Neutral Citation Number: [2022] EWHC 2856 (Comm)

Case No: CL-2021-000089

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2022

Before :

Simon Salzedo KC
Sitting as a Deputy Judge of the High Court

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Between :

JINXIN INC.	**Claimant**
- and -	
(1) ASER MEDIA PTE LIMITED; **(2) MEDIA PARTNERS AND SILVA, LLC;** **(3) SU HYEON CHO;** **(4) LARA VANJAK;** **(5) MARCO AULETTA;** **(6) RICCARDO SILVA HOLDING DESIGNATED ACTIVITY COMPANY;** **(7) ROBERTO DALMIGLIO;** **(8) FONG LEE YUH;** **(9) RICCARDO SILVA;** **(10) ANDREA RADRIZZANI**	**Defendants**

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Adrian Beltrami KC and Nathaniel Bird (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Tim Benham-Mirando (instructed by **Fladgate LLP**) for the **Fifth Defendant**
Shane Sibbel and Barnaby Lowe (instructed by **Bird & Bird LLP**) for the **First and Tenth Defendants**
Simon Colton KC and Sophie Weber (instructed by **Allen & Overy LLP**) for the **Sixth and Ninth Defendants**
Nicholas Goodfellow (instructed by **Kingsley Napley LLP**) for the **Second Defendant**

Hearing dates: 31st October 2022 - 1st November 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
SIMON SALZEDO KC

Simon Salzedo KC:

1. These are my reasons for dismissing the claimant's application for a declaration, that:

> "... the First, Second, Fifth, Sixth, Ninth and Tenth Defendants are not entitled to claim privilege as against the Claimant over any data and documents that were held on or collected from the computer systems of MP & Silva Holding SA ('MPS') and MPS's subsidiaries and associated bodies corporate (including, for the avoidance of doubt, Media Partners & Silva Limited)."

2. The basis of the application is neatly summarised in the application notice as follows:

> "Because, for the reasons set out in the attached witness statement, those Defendants could not have any reasonable expectation of privacy in data and documents stored on the corporate computer systems of the MPS group and such data and documents are accordingly not confidential as against the Claimant."

The proceedings

3. The claimant, Jinxin, is a company incorporated in the Cayman Islands.

4. The first defendant, Aser, is a company incorporated in Singapore. The tenth defendant, Mr Radrizzani, is an individual and the ultimate beneficial owner of Aser.

5. The second defendant, MPS LLC, is a company incorporated in the State of Florida, USA. Mr Pozzali is an individual and the ultimate beneficial owner of MPS LLC.

6. The fifth defendant, Mr Auletta, was at all material times prior to 24 May 2016 the chief executive officer of MPS, which was a company incorporated in Luxembourg.

7. The sixth defendant, RSHL, is a designated activity company, incorporated in the Republic of Ireland. The ninth defendant, Mr Silva, is an individual and the ultimate beneficial owner of RSHL.

8. Aser, Mr Radrizzani, MPS LLC, Mr Auletta, RSHL and Mr Silva are collectively referred to as "the Tort Defendants". They have been represented before me by four teams of counsel. The four individuals, Mr Radrizzani, Mr Auletta, Mr Silva and Mr Pozzali, have been referred to together as the "Group Directors".

9. The claims against the third, fourth, seventh and eighth defendants (the "Other Defendants") are stayed and they have taken no part in the application before me.

10. Pursuant to a share purchase agreement dated 8 March 2016 (the "SPA"), Jinxin purchased from the vendors, which included some of the Tort Defendants, 65% of the issued shares in MPS for a final consideration of US$661,375,034.

11. Prior to completion, the majority shareholders of MPS were RSHL and Aser. A significant minority of the MPS shares were held by MPS LLC. Mr Auletta held a small minority of the MPS shares. MPS was the holding company for a group of companies which carried on business as a sports rights agency (the "MPS Group"). MPS was

involved in the acquisition, sale and licensing of international broadcasting and media rights for various sporting events around the world.

12. On the same date as the SPA, a shareholders' agreement (the "SHA") was entered into which set out that after the completion of the SPA, the equity shares in MPS would be held in the following proportions: Jinxin 65%, Aser 14.394%, Mr Auletta 0.875%, RSHL 15.795% and MPS LLC 2.625%, with small amounts held by each of the Other Defendants.

13. Completion for the purposes of the SPA took place on 24 May 2016.

14. On 13 April 2017, Jinxin and the vendors entered into a deed of variation relating to the SPA. From around 2018 onwards, MPS and its subsidiaries entered into a variety of insolvency proceedings and many have been subsequently declared bankrupt or wound up.

15. Jinxin claims that it was induced to enter into the SPA and proceed to completion by fraudulent misrepresentations made by the Tort Defendants. The alleged representations have been broadly summarised in the agreed list of issues as follows:

    1. The Business Practice Representations concerning the honesty, legality and lawfulness of the conduct of the MPS Group business, including as to the absence of bribery, corruption or similar misconduct.

    2. The Serie A Representations that the MPS Group had won the Serie A rights as a result of its long-standing and legitimate relationship with the Italian league, and that the group's management were confident that the rights would be renewed in 2017 and beyond.

    3. The Investigation Representations as to the limited nature of the criminal investigation then being conducted in respect of the ninth defendant, and its irrelevance to the business of the MPS Group.

    4. The EBITDA Representations concerning the truth, material accuracy and completeness of the financial information, including EBITDA forecasts, provided to Baofeng, Everbright and Jinxin.

16. The representations alleged by Jinxin are both express representations made in the sale documents and implied representations, the implied representations emerging from the sale documents. It is not alleged that any oral representations were made.

17. Jinxin seeks to rescind the SPA and recover the amount it paid for the MPS shares. Alternatively, Jinxin claims damages. The Tort Defendants deny the deceit claim in full. Jinxin further claims that the Tort Defendants conspired to harm Jinxin by unlawful means through the making of the alleged fraudulent representations set out above, and this claim is also denied in full.

Background to the application

18. I have already mentioned the Shareholders' Agreement (SHA) made between the claimant and the other shareholders of MPS. The SHA provided as follows at clause 9:

"**9. INFORMATION RIGHTS**

9.1. Accounts and periodic reporting

The Company shall:

(a) maintain accurate and complete accounting and other financial records in accordance with all applicable laws; and

(b) prepare the accounts and reports set out in the first column of the table in part 1 of schedule 7, provide copies of those accounts and reports to each shareholder (or in the case of the reports and other information referred to in paragraph 5 of the first column of the table of part 1 of schedule 7 to each Significant Shareholder) as soon as they are available and in any event within the period specified in the second or third column (as applicable) of the table in part 1 of schedule 7.

9.2. Other information to be provided

The Company shall promptly provide to each Significant Shareholder the information set out in part 2 of schedule 7.

9.3. Access to books, records and other information

Subject to clause 9.4, the Company shall give to each Significant Shareholder and each Nominated Director (without prejudice to any rights they may have under applicable law) reasonable access on reasonable notice to:

(a) inspect the assets of each Group Company;

(b) inspect and take copies of documents relating to any group company, including the statutory registers and all accounting and other financial records; and

(c) discuss the affairs, finances and accounts of each Group Company with the relevant responsible officer, any person who reports directly to that officer and the auditor of the relevant Group Company.

9.4. Exceptions to shareholder access rights

Nothing in clause 9.3 requires the Company to give any person access to information if to do so would in the reasonable opinion of the Board:

(a) constitute a breach by any Group Company of any obligation or confidentiality owed to a third party or imposed by law; or

(b) materially and adversely affect the best interests of any group company, whether due to a conflict of interest to the person requesting such access or due to a possible loss of legal or litigation privilege or otherwise; or

(c) materially disrupt or have a material adverse effect on the business or operations of any Group Company.

> **9.5. Disclosure of information**
>
> A Nominated Director is entitled to pass information concerning any Group Company to his Appointor, or any of his Appointor's Affiliates or Associated Persons who need to know that information for the proper performance of their duties, so long as each recipient keeps that information confidential in accordance with clause 27."

19. Part 2 of Schedule 7 provided as follows:

> "**PART 2**
>
> **OTHER INFORMATION**
>
> **Information required**
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> 1. Notice of any event, occurrence or change which has or could reasonably be expected to have a material effect (positive or negative) on the business, assets, liabilities, financial or trading position, profitability or prospects of any Group Company.
>
> 2. Notice of any offer received from a third party that could reasonably be expected to lead to a disposal of all of the Shares or the whole or a substantial part of the undertaking or assets of any Group Company.
>
> 3. Such other information relating to the business or affairs of the Group as any Significant Shareholder may from time to time reasonably request."

20. "Significant Shareholder" was defined as being a shareholder with an equity proportion of 10% or more. It therefore included Jinxin, Aser, and RSHL.

21. Counsel for each of Mr Radrizzani and Mr Silva make the point that they were not party to the SHA. Mr Beltrami KC, representing Jinxin, submits that Aser was the corporate vehicle of Mr Radrizzani, and RSHL was the vehicle of Mr Silva. While I make no finding of fact on this issue, I proceed on the assumption that each of the Tort Defendants knew of the content of the SHA. Jinxin says that as MPS entered financial difficulties in 2018, Jinxin took steps to collect and preserve data that would enable it to investigate the causes of MPS's difficulties.

22. In or around September 2018, the board of MPS passed resolutions approving the provision to Jinxin and to BDO and Herbert Smith Freehills ("HSF"), acting on Jinxin's behalf, of extensive information including MPS' email servers and other computer drives.

23. This included the email mailboxes and other documents stored on the MPS Group's systems that had been used by Messrs Auletta, Silva, Radrizzani and Pozzali. Jinxin's evidence is that in order to reduce the risk that its legal team would review privileged documents, keyword searches were performed which were thought likely to identify documents in which the Tort Defendants might claim privilege. The documents thus identified were to be reviewed by a separate team of HSF lawyers in HSF's Belfast

office, none of whom were otherwise involved in these proceedings. Additional keywords were later agreed for this purpose with the Tort Defendants.

24. In November 2021 and January 2022, HSF confirmed to Mr Silva and Mr Radrizzani respectively that emails collected from their mailboxes which responded to the keywords would be quarantined and not reviewed by anybody pending the case management conference in these proceedings.

25. Jinxin says that the keywords that it used for this purpose were extensive, and the result is that approximately half of the 1.5 million documents collected have been quarantined. There was some correspondence between the parties about how to deal with the situation where Jinxin held documents that should be reviewed for disclosure, but which might contain materials in which the Tort Defendants could claim privilege. In the end the only application that has been made is Jinxin's application for a final declaration that none of the Tort Defendants can claim any privilege against Jinxin in relation to any documents that were held on MPS's computer systems. If the application succeeds, then it would mean that Jinxin could safely proceed to review all the relevant documents it holds without further quarantine issues.

Relevant law

26. Counsel for Jinxin reminds me that confidentiality is an essential prerequisite for a claim to privilege. Jinxin accepts that there is a presumption that communications between lawyer and client are generally confidential, but emphasises that if the client shares the communication with a third party, then the client cannot claim privilege against that third party, because confidentiality will have been lost as against that person. The classic statement of the equitable doctrine of confidentiality in a commercial context is that of Mr Justice Megarry in *Coco v AN Clark (Engineers) Limited* [1968] FSR 415 at 419, where he set out the three elements of an action for breach of confidence, of which the second was:

> "... that information must have been imparted in circumstances importing an obligation of confidence."

27. Further guidance as to the meaning of this formulation can be found in the same judgment at pages 420 to 421, where Mr Justice Megarry said:

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

28. This guidance "chimes well" with the more recent case law on the right to privacy, the touchstone of which is whether the claimant had a "reasonable expectation of privacy", in respect of the information at issue: *Imerman v Imerman* [2010] EWCA Civ 908, [2011] Fam 116 at paragraph 66.

29. Although the tests for both confidentiality and privacy are objective, and may lead to the same answer on the same facts, they do not always run together and they have been developed in relation to different causes of action (breach of confidence and misuse of

private information) which rest on different legal foundations and protect different interests: *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158, at paragraphs 45 and 150.

30. The parties before me submitted that the touchstone of confidentiality is a reasonable expectation of privacy, as was accepted by Mr Justice Garnham in *Simpkin v The Berkeley Group Holdings Plc* [2017] EWHC 1472 (QB), [2017] 4 WLR 116 at paragraph 31, from a submission by counsel that was based on dicta in *Campbell v MGN Limited* [2004] UKHL 22, [2004] 2 AC 457, at paragraphs 21 and 85.

31. Accordingly, most of the argument before me (I heard oral submissions only from Mr Beltrami KC but I also had the benefit of skeleton arguments from counsel for each of the four sets of respondents), was concerned with the question whether the Tort Defendants had a reasonable expectation of privacy in respect of the information contained in their mailboxes and documents.

32. The basis in *Campbell* of the suggestion that a reasonable expectation of privacy is the touchstone of confidentiality is doubtful. At paragraph 21 of *Campbell*, Lord Nicholls said:

> "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

33. In this paragraph a reasonable expectation of privacy was indeed said to be a touchstone, but it was a touchstone of the ambit of an individual's "private life", not of confidentiality.

34. At paragraph 85, Lord Hope did not use the term "touchstone" at all, though he may fairly be said to have been treating the misuse of private information as a species of the traditional cause of action for breach of confidence.

35. Although Lord Hope, but not Lord Nicholls, was one of the majority who allowed Ms Campbell's appeal, it is Lord Nicholls' view that the two causes of action are separate from each other which has now prevailed: *ZXC v Bloomberg* at paragraph 45, *Brake v Guy* [2022] EWCA Civ 235 at paragraph 4.

36. In *ZXC v Bloomberg*, not only at paragraph 45 but also at paragraphs 46, 50 and paragraphs 147-151, the Supreme Court held that at least in some circumstances, the confidentiality of information can be treated as a factor tending to support a reasonable expectation of privacy.

37. In the light of these paragraphs, I think it is mistaken to describe the reasonable expectation of privacy as being a touchstone of confidentiality. I doubt if anything in the present application turns on the point, but my own view of where the law stands at present is that privilege rests on confidentiality (which was common ground before me), and that it is more helpful to consider confidentiality directly on the basis established by Mr Justice Megarry in *Coco v AN Clark*, rather than to attempt an analysis which starts from the reasonable expectation of privacy and moves from there to confidentiality.

38. Certainly both tests involve a similar objective element based on reasonable expectations, but privacy and confidentiality are not to be equated.

39. In reaching this view, I take comfort from the way that Lord Justice Baker put the matter in *Brake v Guy*, at paragraph 66:

> "In reaching his decision that there was no reasonable expectation of privacy, the judge applied the principles set out in *Murray*. In reaching his decision that the defendants were under no duty of confidentiality with regard to the emails, the judge [similarly] ... applied the principles in *Coco v Clark* to the facts as he found them. The claimants have not identified any flaw in [this] ... approach."

40. The question of whether the information was imparted in circumstances importing an obligation of confidence, like the question whether a party had a reasonable expectation of privacy, requires an intensive focus on the facts to assess what a reasonable person in the position of the party seeking to use the information (or in a three party situation the person from whom that party obtained the information) would have understood from all the circumstances in which the information was received. An important similarity between the objective assessment that is required by both the privacy and confidentiality tests is that neither is limited to a binary outcome.

41. *Brake v Guy* concerned a claim in which both tests gave rise to the same answer on the basis of the same arguments. The point that the answer to the objective test is not binary was clearly made by Lord Justice Lewison in his concurring judgment in the case. He said:

> "76. I agree. In *Bloomberg* the Supreme Court distinguished between two stages. We are principally concerned with stage 1. The applicable test at stage 1 is whether, objectively, there is a reasonable expectation of privacy. Although I have expressed the test in that way, that formulation is incomplete. Private and non-private is not necessarily a binary category. Moreover, material may be private as regards some recipients or publishers of the information and not against others. It is not possible, in my view, simply to read across decisions about publication of material in national newspapers to the very different circumstances of this case.
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> 77. In *Bloomberg* at [paragraph 49] the Supreme Court affirmed the formulation of the test by Lord Hope:
>
> > *'Whether there is a reasonable expectation of privacy is an objective question. The expectation is that of a reasonable person of ordinary sensibilities placed in the same position as the claimant and faced with the same publicity.'* (Emphasis added).'
>
> 78. It follows, in my judgment, that the nature of the information, the extent of publication and the identity of those to whom publication is made are all highly relevant at stage 1. Some information may be private as regards some people but not against others. A person communicating highly private information to their solicitor, for example, may not have any reasonable expectation that the information would be kept private as against a paralegal working on the matter. A suspect under investigation may have no reasonable expectation that their

> identity will not be disclosed to a forensic scientist. It all depends on the facts and the overall circumstances. That is why Garnham J was correct in *Simpkin* to consider whether the document in issue was confidential as against the defendant. Whether it would have been confidential as against anyone else is irrelevant."

42. The principle that information can be confidential (or private) as against certain persons, and in relation to certain uses of it, as opposed to having to be absolutely secret or else unrestricted, is important in the law of privilege.

43. The non-binary nature of the relevant assessment has more than one aspect. First, privilege is not lost merely because its owner shows the privileged document to one or more third parties: *Gotha City v Sotheby's* [1998] 1 WLR 114 at 118H to 120B; *USP Strategies Plc v London General Holdings Limited* [2004] EWHC 373 (Ch) at paragraphs 18 to 21.

44. Secondly, privilege in a document is not lost generally against even one of the persons to whom it is shown or given if it was disclosed only for a limited purpose: *Berezovsky v Hine* [2011] EWCA Civ 1089, at paragraphs 28 to 29.

45. Since confidentiality is a necessary condition for privilege, these authorities indicate that confidentiality itself is not simply a quality which information either has or does not have, but may be viewed as a relationship between information, persons and uses. The relationship must be identified from all the circumstances, which indicate to a reasonable person what, if any, kinds of use that person is or is not entitled to make of the information.

46. Finally in relation to legal principles, I have also been reminded in the skeleton argument of Mr Sibbel and Mr Lowe for Aser and Mr Radrizzani, that:

> "In the context of declaratory relief, declarations should (as a rule of practice) rarely be made in the absence of a full trial on the evidence: *The Bank of New York Mellon v Essar Steel India Limited* [2018] EWHC 3177 (Ch) per Marcus Smith J, at paragraph 21(5); see also the CPR Notes at 40.20.3; *Wallersteiner v Moir (Number 1)* [1974] 1 WLR [1991] (CA) per Buckley LJ at page 1029, and Scarman LJ at page 1030; *The Declaratory Judgment* (fourth edition) at 7-28. This is because (as set out above) the court must be satisfied that all sides of the argument have been fully and properly put and that there is a proper evidential basis for the declaration being sought."

Jinxin's argument

47. Counsel for Jinxin made an argument with the following key steps:

(a) the Tort Defendants had no reasonable expectation that MPS would not access the information that they stored on servers controlled by MPS.

(b) it follows that they had no reasonable expectation of privacy as against MPS.

(c) the reasonable expectation of privacy being the touchstone of confidentiality, it follows that the information so stored was not confidential as against MPS.

(d) since MPS had unrestricted access to the information, MPS was free to pass it to Jinxin equally free of restrictions.

(e) alternatively the SHA authorised MPS to pass information to Jinxin against whom the Tort Defendants could have had no reasonable expectation of privacy and therefore no confidentiality.

48. In support of those key steps, counsel drew attention to the following facts:

(a) the Group Directors' email accounts were provided to them by MPS for business use on behalf of MPS.

(b) the Group Directors also had (and/or could easily have acquired) personal email accounts which they were free to use for personal, private or non-MPS business.

(c) the email accounts were hosted on servers controlled by MPS and its IT director, Mr Patel.

(d) all IT was operated centrally on a global basis for the MPS Group.

(e) in or around March 2016, the mailboxes were migrated to the Microsoft Office 365 cloud platform, where they were under the control of an independent contractor, TSG, which had the ability to access any mailbox on behalf of MPS.

(f) Mr Patel and later TSG had the ability to reset users' passwords.

(g) the Group Directors did not generally use encryption as they could have done to protect their information from others.

(h) on 13 May 2016 Mr Silva emailed Mr Patel stating that Mr Pozzali had not been receiving emails. Mr Patel responded on the same date stating that "two emails have been sent to Carlo ... I can confirm both were received into Carlo's mailbox but I will speak with him". This, it is said, showed that Mr Patel accessed Mr Pozzali's emails to the knowledge of Mr Silva.

(i) in similar exchanges in June and August 2016, Mr Patel reported to Mr Auletta and Mr Radrizzani respectively, that Mr Radrizzani's emails were working fine on the server, indicating that he had accessed them.

(j) Mr Silva shared his password with two personal assistants. On at least one occasion in June 2016, Mr Silva appeared to have asked one of his assistants to access his emails in order to check that new emails were being received.

(k) MPS London, which employed around one-third of the total MPS workforce, adopted a staff handbook in 2010 which included an Email and Internet Policy as follows:

> "Employees may not send any emails of a defamatory, pornographic or abusive nature or which constitute sexual, racial or disability discrimination or any other form of harassment. Employees are furthermore not permitted to download any pornographic or other offensive material. MP & Silva Ltd reserves the right to

> monitor all email and/or internet activity by Employees. Any breach of this policy will result in disciplinary action."

(l) the Group Directors ought to have known about the 2010 handbook and ought reasonably to have expected to have been treated in accordance with it, regardless whether it bound them contractually.

(m) the staff handbook was updated in 2017 and 2018. The 2018 version is the important one because it was current when the mailboxes were accessed by Jinxin. This provided:

> "27.6. All MP & Silva email addresses and associated accounts are the property of the company.
>
> 27.7. All MP & Silva related email and IM chat correspondence must be conducted using the company's email and IM systems. Microsoft Outlook for email and Microsoft Skype for Business IM tool.
>
> 27.8. All MP & Silva emails and logged IM chat messages are subject to the Data Protection Act and the Freedom of Information Act and may be legally disclosable.
>
> 27.9. All users working in an employee capacity (hereafter referred to as employee) are responsible for ensuring that any work-related emails are kept according to the Company's Maintenance of Records and Data Protection Policies.
>
> 27.10. Users are permitted to use MP & Silva's email and IM systems for occasional personal use.
>
> 27.11. The associated accounts and their stored data within the company's Email and IM systems are the property of MP & Silva which allows the company the right, where necessary, to monitor/access emails and IMs.
>
> **Confidentiality**
>
> 27.12. You should not assume that internal or external messages are necessarily private and confidential, even if marked as such. Matters of a sensitive or personal nature should not be transmitted by email without care.
>
> 27.13. Internet messages should be treated as non-confidential. Anything sent through the internet passes through a number of different computer systems, all with different levels of security. The confidentiality of messages may be compromised at any point along the way unless the messages are encrypted.
>
> ...
>
> **Interception of communications**
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> 27.31. We reserve the right to intercept any email for monitoring purposes, record-keeping purposes, preventing or detecting crime, investigating or detecting any unauthorised use of our telecommunication systems or ascertaining compliance with our practices or procedures and the law.

> 27.32. We reserve the right to monitor and record any use that you may make of our electronic communication systems for the purposes of ensuring that our rules are being complied with and for legitimate business purposes."

(n) only Mr Silva has stated that he believes that his mailbox is likely to contain privileged material, though Mr Pozzali's solicitors have stated that he also believes his mailbox "may also very well contain privileged and confidential information".

(o) as I have already mentioned, the Group Directors were all either party to or privy to the SHA, including clause 9.3 which provided for a right of access to Jinxin.

49. I refer below to material that would arguably be privileged in favour of a Tort Defendant or a Group Director absent the corporate context as being "putatively privileged".

Discussion

50. Factor (n) above - that there is only very thin evidence that any of the relevant mailboxes or file servers contain any putatively privileged material, and no such evidence at all in relation to Mr Auletta and Mr Radrizzani - may at first sight look rather important. However, there was nothing in the application notice, or the evidence that supported it, which would have suggested that this proposition might be relied upon by Jinxin. The application was put entirely on the basis that the Tort Defendants had no reasonable expectation of privacy in whatever material they stored on MPS servers and that any information, therefore, lacked the quality of confidence and therefore could not be privileged as against MPS or Jinxin.

51. Even in Mr Copeman's third statement served as reply evidence, he did not suggest that this would be a matter upon which the claimant would rely. The application was therefore brought upon the implicit assumption that some of the material in the relevant mailboxes or file servers was putatively privileged.

52. In my judgment that means that factor (n) is not of assistance to Jinxin's application. Mr Beltrami KC accepted that he could not invite the court to make a finding of fact in relation to the content of the relevant data, and he was right to do so for the reason I have just outlined.

53. But that is not to say that factor (n) lacks all significance. It is a striking feature of the evidence on this application that there has been no attempt by Jinxin to identify whether and in what respects there might actually be putatively privileged material in the documents that they have harvested. That may be at least partly because of the agreement the claimant has reached with the Tort Defendants to quarantine documents pending the determination of this application (which Jinxin originally hoped would be listed at the case management conference). Whatever the reasons, the effect is that the court has very little insight into the actual content of the 1.5 million documents with which the application is concerned. In those circumstances, it seems to me that the court should proceed on the assumption that it was implicit in the application itself that the relevant material might well include putatively privileged documents in favour of each of the Group Directors (including Mr Pozzali who is not a party to these proceedings).

54. In *Brake v Guy*, one of the factors that led the Court of Appeal to uphold the judge's dismissal of claims for breach of confidence and misuse of private information was that:

> "Only two of the 3,149 tranche of emails were produced to the judge by the claimants. He was not prepared to accept on the basis of those two emails alone that there was a reasonable expectation of privacy in relation to that tranche. That finding was manifestly open to him on the evidence."

55. This holding confirms the obvious point that the content of the relevant documents would be amongst the facts and matters that determine whether the overall circumstances imported a duty of confidentiality. The court has limited information about the content of the 1.5 million documents. It seems to me that it would be a very strong step indeed for a court to make a final declaration that 1.5 million documents contain no privileged material without evidence from the applicant as to the actual content of those documents.

56. Mr Silva retained a copy of his mailbox which will no doubt overlap to an indeterminable extent with that in the possession of Jinxin. His solicitor, Mr Hitchin of Allen & Overy, provided the following evidence about the content of the material in that mailbox:

> "29. There is a dispute, however, as to whether Mr Silva had a reasonable expectation of privacy in respect of any documents in his Mailbox. Jinxin's position is that Mr Silva had no reasonable expectation of privacy over any documents in the Mailbox or in other MPS Group IT systems. I do not consider that the court can reach such a general conclusion. Without attempting a systematic review at this stage, we have already identified within the Mailbox documents of the following sort:
>
> 29.1. Emails containing information about Mr Silva's personal relationships, including emails with his wife -- by way of example: (a) an email from Mr Silva to a friend and his wife attaching photos of their son -- this email responds to Jinxin's proposed search term 'IMG' because it attaches image files; (b) an email from Mr Silva's wife forwarding photos of their son and his friends; (c) an email from Mr Silva's wife to him and a friend regarding one of their children's friend's birthday parties; (d) emails between Mr Silva and his wife about a plan for a business unrelated to MPS or Silva International -- this responds to the search term 'business plan'; (e) emails involving his wife about delivery of art to their personal residence -- this responds to Jinxin's proposed search term of 'Media Partners' as the art was sent to her as the client but c/o Media Partners and Silva; (f) emails involving his wife and friends about a proposed trip -- this responds to Jinxin's proposed search term of 'Zurich'.
>
> 29.2. Emails about his children, including their sensitive health data -- by way of example: (a) an email from Mr Silva's wife copying him to their son's school; (b) his son's physical evaluation form for school. This responds to the search term 'dd' as this is a signifier for 'date' under the signature block; (c) his son's medical form for football camp -- as above this responds to the search term 'dd'; (d) emails between Mr Silva and his wife about health and emergency

> information for their son's school; (e) emails between Mr Silva and his wife about their son's vaccination.
>
> 29.3. Emails concerning Mr Silva's sensitive health data, by way of example, BUPA authorisation documents.
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> 29.4. Emails about other personal matters -- by way of example: (a) emails with private bankers; (b) emails with estate agents about his family's living arrangements.
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> 29.5. Without waiving any privilege, emails with lawyers about personal matters including an email chain containing legal advice to Mr Silva's wife in respect of a property purchase -- this document responds to Jinxin's proposed search term 'Zurich' because it is the location of one of the law firm's offices.
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> 29.6. Without waiving any privilege, advice from Mr Silva's Italian lawyer about the criminal investigation in 2016 and 2017.
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> 29.7. Emails about charitable donations made in a personal capacity; and
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> 29.8. Invitations to an event in a personal capacity -- for example, an invitation from the directors of Art Basel to a cocktail reception which responds to the search term 'UBS' because they must have been a sponsor.
>
> 30. Having reviewed these documents, it is clear to me -- and Mr Silva has confirmed -- that none of these were created by Mr Silva on MPS's behalf: these are personal, not work, documents."

57. Only a few of these categories include putatively privileged documents, but more of them are suggestive of documents that would ordinarily be confidential and/or private. Jinxin argues that if the Group Directors thought their information saved on MPS's servers would be confidential from MPS, then their views were not reasonable, so that viewed objectively, they lacked the reasonable expectation of privacy that is necessary to found an obligation of confidentiality. As I said, I prefer to identify the question as being whether all the circumstances imported an obligation of confidentiality, but that does not radically alter the nature of the enquiry.

58. Accordingly, this evidence confirms the reasonableness of the hypothesis of the application that at least some of the documents under consideration had content that would normally be viewed as private and confidential and, indeed, that at least some are putatively privileged.

59. Factors (a) to (g) are commonplace in modern corporate life. Practices will no doubt continue to develop, but in the 2010s, any corporate executive would have expected to be provided with corporate email and document storage facilities, and only the most fastidious would have implemented a full segregation between work and private use of such facilities. As Jinxin emphasises, it was also common practice that IT professionals employed by the corporate group had the ability to access these facilities, and if they chose, to read the data stored there.

60. However, Jinxin's evidence also demonstrates, if demonstration were needed, that the purposes for which IT professionals would properly access the data were limited to the provision of IT services, not the extraction of private information about the executives concerned.

61. Factors (h) to (j) above summarise parts of paragraph 15 of Mr Copeman's third witness statement for Jinxin. They confirm the perfectly normal situation in the corporate world that senior executives trust their employees, including especially personal assistants and those employed as IT specialists, to have access to confidential information without taking advantage of such access to misuse such information.

62. In a perfect world, no doubt, all the information on corporate servers would be confidential to the corporation alone, and it would only be the corporation's confidentiality that employees would be obliged to protect. But the mere fact that they had access for proper purposes does not establish whether the real world was perfect in that respect. An executive in the position of the Group Directors might reasonably assume that their personal confidentiality would be equally protected by the duty of the corporation's employees.

63. As Lord Justice Baker made clear in *Brake v Guy* at paragraph 60, ownership of the servers is not decisive, though it is a factor tending against confidentiality as between the Group Directors and MPS.

64. The Tort Defendants dispute (in different ways for each of them) that they are bound by the various employee handbooks and policies to which I have referred. Jinxin accepts that they are not necessarily binding as a matter of contract, but argues that senior executives in the Group (and their corporate vehicles) should be taken as being aware of such policies, and must reasonably have understood that they undermined any reasonable expectation of privacy. For the reasons given above, I prefer to re-frame that submission as being that they must have been aware of facts in the form of the existence of the policies that would have led a reasonable person to understand that information left on company servers would not be left in circumstances that would import an obligation of confidentiality on the part of the company.

65. Without making any finding on the point, I decide this application on the assumption that Jinxin is correct that the Tort Defendants and the Group Directors should be taken as being aware of relevant Group policies, so that those policies form part of the background that was available to reasonable persons in the position of the parties.

66. I have set out the most material part or parts of the relevant staff handbooks at factors (k) to (m) above. In my judgment, reading these fairly, the overall implications included:

    (a) staff were not prohibited from using the Company systems for private communications (implicit in the 2010 handbook, explicit in the 2018 handbook at 27.10).

    (b) staff should be aware of the risks of interception generally and should take care accordingly (2018 handbook 27.12 and 27.13).

(c) staff should not misconduct themselves using electronic communications (2010 handbook, 2018 handbook, 27.31 and 27.32).

(d) MPS reserved the right to monitor and access the material on its servers "where necessary" including in order to detect or police any potential misconduct or for other legitimate business purposes (2018 handbook, 27.32).

67. Jinxin argues that these provisions mean that any and all data stored on MPS's servers were not confidential as against MPS, because relevant staff would have been aware that MPS had the right to access it. In my judgment, this argument wrongly treats the question of confidentiality as having a binary answer.

68. On the present assumption, staff would have been aware that MPS could access data on the servers if required for monitoring or other business purposes. They would not reasonably have understood that MPS was entitled to search the data on their servers for private information belonging to individual staff members with a view to using that information for any purpose whatsoever, including collateral gain.

69. Jinxin's first way of putting their case (key step (d) in paragraph 47 above) was to say that MPS could use the information for any purpose whatsoever, including, for example, selling it to a tabloid newspaper in return for payment. Mr Beltrami KC did not shrink from saying that as far as privilege was concerned, this was indeed the implication of his first argument. This seems to me to demonstrate that the first argument could not be right. Circumstances in which a company permits its employees to use its servers for private purposes but retains a right to monitor them where necessary, do not lead to the conclusion that the company has completely free rein to do as it pleases with any private information that it may find. A reasonable executive would not believe that the company could sell his private information merely because it was left on the corporate server, nor would a reasonable company believe that. In other words, these circumstances import some obligations not to misuse the information, even if they do not imply that the company could not access it at all. The company's ability to access might narrow the scope of what counts as misuse, but it does not negate any idea of confidentiality at all.

70. A less extreme example than a sale to a tabloid might be an employment dispute. In the event of such a dispute arising, would MPS be entitled to access and exploit privileged information belonging to the employee, merely because it was found to be on the servers? I can see little attraction in a positive answer to this question.

71. On the basis that confidentiality is not binary in the way that I have attempted to explain, the next question that arises on the first argument is whether the circumstances did import a duty on MPS not to pass any putatively privileged material that might be on its servers to a shareholder who is in dispute with the relevant employee or executive.

72. In my judgment, a reasonable person would be taken to know of the strong policy of the law in favour of legal privilege as a substantive right which is rarely overridden. The reasonable person would assume that the company's right to monitor and access data on its servers would not extend to locating and exploiting otherwise privileged material for the benefit of a person with an adverse interest to the owner of that privilege, even if that person was a majority shareholder of the company.

73. Just as MPS would not be entitled to sell private information for monetary gain, so it would not be entitled to favour one shareholder by passing over privileged information belonging to another, or indeed to other staff members.

74. Since that would be the reasonable inference from all the circumstances, confidentiality was not lost to that extent and in that respect, from which it follows that privilege has not been demonstrated to have been lost either.

75. It might be said that the reasoning that I have just set out is to some extent circular. I rely on the fact that the information is putatively privileged to demonstrate its confidentiality and thus that the attempt to undermine privilege fails.

76. I do not think that is an objection to the reasoning. As I have said, the nature of the information itself may be highly relevant to the question of whether all the circumstances import an obligation of confidentiality. In this case, all that is known of the information under consideration is that (a) it is assumed to be putatively privileged in favour of the Tort Defendants and (b) it may be relevant to the claim brought by Jinxin.

77. Based on that description, the court cannot confidently hold -- as Jinxin invites it to do -- that MPS must reasonably have understood that it had the right to pass such information on to Jinxin if it wished to do so.

78. The last of the factors I have identified at paragraph 48 above, (o), the SHA, relates to the alternative way in which Jinxin puts its case (at key step (e) at paragraph 47 above); namely that under the SHA, the Tort Defendants have consented to the transfer by MPS of putatively privileged information to Jinxin specifically, even if not to the whole world.

79. Again, there are disputes about the extent to which each of the Tort Defendants is bound by the SHA in respect of all of the relevant data, but I am content to assume for present purposes that it forms a sufficiently relevant part of the circumstances known to all parties to be considered in its terms.

80. I have set out at paragraphs 18 and 19 above clause 9 of the SHA and also Part 2 of Schedule 7. These provisions should be read as a whole to assess whether a reasonable person reading them would conclude that they entitled Jinxin to require, or MPS to agree, to pass to Jinxin putatively privileged material that might assist Jinxin in a dispute with other shareholders.

81. In my judgment the answer to that is plainly that such would not be the reasonable understanding to be gained from clause 9 read as a whole.

82. Mr Beltrami KC founds his contrary argument on the words of clause 9.3(b), “inspect and take copies of documents relating to any group company”, which he says are unlimited and general words. Although that is literally true, these words do nothing to emphasise universality as they could easily have done. Instead, they are immediately followed by “including the statutory registers and all accounting and financial records”.

83. On Mr Beltrami KC's argument, that latter phrase is entirely otiose, which is one possibility. However, in the context of clause 9, whose principal subject matter is

formal and accounting records of the Company, which would be of obvious commercial interest to a Significant Shareholder, I do not think the second part of clause 9.3(b) is entirely otiose.

84. I consider that it conveys to a reasonable reader the flavour of the entitlement of the Significant Shareholder, while leaving the precise boundaries of "documents relating to any group company" undefined. It is then important to notice that clause 9.3 begins with the words "subject to clause 9.4 ..." and that clause 9.4 carves out access that would breach obligations of confidentiality.

85. Mr Beltrami KC has two answers to this. First, he says clause 9.4 provides for a discretion, vested in the board of MPS, to refuse access if it so chooses. I doubt if there is much breadth to this discretion because it is hard to imagine when it could be in the legitimate interests of MPS to breach its legal obligations in this regard for the benefit of a Significant Shareholder.

86. It follows in my view that the true construction of these clauses taken together is that the documents which a Significant Shareholder is entitled to demand access to do not include any where such access would involve the Company breaching an obligation of confidentiality.

87. Secondly, Mr Beltrami KC says that the Tort Defendants are not for this purpose third parties, because they (or their privies) were party to the SHA itself. I think for this purpose, a "third party" is a person other than the requesting Significant Shareholder and the Company (even if such person was party to the SHA).

88. If it had been intended to carve out from the protection under clause 9.4 the rights of confidentiality of the signatories of the SHA, this would have been stated clearly. In any event, the relevant obligations are also here imposed by law.

89. For these reasons, I hold that the SHA does not assist Jinxin. If the confidentiality of the relevant documents survives the other attacks made upon it, then they are not the subject of rights under clause 9.3. The primary basis upon which I so hold is the effect of clause 9.4, though I would also incline to the view that at least some types of private information belonging to individual executives may well fall outside the words of clause 9.3(b) in any event.

Conclusions

90. For the reasons that I have set out in the above Discussion section of this judgment, I do not think that any putative privilege that may exist in the relevant documents has been lost for any of the reasons given by Jinxin. Even if I am wrong in that conclusion, it seems to me that it would not be safe for the court to make a final determination on the present evidence that confidentiality and therefore privilege has been lost in an unknown number of unidentified documents which had been stored on MPS servers at unknown times and in unknown circumstances.

91. Even if I had inclined to the view that confidentiality was most likely undermined by the circumstances in which documents were stored on the servers and/or by the SHA, I would still have declined to make a declaration in the exercise of my discretion, on the basis that it was not safe to do so on such inadequate evidence.

92. Although such a declaration would serve a useful purpose of resolving issues which are presently impeding the disclosure exercise in the case, it should not issue in circumstances where the court has so little detailed evidence to go on.

93. That conclusion is reinforced by the consideration that there are other ways of dealing with the disclosure problem, especially in litigation concerning such large sums and/or important issues as does this claim.

94. One such solution is recorded in *BBGP Managing General Partner Ltd & Others v Babcock & Brown Global Partners* [2010] EWHC 2176; (Ch) [2011] Ch 296, where the party in possession of the disputed documents, in consultation with other parties, employed a second legal team to review them behind an information barrier, so that the court was put in a position to determine issues of principle as to privilege and confidentiality on the basis of both open and closed material.

95. Another example in the reported cases can be found in *Stiedl v Enyo Law LLP* [2011] EWHC 2649 (Comm); [2012] PNLR 4, at paragraph 3. Even in the present case, parties on both sides of the divide have made proposals for alternative ways of dealing with the matter which have not so far resulted in any agreement. But I am confident that some such proposal can be found that would be capable of resolving the present impasse with such assistance from the court as may be required.

96. For this reason also, I would have considered it inappropriate to make an insecure declaration, even had I been convinced on the balance of probabilities that its content would have been correct, which I have not been.

97. I will hear the parties on consequential questions including on how best to move the disclosure process forward from here.