

Complex tax structures can constitute confidential information, even if third parties have devised similar schemes (Kieran Corrigan & Co Ltd v OneE Group)

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Information Law analysis: This case concerned a complex tax structure devised by the claimant which resulted in associated claims for breach of confidence, procuring a breach of contract and unlawful means conspiracy. All except the second defendant were held liable for breach of confidence and unlawful means conspiracy. The claim for procuring a breach of contract was time-barred. The judgment provides a useful overview of the law on breach of confidence, the nuances of confidentiality when public and private information is combined and how other causes of action might arise on similar facts. On the procedural front, the judge considered (and sanctioned) serious breaches of CPR PD 57AC's requirements for trial witness statements. Written by Edward Rees, associate at Trowers & Hamlin LLP.

Kieran Corrigan and Co Ltd v OneE Group Ltd and others [2023] EWHC 649 (Ch) (23 March 2023)

What are the practical implications of this case?

The judgment is essential reading for any practitioner advising on contested claims of confidentiality. The judge considered the more nuanced aspects behind the confidentiality of certain information, alongside a clear and comprehensive overview of the law on breach of confidence as a whole, from the test in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 onwards. The analysis covers situations where products are already in the public domain (but confidentiality is asserted over the design), where the confidential information comprises both 'public' and 'private' components, or where many 'public' elements are combined to create confidential material.

The judgment also touches on alternative causes of action to breach of confidence, which might arise within the same factual matrix, and the respective limitation periods. This includes where the confidential information constitutes a 'trade secret' under the Trade Secrets (Enforcement, etc) Regulations 2018, SI 2018/597 (the Trade Secrets Regulations) and tort claims in privacy.

Practitioners will benefit from seeing how the court applied sanctions in response to the defendants' 'serious' non-compliance with CPR PD 57AC and its 'Statement of Best Practice'. The original witness statements were not in the witnesses' own words and common passages indicated coordination between witnesses. A common bundle of documents included information not seen by each witness at the time and risked contaminating each witness's recollections with the views of others.

What was the background?

The claimant in this case was an Irish company specialising in accountancy and tax advisory services. The first defendant is an English company (OneE Group) and parent of a number of OneE companies involved in developing and marketing tax efficient investment products. The second to fourth defendants either are or were directors of, and/or otherwise engaged by, OneE Group or its subsidiaries.

From 2012–13 onwards, the claimant, alongside an experienced tax barrister, developed a tax-efficient structure using LLPs to allow small and medium enterprises (SMEs) to access enhanced subcontractor research & development (R&D) relief under UK tax legislation (the Structure). The

claimant approached OneE with a view to marketing the Structure. In February 2014, the claimant and 'OneE Tax' (a now defunct subsidiary of OneE Group) entered into a non-disclosure agreement (NDA).

At a meeting in February 2014, which was attended by the second to fourth defendants, the claimant shared confidential information about the Structure.

Later in 2014, OneE instructed separate counsel in respect of a similar 'Nemaura' scheme, which incorporated elements of the Structure and also made use of LLPs to allow SMEs to access enhanced subcontractor R&D tax relief. OneE began marketing Nemaura that year and, in the claimant's view, assumed the 'first mover advantage' for a scheme of this nature.

After overcoming apparent funding hurdles, the claimant issued proceedings on 5 October 2020 for:

- breach of confidence
- procuring a breach of contract (namely the NDA), and
- unlawful means conspiracy

What did the court decide?

On breach of confidence

Following the three-part Coco test, the court found the first, third and fourth defendants liable for breach of confidence. The second defendant ultimately escaped liability because he did not 'misuse' the confidential information—he was not a tax expert and had no involvement in the tax aspects of the Nemaura scheme.

The 'raw material' behind the Structure included publicly available legislation. However, the judge held that creating complex tax-planning products required time, effort and significant skill. Such products (and their individual components) were more likely to hold the necessary quality of confidence than a simple list of public information. Confidentiality can be maintained despite the real possibility that others could have come up with a similar structure. In this case, the existence of a third party structure known as 'Ultra Green', which was based on earlier tax legislation, did not scupper the claimant's assertions of confidentiality as to its Structure.

The defendants' actual or imputed knowledge of the NDA, and that the Structure was shared with them confidentially, satisfied the second limb of the Coco test.

The judge then established 'misuse' of confidential information under the third limb—this occurred in May/June 2014 when the third and fourth defendants instructed independent Counsel to advise them on Nemaura, and then in October 2014 when the first defendant began marketing Nemaura.

The judge rejected the defendants' arguments on limitation for breach of confidence claims, finding that the Trade Secrets Regulations 2018 had not introduced a new limitation period for equitable breach of confidence claims. Further, while an action for breach of confidence might appear similar to a tort claim, the facts did not support the defendants' argument that section 2 of the Limitation Act 1980 (LA 1980) time limit should apply 'by analogy' to this claim under LA 1980, s 36.

On procuring a breach of contract

OneE Tax had obligations under the NDA, which it breached in May 2014 by passing information about the Structure to OneE Investments. While the court considered that the third defendant brought about this breach, the claim for procuring a breach of contract was time-barred.

On unlawful means conspiracy?

The first, third and fourth defendants were held liable for unlawful means conspiracy. The third and fourth defendants' relevant common design was the development of Nemaura, on which they acted and from which they intended to generate fees. In this case, the judge found the requisite 'intention to injure' by way the use of the claimant's ideas without recompense and their knowledge that Nemaura would be the first to market with this type of LLP structure for subcontractor R&D relief.

On CPR PD 57AC?

The judge considered the defendants' failings under CPR PD 57AC (as set out above) to be well outside of the norm'. The deficiencies went beyond procedural infringements and impacted on the reliability of the evidence.

The defendants' application for relief from sanctions was unsuccessful.

The court applied costs sanctions under of CPR PD 57AC, para 5.2(3), being 100% of the claimants' application costs on an indemnity basis.

Case details

- Court: Chancery Division
- Judge: His Honour Judge Jonathan Hilliard KC (sitting as a deputy judge of the High Court)
- Date of judgment: 23 March 2023

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