiality was informed and shaped by the contractual arrangements between itself and IVC International Ltd. In particular, the Defendant bank argued that any duty of confidentiality had expired prior to its acquisition of the carbon trading house, because more than a year had passed between the end of Project Carbonara and the Defendant bank's purchase of the carbon trading house.

However, the Judge found that the contractual period of one year, after which a duty of confidence was purported to expire, was not definitive in this case, and instead found that the duty of confidence subsisted for so long as the information retained its quality of confidence. The Judge noted that the contractual arrangements between the Defendant bank and IVC International Ltd were:

“a guide not a prescription: the scope and content of equitable obligations are informed, but neither exclusively nor conclusively defined, by a contract, even in the case (a fortiori in comparison to this case) of a contract between exactly the same parties.” [para 895].

In light of the above, the Judge decided that the Claimant was entitled to £10m in compensation. Damages were assessed on a *Wrotham Park*¹ basis, whereby the Court made an award of damages on the basis of a 'hypothetical bargain', that may have been reached by the parties had the Defendant bank, before breaching its obligations, negotiated a release from the same by the Claimant.

Conclusion

This case serves as a reminder of the importance of considering issues of confidentiality at the outset of negotiations, particularly when it is likely that sensitive information will be shared. Commercial agreements are often negotiated at a fast pace and it can be difficult to find the time to give consideration to such matters. However, it is worthwhile taking the time at the beginning of a contemplated transaction or negotiation to think about how confidential information will be shared and protected, and to reach agreement on these matters with the other parties. Spending time addressing these issues at the outset of a negotiation may prevent a costly dispute arising in relation to them at a later date. Indeed, the Judge commented in this case that it was *“litigation on a grand scale”*, and that the Defendant bank's *“costs alone [were] in the region of £10 million”* [para 31].

If you need help or advice about a confidentiality agreement, or issues of confidentiality in general, contact:

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¹ *Wrotham Park Estate Ltd v Parkside Homes Ltd* [1974] 1 WLR 798