

JERSEY / JUDGMENT

Sinel v Hennessy [2018]

JCA 095 (24 May 2018)

[2018] JCA 095

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Court of Appeal 24 May 2018 Before : James W. McNeill, Q. C., President George Bompas, Q. C., and Sir Wyn Williams Between Phillip Cowan Sinel (trading as Sinels) Plaintiff And (1) Moira Hennessy (2) Damien James (3) Adam Clarke (4) Luc Jean Edourd Argand (as executor of the estate of the late Killian Hennessy) (5) Marie Emanuelle Michelle Argand (as executor of the estate of the late Killian Hennessy) (6) Sylvain Michael Bogensberger (7) Amuary D'Everlange (8) The Law Society of Jersey Defendants Advocate J. S. Dickinson for the Plaintiff. Advocate M. L. Preston for the First Defendant.

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Introduction

1. On 1 March 2017 the Plaintiff, Advocate Philip Sinel (trading as Sinels), issued an Order of Justice claiming relief, described below, against the First Defendant, Moira Hennessy, and others. The First Defendant is resident outside the jurisdiction. On 15 March 2017 the Master of the Royal Court, Advocate Matthew Thompson, gave the Plaintiff leave to serve the Order of Justice out of the jurisdiction. Later an order was made for substituted service on the First Defendant, and this was, in due course, effected on the First Defendant in late July 2017. 2. With the leave of the Royal Court, the Plaintiff now appeals to the Court of Appeal against the Act of Court made by the Royal Court (Sir William Bailhache, Bailiff, with Jurats Sparrow and Christensen) on 12 January 2018 discharging the Act of Court of 15 March 2017 and setting aside the service on the First Defendant. At the heart of the judgment (Sinels-v-Hennessy and Others

[2018] JRC 007) given by the Royal Court was the conclusion that the claim presented in the Order of Justice was unarguable. Before us the Plaintiff challenges this conclusion. The Plaintiff also challenges the approach taken by the Royal Court, when it refused to take into account a proposed Amended Order of Justice which we describe below.

Background

3. The Plaintiff is an Advocate. In the course of his work he gives legal advice to clients. In general, the Plaintiff owes a duty of confidentiality to his clients. This duty, which is reinforced by rules of professional conduct along with the clients' right to claim legal professional privilege, is fundamental. It is at the heart of a citizen's right to be able to take legal advice freely and to obtain representation before the courts.
4. The Order of Justice sets out claims made by the Plaintiff in respect of certain materials. One of the Plaintiff's clients, according to the Order of Justice, was and is a Mr Gilles Hennessy. The materials in question comprise the contents of a package sent in May 2015 to the First Defendant by an anonymous person under cover of a Jersey postcard with, written on it, the text " Again, I think you deserve the truth" . The Order of Justice states that these materials included documents (which we call "the Documents") which on their face plainly attracted legal professional privilege by virtue of the lawyer/client relationship between the Plaintiff and his client. The Order of Justice contains averments to the effect that the Documents must have been stolen or otherwise improperly obtained from the Plaintiff or his client, that they could not have been intended for anyone to see other than the Plaintiff, staff of his firm or his client, and that that must have been obvious to any of the Defendants into whose hands the Documents came.
5. The relief claimed in the Order of Justice is injunctive only, to preserve confidentiality. The Order of Justice seeks to restrain, in summary, the giving of publicity to the Documents and their contents (that is, the information set out in the Documents), the delivery up or destruction of the Documents and of any copies and the giving of assistance to the Plaintiff to enable him to see that confidentiality continues to be maintained.
6. It has been said by the Plaintiff that he is enforcing the claims in the Order of Justice with the approval of his client, Mr Gilles Hennessy. Although this statement is not made expressly in the Order of Justice, it is a reasonable inference that, in a matter which touches the affairs of his client, the Plaintiff is not acting without the knowledge of his client; and it is also a reasonable inference from what is pleaded that the client had not authorised the disclosure of the Documents or their contents to any of the Defendants or more widely. But should there have been any doubt, the Plaintiff had made an affidavit for the purposes of the First Defendant's application in which he said, Mr Gilles Hennessy " is fully aware of these proceedings and agrees with the steps I am taking in relation to" the Documents.
7. Paragraphs 26 to 31 and 33 of the Order of Justice set out the following: "26. The Privileged Documents are self-evidently confidential in nature by virtue of the facts that: 26.1 They arise in the context and as a result of a relationship of lawyer and client; 26.2 The documents and the information which they contain came into being in the context and as a result of the provision of legal advice by Advocate Sinel to his client and/or in the contemplation of litigation. 26.3 The information contained within the documents is by its very nature confidential, pertaining as it does to confidential affairs of the client and/or to matters in respect of which the client has sought legal advice from Advocate Sinel. 27. Further, by virtue of the foregoing matters the Privileged Documents attract both legal advice and/or litigation privilege. 28. Said privilege and the rights to which it gives rise are

the property of and/ or properly belong to Gilles Hennessy and Advocate Sinel. 29. The obligation of confidence arising out of the confidential and privileged nature of the relationship of lawyer and client is an obligation owed by Advocate Sinel to Gilles Hennessy. 30. Advocate Sinel is, by reason of that obligation of confidence and/or the privileged nature of the Privileged Documents, duty bound both as a matter of law and of professional conduct, to defend the privilege therein and to assert that privilege against all others into whose hands the Privileged Documents should fall. 31. The confidential nature and aforementioned privilege attaching to the Privileged Documents has been and continues to be infringed by the retention of those documents and the information contained therein by such of the Defendants as have retained the same, and by the circulation or dissemination of those documents and the information contained therein between such of the Defendants as have sent or received the same. 33. The confidential and privileged nature of the Privileged Documents is absolute and is entitled to the protection of the Court by means of injunctive relief as described in the prayer for relief below." 8. The Documents, that is the contents of the package received by the First Defendant, were described in a little more detail by the Plaintiff in his witness statement of 13 October 2017 made in response to the First Defendant's application to discharge the Act of Court of 15 March 2017. In summary, according to this description the Documents are themselves copies of documents, not originals, generated in the course of the Plaintiff's professional work for Mr Gilles Hennessy and which will have passed from the Plaintiff to Mr Gilles Hennessy. If this is correct, the likelihood is that somehow the original confidential material was copied by someone who appreciated that what was being done infringed the confidentiality attaching to that material and was unauthorised and therefore improper. The nature of the impropriety we discuss below. But the fact that the Documents are copies immediately raises a question as to the subject and nature of any property rights which might be claimed by the Plaintiff or Mr Gilles Hennessy in relation to the Documents. This point was taken by Advocate M Preston, representing the First Defendant, in his address to the Royal Court on the hearing of the First Defendant's application. 9. So far as concerns this last point, the Order of Justice did not claim any right of property in the Documents themselves on the basis that the Plaintiff (or, for that matter, Mr Gilles Hennessy) owned the pieces of paper on which information was printed. Rather, the claim was based on confidentiality, or privilege, in relation that information, it being the rights in relation to the information which were said to be property rights. 10. It is relevant to describe two sets of proceedings which had been started before the Order of Justice was issued. The first arose following the death of the late Mr Killian Hennessy, Mr Gilles Hennessy's father. He had died on 1 October 2010 in, and domiciled in, Switzerland. His last will dated from 2002. By this he appointed Luc Argand and Marie Emanuele Argand as his Executors. They are the Fourth and Fifth Defendants in the Plaintiff's action. The Sixth Defendant in the Plaintiff's action is Sylvain Bogensberger, the Executors' special attorney. 11. Before his death Mr Killian Hennessy had consulted the Plaintiff for legal advice. The Plaintiff states that this was in anticipation of proceedings which Mr Killian Hennessy believed were likely to be brought by the First Defendant following his death. The First Defendant is his daughter. 12. On 26 May 2016, according to

the Plaintiff's Order of Justice, the Sixth Defendant as special attorney for the Executors issued a Representation against the Plaintiff seeking certain information and documents said to be held by the Plaintiff from his having acted for Mr Killian Hennessy. In the Representation it appears to be said against the Plaintiff that the Plaintiff cannot rely, as against the Fourth to Sixth Defendants, on any duty of confidentiality he might have owed to Mr Killian Hennessy, or on any claim to legal professional privilege Mr Killian Hennessy might have had, as a basis for refusing to give explanations or documents. 13. At some point after receiving the Documents the First Defendant had passed them over to her advocate, Advocate James. He is the Second Defendant in the Plaintiff's action. Some 18 months later she instructed the Second Defendant to disclose the Documents to the Third Defendant, Advocate Clarke. He is the advocate for the Fourth to Sixth Defendants. After this, the second set of proceedings started. At first the Second Defendant sought assistance from the Law Society of Jersey, and then in proceedings from the Royal Court sought directions as to the approach which properly he ought to take in relation to the Documents, having regard to the fact that, judging from their nature and content, they were or were likely to be privileged and confidential. 14. According to the Plaintiff's Order of Justice, the Law Society of Jersey advised the Second Defendant, among other things, that "the nature and content of the documents received by our (sic) client means that they were not intended for, or meant to be seen by, your client ", that "the nature of the receipt ... as an anonymous package, indicates that the disclosure is not inadvertent , but a deliberate act on the part of another person", and "The accompanying note, disguised handwriting and nature of the contents gives rise to an indication of being improperly obtained by or through the sender (who is not the client)." It seems to us that the inferences so described may, for present purposes (that is, for the question of service out of the jurisdiction), be treated as capable of being held to be obvious: someone, knowing what had been received by the First Defendant, and how it had been received, would have needed to have been obtuse or to have been intentionally avoiding drawing the obvious conclusions, if they did not draw the inferences described by the Law Society of Jersey. 15. On 22 March 2017 the Royal Court (Sir William Bailhache, Bailiff, with Jurats Grime and Pitman) gave a judgment on the Second Defendant's application to the Royal Court. In this judgment, *James v Law Society of Jersey and Others*

[2017] JRC 047B , the Royal Court refused to give the Second Defendant permission to transmit the Documents to the Third Defendant, notwithstanding the instructions given to him. The Royal Court explained: "The furthest we feel we should go in the present proceedings is to indicate that it is on the face of it difficult to identify a valid reason why [the First Defendant] should have been sent documents which do not belong to her; on the face of it they must have been obtained improperly, and it would be unsurprising if a court were to determine that in those circumstances they ought not to be used." 16. We have explained above the relief claimed in the Plaintiff's Order of Justice in the present case. 17. The basis of the First Defendant's successful application to have the 15 March 2017 Act of Court discharged was that the only person entitled to obtain the relief claimed in the Plaintiff's Order of Justice is Mr Gilles Hennessy, who is not a party, and not the Plaintiff. It matters

not, so the First Defendant argued successfully, that Mr Gilles Hennessy had given his consent to the Plaintiff's bringing of his proceedings and supported the proceedings. 18. It will be appreciated from what we have said already that the legal basis for the Plaintiff's claims for the relief sought in the Order of Justice were (a) that the Plaintiff had a right of property in respect of the Documents, and alternatively (b) that the Documents contained confidential information brought into being in the relationship of confidence between him and Mr Gilles Hennessy, and that the Plaintiff was entitled, and indeed obliged, as a result of that relationship to protect the confidentiality attaching to the information where there was a real possibility that it had been improperly passed on. 19. The proposed Amended Order of Justice which the Plaintiff sought, unsuccessfully, to have the Royal Court take into account when deciding the First Defendant's application was only in a draft form, still (as it was explained to the Royal Court) awaiting review at the time of the hearing. When asked whether the Plaintiff was making an application to amend the Order of Justice, Advocate J Dickinson (for the Plaintiff) answered as follows: "... the plan had been to make an application to amend the Order of Justice to the Master in the usual way, and what I will say is that it is, that you are entitled, when you exercise your discretion in relation to this application, to have regard to the fact that [the Plaintiff] is shortly planning to amend his Order of Justice and to plead out in more detail the various claims that have been made ... but there is not presently an application before you to amend the Order of Justice". 20. On 18 October 2017, the day after the hearing of the application, what was said to be the final version of the draft Amended Order of Justice was sent to the Royal Court under cover of an email saying "It is plainly a matter for the Court as to what account it takes of the" attached draft. The attached draft was rather more elaborate than the draft which had been exhibited to an affidavit sworn by the Plaintiff shortly before the hearing of the First Defendant's application: the affidavit explained that "now all the parties are before the Court I will shortly be taking steps to apply to amend the Order of Justice", the exhibited document being described as "the current draft". 21. On 4 December 2017, and therefore after the hearing of the First Defendant's application, an email was sent on behalf of the Plaintiff to the Court explaining that the Order of Justice was to be amended in the form of the draft Amended Order of Justice by way of a consent order. The consent order, however, shows that it was made only with the consent of the Fourth, Fifth and Sixth Defendants, and not with the consent of any other Defendant and in particular not with the First Defendant's consent: so far as she is concerned the Order of Justice remains in its original form as served in July 2017. Indeed, as matters stand there is, according to the draft consent order, a default judgment against the Seventh Defendant, and as against the Second, Third and Eighth Defendants the proceedings have been adjourned sine die but on terms allowing re-activation. 22. The Amended Order of Justice elaborates on the allegations and claims previously put forward by the Plaintiff by adding, among other matters, allegations of dishonesty against the First Defendant in relation to the obtaining of the Documents, a claim that the Documents themselves were property of the Plaintiff, a claim in trespass against the First Defendant, a claim based on infringement of copyright and database rights, claims founded on dishonest assistance in a breach of fiduciary duty

and on knowing receipt of trust property, and claims for breach of contract and unlawful interference with contract. Service out of the jurisdiction 23. It is accepted on behalf of both the Plaintiff and the First Defendant that the test applicable for the giving of leave to serve process out of the jurisdiction is that described in summary by this Court in *Maywal Ltd v Nautech Services Ltd*

[2014] JLR (2) 527 at paragraph 23: "On an application for leave to serve out there are three hurdles for a plaintiff to surmount. (1) First, the Royal Court needs to be satisfied that there is a good arguable case that the claim meets the requirements of at least one of the various permissible gateways set out in Rule 7 [of the Service of Process Rules 1994]. (2) Second, the Royal Court needs to be satisfied that on the merits of the claim there is a serious issue to be tried. (3) Third, the Royal Court needs to be satisfied that Jersey is the suitable forum for the trial of the claim." 24. As was the case before the Royal Court, the First Defendant accepts before us that the first and third of the three hurdles have (and had before the Master) in principle been surmounted by the Plaintiff. The issue before us lies only with the second, the "serious issue to be tried" test. 25. As to the first of the three hurdles, the "gateways" relied upon by the Plaintiff were, so far as relevant, those in paragraph (a) to (c) of Rule 7 of the Service of Process Rules 1994 dealing with the circumstances in which the Court has and should exercise jurisdiction to serve out of the jurisdiction, namely (a) that relief was sought against a person domiciled within the jurisdiction, (b) that an injunction was sought ordering the Defendants (including the First Defendant) to do or refrain from doing something within the jurisdiction, and (c) that the claim was brought against a person duly served within the jurisdiction and the First Defendant was a necessary or proper party thereto. And, as to the third, Jersey is indisputably the suitable forum for the trial of the claim. 26. In the judgments of both the Court of Appeal and the Royal Court in the *Nautech-v-CSS Ltd*, *Dunning*, *Coleman*, *Inns*, *Gollop*, *Maywal Ltd*, *Warpole* and *Murch*

[2014] JRC071 case there was discussion about the standard which a plaintiff needs to satisfy in relation to the second hurdle, that is the serious issue to be tried test. This standard is not that there is a good arguable case (the standard applicable in relation to the first test), but is a lesser standard. In the present case the entitlement to serve out of the jurisdiction depends only upon the existence of a claim which it is proper to argue at trial if the proceedings continue. As to this, the Court should not enter into a prolonged debate and consideration of the merits of the Plaintiff's claim. This has particular resonance where the claim involves disputed factual issues; where the facts are unlikely to be greatly in dispute and the issues are essentially of law, the Court should be slow to decide that there is no seriously arguable claim unless the claim is one which is liable to be struck out as failing to set out any cause of action. The grounds of appeal 27. The Plaintiff's first ground of appeal challenges the Royal Court's judgment on the basis that the Royal Court erred in deciding the First Defendant's application on the Order of Justice as it stood, not on the basis of the draft Amended Order of Justice. The remaining grounds of appeal are directed at the conclusions reached by the Royal Court concerning the claims in the unamended

Order of Justice. These are all directed to the contention that the Plaintiff's Order of Justice put forward claims which were seriously arguable. On the one hand, so it was contended, the Order of Justice made a proprietary claim to ownership of the Documents; and on the other it was contended that there was a seriously arguable claim on the part of the Plaintiff to have a right to have the Court's assistance in maintaining confidentiality for the Documents. Discussion 28. We start with the unamended Order of Justice, and the claims as there set out. Was there a claim which was seriously arguable? In this context we consider first the claim based in confidentiality, and then the proprietary claim. After that we refer briefly to the Plaintiff's first ground of appeal. 29. The Royal Court accepted that the Documents were confidential, concluding that the confidentiality sprang from the duty owed by the Plaintiff to Mr Gilles Hennessy to preserve for him confidentiality for their relationship, and for work done by him and communications passing between them in the course of that relationship. However, the Royal Court reasoned that because the duty of confidentiality was owed to Mr Gilles Hennessy, not the other way around, and because it was Mr Gilles Hennessy who could choose to preserve or waive confidentiality while the Plaintiff would have to follow Mr Hennessy's instructions or decisions as to this, the Plaintiff himself was not a proper claimant to assert the confidentiality against a third party into hands any confidential material arising from the relationship might fall. 30. As a matter of first impression, as it seems to us, it would be surprising if someone owing fiduciary duties and possessed of information confidential to the person to whom the duties are owed, should be unable to restrain the use of that information when obtained improperly, quite probably from the fiduciary but possibly in some manner which the fiduciary cannot explain. In the present case the fiduciary is an advocate providing legal services to clients and to that end entrusted with confidential information. But equally the fiduciary might be, say, a trustee entrusted by a beneficiary with confidential information about the beneficiary's circumstances to enable the trustee to exercise a power or discretion in relation to the beneficiary. And these instances do not take into account the case of information held by the fiduciary for or relating to multiple clients or beneficiaries. 31. We note, in this regard, that in the judgment on the Second Defendant's Representation the Royal Court, at paragraph 48, said: "[The Plaintiff] has quite understandably taken out an Order of Justice seeking to restrain the use of the [Documents] [The Plaintiff] might wish to consider whether he should not issue a summons for an immediate injunction restraining the use of the documents..." The comment and suggestion in these two sentences show that at that time the Royal Court did not see it as self-evident that the Plaintiff's proceedings were fatally flawed without Mr Gilles Hennessy being a party, the Plaintiff by himself having no claim. 32. However, in deciding the First Defendant's application in the present case, the Royal Court relied on the decision of the English Court of Appeal in *Fraser v Evans*

[1969] 1 QB 349. In that case Mr Fraser had sought, unsuccessfully, to restrain publication of a report he had made under a contract with the Greek Government imposing on him a duty never to reveal any information about his work for them. In concluding that Mr Fraser was

not entitled to an injunction the Court of Appeal held that he had no standing to assert a claim in confidentiality: any claim rested with the Greek Government to whom Mr Fraser owed his duty of confidentiality. The Royal Court quoted a passage from the judgment of Lord Denning MR at page 361. The relevant paragraph is as follows: "Second, Breach of Confidence. Mr. Fraser says that the report was a confidential document and that the publication of it should be restrained on the principles enunciated in the cases from *Albert (Prince) v. Strange* (1849) 1 Mac & G 25 to *Argyll (Duchess) v Argyll (Duke)* [1967] Ch 302. 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 on 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 a person to whom the duty of good faith is owed. It is at this point that I think Mr. Fraser's claim breaks down. There is no doubt that Mr. Fraser himself was under an obligation of confidence to the Greek Government. The contract says so in terms. But there is nothing in the contract which expressly puts the Greek Government under any obligation of confidence. Nor, so far as I can see, is there any implied obligation. The Greek Government entered into no contract with Mr. Fraser to keep it secret. We have seen affidavits - one of them as late as this morning - which say that it was not the policy of the Greek Government to publish, or allow the publication, of any documents prepared by Mr. Fraser or his firm, and that they would, as matter of practice, keep them confidential. 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 entitled to the information. 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. On this short point it seems to me that Mr. Fraser himself cannot proceed on breach of confidence so as in his own behalf to prevent "The Sunday Times" publishing the article." 33. The law of confidentiality is commonly accepted as having its origin in equity; and an action to restrain, or to seek compensation for, misuse of confidential information has frequently been described as an "equitable action". In its simplest form one person, in a prior relationship of confidence with another who owes him a duty of confidentiality, will be claiming against that other for misuse of confidential information from the relationship; and the claimant may well then proceed also against third parties who have obtained the confidential information from that other. However, it is now clear that a prior relationship of confidentiality with the claimant is not an essential element in a claim. 34. The earliest of the cases to which we have been referred, *Prince Albert v Strange*

- [1849] 1 Mac & G 25, is one in which Prince Albert was found to be entitled to an injunction restraining publication of copies of his private etchings, the circumstances in which the copies had come to be available to the defendant being unknown except that at some time someone must have had unauthorised access to the plates from which the impressions were made; and in giving judgment Lord Cottenham LC commented that " the possession of the defendant ... must have originated in a breach of trust, confidence or contract...". Effectively the basis of the claim was that the defendant's conscience was affected by knowledge that what he had was unauthorised, was private to Prince Albert, and was the product of a breach of duty. However, in that case it was not supposed by Lord Cottenham that the individual who committed the breach of trust, confidence or contract had necessarily to be someone in a direct relationship with the Prince, and hence someone owing him a direct duty or being in a relationship of confidentiality with him, as Lord Cottenham contemplated that that wrongdoer might have been an employee of a third party (see at pages 44-45). 35. The reasoning underpinning the jurisdiction was explained by Lord Denning MR in the Fraser case (at page 361B-C), "The jurisdiction is based not so much on property or on contract as on the duty to be of good faith". It is the good faith of the recipient of the information which is all important. If there were any doubt about the point, in *Campbell v MGN Ltd*
- [2004] 2 AC 457 Lord Nicholls of Birkenhead said that "this cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship". 36. The recognition that a claim to enforce confidentiality in respect of information does not require any pre-existing relationship of confidence has no doubt been assisted by the Convention for the Protection of Human Rights and Fundamental Freedoms as carried into domestic law. The Article 8 privacy right has brought about a developing body of law concerning the enforceability of an expectation of privacy for material which falls improperly into the hands of a third party. Although a claim for misuse of private information, or invasion of privacy, is now a distinct cause of action (a tort cause of action) from a claim based in confidentiality, nevertheless the two claims are closely related. 37. Thus, although the Fraser case is still regarded as good law, and although the passage quoted above from the judgment of Lord Denning is still referred to, a gloss has been put on the proposition for which the case is authority. This appears from the judgment of Tugendhat J in *Abbey v Gilligan*
- [2012] EWHC 3217 QB ,
- [2013] EMLR 12 . In that case Tugendhat J dismissed the claims made against the defendant for invasion of privacy and breach of confidentiality. At paragraph [40] Tugendhat J described the proposition established by the Fraser case, namely that a claimant seeking to establish a claim in breach of confidence must show that he is the proper person to sue, he went on to comment at paragraph [41] that: " There are cases where a person may sue to protect the rights of others. Examples include where hospitals have sued to prevent publication of patients' records (*Ashworth [Hospital Authority] v MGN Ltd*

[2002] 1 WLR 2033). But even in those cases, it is obvious that the claimant cannot be awarded damages for wrongs suffered by third parties ". (As we have noted already, the Plaintiff's Order of Justice in the present case does not advance a claim for damages.) 38. In his judgment in the Abbey case Tugendhat J had referred to the report of the Ashworth case in the House of Lords. In its judgment in the present case the Royal Court had discussed the Court of Appeal's judgment in the Ashworth case (reported at [2001] 1 WLR 525), a judgement upheld in the House of Lords. We discuss this case further below. 39. The Plaintiff's grounds of appeal and supporting written contentions before us take issue with the Royal Court's analysis of the judgment of the Court of Appeal in *Ashworth Hospital Authority v MGN Ltd*, and also of that Court's judgment in *Imerman v Tchenguiz*

[2010] EWCA Civ 908 ,

[2011] Fam 116 . These cases were relied upon by the Plaintiff before the Royal Court as demonstrating that it was, at the least, seriously arguable that the Plaintiff had by himself standing to claim in respect of the Documents the injunctive relief sought against the First Defendant. 40. We start with the Ashworth Hospital Authority case. The Plaintiff's argument is that by parity of reasoning with that case, he has standing to claim injunctive relief to protect the confidentiality attaching to materials which he held in confidence, even if he himself owed a duty of confidence to his client in respect of those materials. And he argues that he had a reasonable expectation of privacy for the materials, something which the First Defendant must have appreciated, so that consistently with what had been said by Lord Neuberger MR in the *Imerman* case (discussed below) he should be entitled have the Court afford him protection against the First Defendant. 41. The Ashworth Hospital Authority case involved unauthorised disclosure to a newspaper of hospital records concerning a notorious individual, the so-called "Moors Murderer" Ian Brady. The hospital authority brought claims in equity for breach of confidence against the newspaper and others, and in that context sought Norwich Pharmacal disclosure orders aimed at revealing the identity of the person who had leaked the records from the hospital authority. The Court of Appeal upheld the grant of the disclosure orders, despite the defendant's arguments that Brady had himself put into the public domain certain aspects of what was in the records, and also that the hospital authority lacked standing. 42. In the course of his judgment Lord Phillips MR (with whom May and Laws JJ agreed) dealt with the question whether the hospital authority's claims were well-founded, and concluded they were. The point had been taken that it was only the individual, Brady, who had standing to claim in respect of his records. But Lord Phillips explained that the hospital authority also had an independent interest in maintaining confidentiality, despite the fact that the records were personal to the individual. He said that the hospital authority had, as regards the records, its own "independent interest in maintaining their confidentiality". As to this, there was on the facts evidence that the hospital authority could be harmed by publicity for confidential records, and also that the records contained input from medical staff; but it was also material that the leak was probably by a hospital employee who owed a duty of confidentiality to the hospital authority. 43. At paragraphs 51 to 54 Lord Phillips

explained: "51 Focusing on the article published in the "Daily Mirror", Rougier J held that Ashworth had no right to confidentiality in the information that it contained. His reasoning was as follows: 'On reading the article I am unable to detect anything contained therein which strays outside the limits of what might be termed Ian Brady's personal right to confidentiality. I am not impressed by the argument that merely because the descriptions of the man come from various sources within the hospital, that automatically creates a state of confidentiality of which the hospital could take advantage, but I wish to make it quite plain that that is a decision which I have reached upon the facts of this case, and upon a reading of this article. I must not be taken to be voicing any general proposition that data recorded about a patient in a fashion such as this could not, in an appropriate case, attract the shield of confidentiality in favour of the hospital.' 52 I am unable to accept this reasoning. The extracts published consisted of observations of Brady by different members of the staff at Ashworth that were recorded as part of his medical records. Though they were personal to Brady, I consider that Ashworth had a clear independent interest in retaining their confidentiality. The Department of Health published, on 7 March 1996, Guidance on the Protection and Use of Patient Information. This includes the following guidance under the heading, "Who has a duty of confidence?": "Everyone working for or with the NHS who records, handles, stores, or otherwise comes across information has a personal common law duty of confidence to patients and to his or her employer." (Emphasis added.) 53 This guidance accurately states the position. Both Ashworth and its patients shared an interest in the confidentiality of patient records. 54 I do not consider that the publicity generated by Ian Brady himself in the period before the publication of the "Daily Mirror" article had the effect of stripping the cloak of confidentiality from the more detailed records about Brady on the PACIS database. Ashworth was entitled to insist that those records remained confidential." 44. However, earlier in his judgment Lord Phillips had described the findings made by the judge concerning the adverse impact on the hospital of disclosure of confidential records. And, Lord Phillips later gave a further summary of his conclusions in paragraph 63 of his judgment, which can be found quoted below. 45. In the House of Lords the Court of Appeal's judgment was affirmed. So far as concerned the question whether the hospital authority had any standing to pursue a claim in breach of confidence Lord Woolf CJ, with whom Lords Slynn, Browne-Wilkinson, Nolan and Hobhouse agreed, said: "32 I also accept the conclusion of Lord Phillips of Worth Matravers MR in the Court of Appeal [2001] 1 WLR 515, 527-528, paras 50-54 that, while Ian Brady's conduct in putting similar information into the public domain could well mean that he would not be in a position to complain about the publication, this did not destroy the authority's independent interest in retaining the confidentiality of the medical records contained in Ashworth's files. So the source who abstracted the information from the database not only acted in breach of confidence; he or she also acted in breach of contract. 33 The Master of the Rolls went on to conclude, at p 529, para 63: "The intermediary, knowing that the information had been obtained in breach of confidence, passed it to MGN, through Mr Jones. MGN, knowing that the information had been transferred in breach of confidence, published extracts from it. In

these circumstances, claims for breach of confidence lie against MGN, the intermediary and the source." 34 On the facts of the present case the Master of the Rolls is almost certainly correct in coming to this

conclusion.

..." 46. The proposition in paragraph 63 of the judgment of Lord Phillips in the Court of Appeal, quoted above by Lord Woolf, is in our judgment material. It supports the conclusion that if a person copies papers in the possession of a lawyer which concern a client of the lawyer, which are obviously confidential, and which either are or must be so understood by the person copying them, that person will have the copies and the information they contained subject to an obligation of confidentiality which the lawyer, as well as the client, can have an interest in enforcing by way of injunction. 47. Before the hearing of the Plaintiff's appeal we drew to the parties' attention an Australian judgment, one in the New South Wales Supreme Court, given by Campbell J (*Mid-City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak* (2006) 67 NSWLR 569). That was another medical records case. At paragraph [139] Campbell J said: "While [the] particular obligation of confidentiality is one which is owed to the patient, the proprietor of a medical practice has a clear interest in conducting the practice in such a way that confidential information disclosed by patients in the course of the practice remains confidential. It would be bad for business if a medical practice was known as one which leaked patient details. As well, the proprietor of the practice would owe an obligation of confidentiality to the patient concerning confidential information the patient gave to professional and clerical employees of the practice, and could perform that obligation only by ensuring that the practice was operated in such a way that all people who came across the information in the course of the practice were bound by a similar obligation of confidence. For the law to regard it as an ordinary incident of being engaged in the work of a medical practice that the person so engaged has an obligation to the proprietor of the practice to maintain this patient confidentiality is a proper way of ensuring that this interest of the proprietor of the practice is protected, and also provides a more effective way of ensuring that the obligation of an individual medical practitioner to the patient is adhered to. *United States v Grossman* 843 F2n 78 (2nd Cir 1988) at 86[5] held that a law firm had a right, as against an employee of the law firm, to the confidentiality of information disclosed to members of the firm by a client. The position with a medical practice seems to me to be analogous." We think that the reasoning of Campbell J is much the same as that of the Court of Appeal in the *Ashworth Hospital Authority* case; and in both cases the reasoning points to the Plaintiff in the present case having standing, that is to say a sufficient interest in being able, to bring a claim based on breach of confidentiality against the First Defendant for the injunctive relief sought in the Order of Justice. 48. The Royal Court, however, distinguished the *Ashworth Hospital Authority* case from the present on the basis that "the plaintiff hospital could assert a breach of duty against its employee who had supplied" the information, the defendant newspaper being aware "of that duty of confidentiality". We do not see that in fact as being a sufficient distinction. In the present case Plaintiff will have his own claim for breach of duty on the part of an employee, being a breach of an express or implied contractual obligation owed by the employee,

if (as seems likely) the source of the leak was an employee, and if the identity of the employee can be established. But we cannot see why that fact should be critical. For this we refer to judgment of the Court of Appeal in *Imerman v Tchenguiz*, at paragraph

[64] (which we have set out below), where attention was drawn by Lord Neuberger MR to Lord Goff of Chieveley's example of the obviously confidential document wafted by an electric fan out of a window, or dropped in a public place, and picked up by a passer-by. What matters immediately is whether the Plaintiff has standing to prevent the First Defendant from further disseminating the Documents (that is copy documents and the information in them) when, as we assume for present purposes, she must appreciate that what she has is confidential in the hands of the Plaintiff and that it has in all likelihood been obtained improperly from the Plaintiff in a way which is inconsistent with the confidentiality in the Documents. Bearing in mind that the Plaintiff says, not unreasonably, that dissemination of such information will be damaging to him in his business, we consider that arguably he has a sufficient interest in restraining the First Defendant. 49. The *Imerman* case was decided in the context of a bitter matrimonial dispute. The wife was contending that the husband was concealing assets. The wife's brother shared an office and computer system with the husband. The brother accessed without permission the husband's computer and copied a great volume of material. The husband sought injunctive relief to restrain any use of the material and its delivery up; and the wife sought to be allowed to use the material in the matrimonial proceedings. The Court of Appeal upheld the claimed injunctions. In giving the Court's judgment Lord Neuberger MR traced out the origin and development of the confidentiality cause of action. At paragraphs [64] to [66] Lord Neuberger drew attention to two points. First, he described how it has become clear that the law of confidentiality has become detached from any requirement for wrongdoing beyond the fact that the defendant has obviously confidential information without the claimant's consent; and, second, he explained how information for which the claimant had an "expectation of privacy" could attract the protection giving to confidential information. What he said was: "64 It was only some 20 years ago that the law of confidence was authoritatively extended to apply to cases where the defendant had come by the information without the consent of the claimant. That extension, which had been discussed in academic articles, was established in the speech of Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd* (No 2)

[1990] 1 AC 109 He said, at p 281, that confidence could be invoked "where an obviously confidential document is wafted by an electric fan out of a window ... or ... is dropped in a public place, and is then picked up by a passer-by". 65 The domestic law of confidence was extended again by the House of Lords in *Campbell v MGN Ltd*

[2004] 2 AC 457, effectively to incorporate the right to respect for private life in article 8 of the Convention, although its extension from the commercial sector to the private sector had already been presaged by decisions such as *Argyll v Argyll*

- [1967] Ch 302 and *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804. In the latter case, Laws J suggested at p 807 that the law recognised "a right of privacy, although the name accorded to the cause of action would be breach of confidence". It goes a little further than nomenclature in that, in *Wainwright v Home Office*
- [2004] 2 AC 406, the House of Lords held that there was no tort of invasion of privacy, even now that the Human Rights Act 1998 is in force. None the less, following its later decision in *Campbell's case*
- [2004] 2 AC 457, there is now a tort of misuse of private information: as Lord Phillips of Worth Matravers MR put it in *Douglas v Hello! Ltd (No 3)*
- [2006] QB 125, para 96, a claim based on misuse of private information has been "shoehorned" into the law of confidence. 66 As Lord Phillips MR's observation suggests, there are dangers in conflating the developing law of privacy under article 8 and the traditional law of confidence. However, the touchstone suggested by Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Campbell's case*
- [2004] 2 AC 457, paras 21, 85, namely whether the claimant had a "reasonable expectation of privacy" in respect of the information in issue, is, as it seems to us, a good test to apply when considering whether a claim for confidence is well founded. (It chimes well with the test suggested in classic commercial confidence cases by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47, namely whether the information had the "necessary quality of confidence" and had been "imparted in circumstances importing an obligation of confidence".) 50. Then, at paragraph 68 of the Court's judgment, Lord Neuberger MR added: "68. If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information ..." 51. The Royal Court considered it important in the *Imerman* case that the subject matter of the husband's successful application was documents owned by him. The Royal Court explained this at paragraph [23] of the judgment as follows: "23. A key point to make at the outset of consideration of this case is that it was the husband who took action, whether against the defendants or against his spouse in the matrimonial proceedings. The documents in question were his documents and he was the plaintiff seeking orders restricting their use. The whole basis of the case therefore is quite dissimilar from one where, according to the facts asserted by the Plaintiff in the order of justice, no claim was made to ownership of the documents." 52. Further, the Royal Court reasoned that in the present case there was no expectation of privacy, and no stated case that there was an expectation of privacy, on the part of the Plaintiff as regards the Documents or the original materials from which they had been produced. This was explained as follows: "25. Applying that test [(the test set out in paragraph

[68] in Lord Neuberger's judgment in *Imerman*)] to the facts of this case as pleaded, can it be said that the Plaintiff had an expectation of privacy in the privileged documents? In our view the answer to that question is that there is no claim setting out why he should have such an expectation. If the position is, as we conceive it to be, that the confidence is that of the client and not the lawyer, it follows that the lawyer can have no expectation of privacy because the client could tell any third party of the advice received, and/or disclose any information or documents which have been obtained from the lawyer other than in circumstances where there are some express arrangements which establish the mutuality of such a confidence. In other words, Lord Neuberger is proceeding in these paragraphs on the assumption that the person bringing the claim is the person entitled to the confidence." 53. Differing from the Royal Court, we do not see that "ownership" of documents was material to, or formed any part of the reasoning of, the Court of Appeal in the *Imerman* case. What had been extracted from the husband's computer was data, or information; and it is questionable (as we explain below) whether such matter is properly to be considered as capable of being "owned" in the way that a piece of paper, or a machine, may be owned. What mattered was that the data extracted from the computer had been copied and then printed; and so copied in digital and paper form had come into the hands of the wife who wished to be able to use it. 54. Before the Royal Court, as before us, Advocate Preston placed reliance on the case of *Nationwide Building Society v Various Solicitors (No.2)* [1998] All ER (D) 119, a case in which Blackburne J applied the principle in the *Fraser* case to deny the claim of the defendant solicitors to the return of materials inadvertently provided by them to the plaintiff in the course of the proceedings, the materials being, so it was claimed, the privileged and confidential materials of the defendants' clients. It seems from the report of the case that the solicitors were being sued as having been party to mortgage fraud, the solicitors themselves having acted for the plaintiff in the impugned transactions. Also, and more importantly, in Blackburne J's judgment there is no indication that consideration was given to the principles discussed in the *Ashworth* case, so far as relevant only the *Fraser* case being referred to by him. In summary he explained: "The long and the short of the matter is ... that the right of confidence (or, if you wish, the privilege) is that of the former clients and it is therefore for them and for them alone to take action to protect the confidentiality of the information in question ..." As it seems to us, this view of the position, with the concept of a "right" of confidence as a property right belonging to one person only and being the correlative of the duty of confidentiality owed to that person, may well no longer be apt as an exhaustive statement of the position. In the *Ashworth Hospital Authority* case, for example, Lord Woolf CJ had, at paragraph [32] (quoted above), referred to the hospital authority as having "an independent interest in retaining the confidentiality of the medical records contained in Ashworth's files." And in the *Abbey* case, Tugendhat J conveyed, in the paragraph of his judgment quoted above in paragraph 37, that such an interest might support a claim for injunctive relief, while being distinct from a right to sue for damages for breach of a duty of confidence. 55. In our judgment, therefore, it is by no means certain that, were the facts of the *Nationwide* case again to come before the courts of England and Wales, the arguments or the result would be the same. 56. As to the expectation of privacy, we consider that in the

present context this is a development of the law of confidentiality, providing a justification and explanation for giving protection to confidential information, while moving away from the requirement for the person seeking protection to show that there has been a breach of duty, or that a breach of duty is threatened, in relation to the information before that person is entitled to the court's assistance. 57. We also consider it well arguable that, where confidential information is shared, most typically in the course of a relationship of confidence, such as in the case of lawyers, doctors or trustees, in which one party provides to another matters of a personal and private nature to the provider, but which the recipient is duty-bound to the provider to keep private, it is perfectly possible for the recipient to expect that what has been provided will be kept private by his staff, unless and until the provider chooses otherwise. From the point of view of the recipient this is not strictly a matter within Article 8 of the Convention, as the confidential information is not personal to him; and anyway Article 8 is concerned with natural persons, not legal persons, and either or both of the provider and the recipient may be corporations. 58. However, the description in the previous paragraph assumes also that the provision of information is entirely one way, from client, patient or beneficiary to the lawyer, doctor or trustee. But in practice there are likely to be two-way communications in the course of the relationship, along with notes made of work done, treatment given or decisions taken. 59. In the present case we think that the Order of Justice (in particular in the paragraphs we have quoted earlier in this judgment) sets out sufficient to demonstrate that the Plaintiff was claiming that the information which had come to the hands of the First Defendant, namely the Documents and the information contained in them, was private to him, as to Mr Gilles Hennessy, and also that he has his own interest in maintaining privacy for them by reason of his duty to Mr Gilles Hennessy. 60. Our conclusion, therefore, is that Plaintiff's proceedings cannot be said to be fatally flawed, to the point where the Plaintiff does not have any seriously arguable claim against the First Defendant to have the injunctive relief sought. In our judgment, the Royal Court was mistaken in deciding that the case of *Fraser v Evans* placed the Plaintiff's claim based in the law of confidentiality outside the area of what is seriously arguable. We think, in summary, that the analysis is, at least arguably, that the Plaintiff was in control of information which had been generated in the course of his relationship, a relationship of confidence, and which he was duty bound to keep confidential, and that it is not critical that the other party to the relationship, a party who could properly and lawfully choose to release the Plaintiff from his duty and give publicity to the information but also who could sue the Plaintiff if the information had been leaked from the Plaintiff's office, was not himself before the Court as a party to the proceedings. Nor does it matter, in our judgment that the Plaintiff cannot be said to "own" the information. It is the quality of the information as confidential while in the control of the Plaintiff, and the interest of the Plaintiff in preserving that confidentiality, which allows the Plaintiff to take steps to protect the confidentiality. 61. This conclusion is sufficient to dispose of the appeal. We therefore comment only briefly on the two other grounds of appeal. 62. The one is that the Plaintiff's entitlement to the claimed injunctive relief could be rested in the law of property, the Plaintiff owning either the pieces of paper which arrived in package received by the First

Defendant, or the information which those papers contained. The claim to ownership of the information is plainly set out in the Order of Justice. We have quoted above paragraph 28 of the Order of Justice which makes this clear. The claim to ownership of the papers themselves is not so easy to discern, but anyway seems implausible as it is contradicted by what the Plaintiff has said in evidence. 63. Without reaching any conclusion on the question, it being unnecessary for us to do so, the Plaintiff's claim to ownership of the Documents and the information in them faces difficulties. There is a line of English authority denying that "information" is property which may be "owned", although legislation has provided for specific rights of a proprietary nature in relation to various categories of information. One such case is *Coogan v News Group Newspapers Ltd*

[2012] EWCA Civ 48 ,

[2012] EMLR 14 . Another is *Capita plc v Darch*

[2017] EWHC 1248 Ch ; and there are the cases cited at paragraphs [68], [69],

[71] and [72] of the judgment in *Darch* . 64. We need say no more about the claim based on ownership of the pieces of paper, other than to comment that it would not be a satisfactory outcome if the Plaintiff were only entitled to the Court's assistance in restraining dissemination of the Documents and the information in them, if he could prove on the balance of probabilities that the pieces of paper arriving in the package themselves were his pieces of paper. 65. The final ground of appeal concerns the Royal Court's approach in deciding the First Defendant's application on the basis of the Order of Justice as it stood at the time of the hearing, and not on the basis of the Amended Order of Justice. This ground of appeal involves an attack on what was, at the hearing of the application, presented to the Royal Court as a matter for its discretion, and was not pressed on the Royal Court, either then or in the emails sent after the hearing, as being the only appropriate course for the Royal Court to take. 66. In the Royal Court's judgment the reasoning of the Royal Court was explained as follows: "18. Finally, it was submitted that although the order of justice was not asserted to be a perfect document, it was plain that it did contain a right of action. Advocate Dickinson accepted that it was not completely right and he was seeking to review it against the possibility of an application for leave to amend. 19. We take the last point first. Advocate Preston rightly contended that he was entitled to a decision on his present application, which was based on the order of justice as now pleaded. If a draft amended order of justice as presented to us was not the finished article, which it was clear it was not, then we should pay no attention to it. He was not in a position to say whether there would be a jurisdictional challenge if the Plaintiff was given leave to amend that particular document. 20. We agree with those submissions. We can only decide the present application on the basis of the order of justice as it stood at the date of the hearing, and if it is subsequently amended, it will be for the Plaintiff to justify an application for leave to serve out of the jurisdiction on the amended basis." 67. In our judgment, there is no basis on which this Court can properly interfere with the Royal Court's decision set out in the last paragraph we have just quoted. The Royal Court had a discretion, and exercised it in a principled way. When the application

was heard the document put forward as the proposed Amended Order of Justice was not put forward as the finished article. The Royal Court was entitled to decide whether or not the Master's order giving leave to serve out of the jurisdiction was wrongly made by reference to the materials which had been before the Master when he made the order, and not by reference to subsequent materials which sought to support his decision on the basis of different claims which might be made in an as yet unperfected proposed Amended Order of Justice.

Disposition

68. Nevertheless, for the reasons we have explained, we would allow the Plaintiff's appeal and, reversing the judgment of the Royal Court, order that the First Defendant's application be dismissed. *Authorities Sinels-v-Hennessy and Others*

[2018] JRC 007. *James v Law Society of Jersey and Others*

[2017] JRC 047B . *Maywal Ltd v Nautech Services Ltd*

[2014] JLR (2) 527 *Nautech-v-CSS Ltd, Dunning, Coleman, Inns, Gollop, Maywal Ltd, Warpole and Murch* [2014] JRC071 *Fraser v Evans* [1969] 1 QB 349 *Prince Albert v Strange*

[1849] 1 Mac & G 25 *Campbell v MGN Ltd*

[2004] 2 AC 457 *Abbey v Gilligan*

[2012] EWHC 3217 QB ,

[2013] EMLR 12 *Ashworth [Hospital Authority] v MGN Ltd*

[2002] 1 WLR 2033 *Imerman v Tchenguiz*

[2010] EWCA Civ 908 ,

[2011] Fam 116 . *Mid-City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak* (2006) 67 NSWLR 569 *Nationwide Building Society v Various Solicitors (No.2)* [1998] All ER (D) 119 *Coogan v News Group Newspapers Ltd*

[2012] EWCA Civ 48 ,

[2012] EMLR 14 *Capita plc v Darch*

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