

Jan 17, 2005
Gind

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

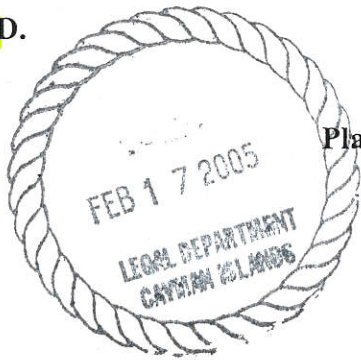
3 CAUSE NO. 227 OF 2004

4
5 BETWEEN:

6
7 **CONDOCO GRAND CAYMAN RESORT LTD.**

8
9 VILLASCO GRAND CAYMAN LIMITED

10 Plaintiffs



11
12 AND

- 13 (1) BROADHURST DACOSTA (A FIRM)
- 14
- 15 (2) REDWOOD HOTEL INVESTMENT CORP. (FORMERLY KNOWN AS
- 16 NANO INC. FORMERLY KNOWN AS MICRO INDUSTRIES INC.)
- 17
- 18 (3) CAYMAN NET LTD.
- 19
- 20 (4) KYC NEWS, INC.
- 21
- 22
- 23
- 24
- 25
- 26

27 Defendants

28 **Appearances:** Mr. Stephen Hall-Jones for the 4th defendant
29 instructed by Diamond Law Associates Attorneys
30 for the 4th defendant

31 Mr. Jeremy Walton of Appleby Spurling Hunter
32 for the plaintiffs



33
34 **Heard:** August 24, 2004

35
36
37 **Before:** The Hon. Justice Henderson

38
39 **JUDGMENT**

40
41 This application raises, although in a preliminary way, the question of the extent to which
42 the public interest exception will protect a journalist from liability for misuse of
43 confidential information.

1

2 The plaintiffs have commenced an action against the fourth defendant, KYC News, Inc.
3 (“KYC”), for damages, a permanent injunction, and an order for disclosure of their
4 sources. The plaintiffs advance claims for breach of confidence, conspiracy to breach
5 confidence and conspiracy to interfere with the economic interests of the plaintiffs by
6 unlawful means.

7

8 On May 24, 2004 Mr. Justice Panton of this court gave leave to the plaintiffs to serve the
9 Writ of Summons and Statement of Claim on KYC in Florida. That order was obtained
10 *ex parte*. I have now conducted an *inter partes* review of the order.

11

12 **Facts**

13

14 KYC distributes news about international finance and financial crime over the internet to
15 paid subscribers. It publishes two monthly newsletters, Offshore Alert and Inside
16 Bermuda, and one weekly newsletter, KYC Alert. Subscribers to these publications may
17 gain access to them over the internet by accessing one of several web sites maintained by
18 KYC for the purpose. In addition, KYC Alert (the weekly newsletter) was distributed to
19 paid subscribers by e-mail until after the commencement of the present action. KYC says
20 that it “promotes its products and services largely via e-mail.”

21

22 KYC is a company registered under the laws of Florida; it is not registered in any other
23 jurisdiction and has no offices or employees in any jurisdiction but Florida. In particular,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

KYC has no assets or employees in the Cayman Islands and no legal or physical presence here.

KYC maintains a journalistic interest in significant financial activities occurring in the Cayman Islands. It is accepted that it has solicited paid subscribers here and has, during the period of time material to this action, made its two monthly newsletters available to them on its web sites and distributed its weekly newsletter to them by e-mail.

The two plaintiff companies are involved in the construction, marketing and sale of various condominiums and villas which are part of the Ritz Carlton Residences project on Grand Cayman Island.

The sole shareholder and director of KYC is Mr. David Marchant. He has published a number of unflattering articles about the plaintiff companies and their principal, Mr. Michael Ryan.

In April, 2004 the plaintiffs and Mr. Ryan were involved in negotiations with Exclusive Resorts LLC for the sale of some units. On April 22, 2004 KYC published an article which included the following information about the negotiations:

“KYC News, April 22, 2004
Financially-strapped, alleged fraudster Michael Ryan is about to receive a cash injection of US \$12.35 million from a high-brow, timeshare company in the United States, KYC News can reveal..

1 Ryan will receive the funds upon the closing of an agreement for Colorado-based
2 Exclusive Resorts LLC to buy properties at Ryan's \$400 million, half-built Ritz-
3 Carlton hotel and condominiums project in the Cayman Islands. The contract is
4 expected to be closed within days, according to a source.

5
6 Exclusive Resorts intends to buy four furnished condominiums in Phase I of the
7 project for US \$13.7 million and 16 villas in Phase 2 for an additional \$40
8 million, KYC News was told.

9
10 Of the US \$12.35 million down-payment, US \$6.85 million is for the condos and
11 \$5.5 million for the villas, said our source."

12
13
14 The plaintiffs say that a number of factual assertions in the article were confidential at the
15 time of publication and must have been obtained by KYC in breach of confidence. These
16 confidential details include the assertion that Exclusive intended to buy four furnished
17 condominiums in phase one for US \$13.7 million and 16 villas in phase 2 for US \$40
18 million. The plaintiffs also point to the revelation of the size of the down payment (US
19 \$6.85 million for the condos and US \$5.5 million for the villas) as information that could
20 only have been obtained by a breach of confidence.

21
22 Mr. Ryan says he has interviewed all of the few people in his organization who had
23 access to the information and has satisfied himself that none of them gave the information
24 to KYC. The corporate counsel to Exclusive has conducted a similar enquiry and sworn
25 to the fact that the negotiations were "conducted in the strictest confidence" and none of
26 the few people at Exclusive involved in them disclosed anything to KYC or to any third
27 party. The plaintiffs do not, at this stage, know how KYC obtained the information.
28 KYC has no intention of telling them; like most journalists, Mr. Marchant intends to
29 protect his sources.

1 The plaintiffs argue that the most reasonable inference, in the absence of an explanation
2 from KYC, is that the information was confidential when KYC obtained it, that it knew
3 that, and that its decision to publish the information amounts to a breach of a duty (or
4 assisting a breach of duty) of confidentiality owed by KYC (or a third party) to the
5 plaintiffs. The information is said to be accurate.

6
7 Around April 20, 2004 the plaintiffs sold unit #312 to Betsy Trimble. On April 29th
8 Mr. Marchant sent an e-mail to Mr. Ryan asking a number of detailed questions about
9 this sale and warning that he would publish an article about it the next day. Mr. Ryan
10 provided no answers. The article, published on April 30th, 2004 by KYC, included
11 disclosure of the following:

- 12
- 13 - Betsy Trimble paid a deposit of US \$100,000 for two units, \$50,000 each;
 - 14 - the combined price of the two units is US \$6.3 million;
 - 15 - she is required to pay US \$3.15 million within thirty days of signing the
16 contract, which she did "recently".

17
18 Mrs. Trimble was contacted by Mr. Marchant prior to the publication, and could have
19 been the source for all of the information in the article. Mr. Marchant does not, however,
20 say so. There is no affidavit from Mrs. Trimble attesting to what she told him. There is
21 no evidence that Mr. Marchant obtained this information from any other source.

22 Mr. Ryan's enquiries have not suggested a source.

23

1 On May 2, 2004 the plaintiffs' attorneys received an e-mail from Mr. Marchant making
2 enquiries about the ongoing negotiations for the purchase of unit #207. The names of the
3 prospective purchasers and a purchase price were mentioned in the e-mail. No answers
4 were provided and no article has been published about these negotiations.

5
6 The latter e-mail also makes reference to an engagement letter between one of the
7 plaintiffs and its attorneys. The date of the letter (December 5, 2001) is specified and
8 some terms of the retainer agreement are described in detail. Mr. Marchant
9 acknowledges having acquired a copy of this engagement letter but does not reveal how
10 he obtained it.

11
12 Mr. Marchant's response on behalf of KYC is that he is a working journalist who
13 happens to have excellent sources feeding him reliable and newsworthy information
14 about the activities of the plaintiffs. He says he is bound only by the law of the United
15 States, in which he carries out his journalistic activities, and that law would not recognize
16 a claim of the sort advanced here. In support, Mr. Marchant has filed the affidavit of
17 Mr. Thomas Julin, an attorney with substantial experience in cases dealing with
18 journalists and their sources.

19
20 **Issues**

21
22 The plaintiffs support their right to serve the Writ of Summons out of the jurisdiction by
23 reference to three provisions of the *Grand Court rules*:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

Order 11

- “1. (1) Provided that the writ does not contain any claim mentioned in Order 75, rule 1 (3) service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ –
- ...
- (b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing) provided that a claim for an interlocutory injunction shall not of itself be a sufficient ground for service of a writ out of the jurisdiction;
- (c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;
- ...
- (f) the claim is founded on a tort, fraud or breach of duty whether statutory at law or in equity and the damage was sustained or resulted from an act committed, within the jurisdiction;”

To succeed, the plaintiffs must satisfy me that they have a good arguable case under at least one of the sub rules quoted above. In addition, the plaintiffs must establish that the Cayman Islands is the most appropriated forum for the trial of their claims: *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] 1 A.C. 460 (H.L.).

Confidentiality

In A.G. v. Guardian Newspapers Ltd. (No. 2) [1990], AC 109 (HL), Lord Goff set down this general principle:

1 “I start with the broad principle (which I do not intend in any way to be definitive)
2 that a duty of confidence arises when confidential information comes to the
3 knowledge of a person (the confidant) in circumstances where he has notice, or is
4 held to have agreed, that the information is such that he should be precluded from
5 disclosing the information to others. I have used the word ‘notice’ advisedly, in
6 order to avoid the (here unnecessary) question of the extent to which actual
7 knowledge is necessary; though I of course understand knowledge to include
8 circumstances where the confidant has deliberately closed his eyes to the
9 obvious.”

10
11 In the decision in *Coco v. A.N. Clark (Engineers) Ltd.* [1969] RPC 41, at page 47,

12 Megarry, J. described the three essential elements of a claim for breach of confidence:

- 13 “ (1) the information must be of a confidential nature;
14 (2) the information must have been communicated in circumstances importing
15 an obligation of confidence;
16 (3) there must be unauthorized use of the information.”

17
18 A number of subsequent decisions have adopted and applied this analysis.

19
20
21 The information must be objectively confidential, and not merely treated as such by the
22 party claiming confidentiality. As to this, Megarry, J. says:

23
24 “It seems to me that if the circumstances are such that any reasonable man
25 standing in the shoes of the recipient of the information would have realized that
26 upon reasonable grounds the information was being given to him in confidence,
27 then this should suffice to impose upon him the equitable obligation of
28 confidence.”
29

30 The first element is that the information must be of a confidential nature.

31
32 KYC devoted a great part of its argument on this hearing to the proposition that none of
33 the information was confidential in nature. It said that none of the information relating to
34 sales of condominiums and villas can be confidential because that information “must in
35 due course be registered with the Registrar of Lands both for land registration purposes

1 ... and the payment of stamp duty ...". It argued that the plaintiffs had no need to treat
2 information about sales of its units as confidential. It said the information is not
3 confidential in the sense of being proprietary or a trade secret, and that KYC was not
4 using the information to compete with the plaintiffs' business. It pointed out that both
5 parties to a negotiation have an interest in the information in question and, if one such
6 party chooses to reveal the information publicly, the other (in the absence of a contractual
7 obligation) should have no complaint.

8
9 In my view, none of these arguments can prevail, at least at this stage.

10

11 To allow service out of the jurisdiction, I must be satisfied only that there is a good
12 arguable case that the information is of a confidential nature. It is not difficult to draw
13 that inference from the nature of the information disclosed here. The details concerning
14 unit prices and down payments are of a sort normally viewed as confidential by the
15 parties to a negotiation.

16

17 The fact that some of this information may have to be disclosed if and when the sale of
18 the real property is registered with the Registrar of Lands is not material. The parties
19 have a right to treat the information as confidential until the moment of registration.

20 Moreover, if the negotiations do not bear fruit for one reason or another, the parties (one
21 assumes) would wish to keep their respective positions taken during negotiations
22 confidential.

23

1 It is clear from a number of cases that confidential information, and breach of
2 confidentiality, can apply to information that is not “proprietary” or a trade secret; see,
3 for example, *A.G. v. Guardian Newspapers*, supra; *Times Newspapers Ltd. v. MGN Ltd.*
4 [1993] E.M. L.R. 443; and *Woodward v. Hutchins* [1977] 1WRL 760.

5
6 I am satisfied there is a good arguable case that the information is of a confidential
7 nature.

8
9 The second element is that the information must have been communicated in
10 circumstances importing an obligation of confidence.

11
12 At this stage, there is no direct evidence of these circumstances. The plaintiffs simply do
13 not know how or by whom the information was communicated to KYC. Mr. Marchant
14 and KYC do not propose to say. All that can be done at this stage is to draw inferences
15 from the nature of the information and the text of the published articles.

16
17 As I have indicated, the information about negotiations for the purchase of units,
18 particularly the information about price and down payments, would likely be viewed by a
19 reasonable man standing in the shoes of the recipient as confidential. Any reasonable
20 recipient of a copy of a law firm’s letter of engagement would probably view it as
21 confidential. At the least, there is a good arguable case for these propositions. I think
22 there is a good arguable case that, in the absence of direct evidence as to the
23 circumstances in which the information was communicated, they were such as to import

1 an obligation of confidence.

2

3 **Public Interest**

4

5 A breach of confidentiality may also in certain circumstances be excused by a finding

6 that the defendant was acting in the public interest: *A.G. v. Guardian Newspapers,*

7 *supra.*

8

9 In English Law, media organizations are not immune from a suit for breach of

10 confidentiality; they may, however, raise in their defence a claim that the breach (and

11 subsequent publication) was in the public interest. The cases are collected and reviewed

12 in *Toulson and Phipps, Confidentiality, London, 1996* at page 74 ff. Most of the

13 authorities treat the public interest element as a defence, not as something which the

14 plaintiff must negative as part of its case. There is no presumption that publication of

15 confidential information by a media organization is in the public interest; each case will

16 turn upon the nature of the publication and the interest served by publishing in spite of

17 the breach of confidence. The public interest defence will, of course, be available to KYC

18 at a trial. The important point, though, is that it is a defence and not something which

19 these plaintiffs must address as part of their case in chief.

20

21 It is obvious from Mr. Marchant's affidavit that he will invoke the public interest in

22 support of his right to publish. I think, therefore, that it is right to take some cognizance

23 of this defence at this stage. I consider that I must be satisfied there is a good arguable

1 case on the question of the public interest. If the plaintiffs can establish a good arguable
2 case that publication of the information in question was not in the public interest, they
3 should have leave to serve KYC out of the jurisdiction.

4

5 The focus of the various publications by KYC about the plaintiffs and Mr. Ryan is to call
6 into question the honesty of their private business dealings. The Ritz Carlton Residences
7 is a very large development with considerable commercial significance to the Cayman
8 Islands. There is thus a public dimension to the plaintiffs' activities which would be
9 absent in the case of many lesser developments. It is arguable that this public dimension
10 justifies publication in breach of a duty of confidentiality.

11

12 Not every revelation of dishonesty and wrongdoing by a public figure, even where
13 supported by cogent evidence, will satisfy the public interest test. Everything depends
14 upon the circumstances. In *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 WLR
15 892 (CA), for example, the Court of Appeal upheld an interlocutory injunction restraining
16 publication of tapped telephone conversations which apparently revealed breaches of the
17 rules of racing (and, perhaps, the criminal law) by a well known jockey. It is equally
18 arguable that the circumstances of KYC's publication, including the inferences that might
19 reasonably be drawn from the confidential information, do not justify a breach of
20 confidence.

21

22 The disclosed information is neither so obviously a matter of public interest that I can
23 safely conclude the action will fail, nor so clearly the opposite that it is bound to succeed.

1 I consider there is a good arguable case that publication of the material by KYC was not
2 in the public interest.

3
4 The third requirement from *Coco v. A.N. Clark (Engineers)*, supra, is that there must be
5 proof of unauthorized use (or “misuse”) of the information.

6
7 The evidence before me establishes a good arguable case that the use of the information
8 published by KYC on the internet and by e-mail was unauthorized by the plaintiffs.

9 There is also a good arguable case that Exclusive did not authorize publication of the
10 information relating to it and Appleby Spurling (attorneys to the plaintiffs) did not
11 consent to a publication of its engagement letter (which, in any event, is a privileged
12 communication).

13
14 Mrs. Trimble was clearly a source of information for the story relating to her and she has
15 not sworn an affidavit. Mr. Marchant has not asserted that Mrs. Trimble was the sole
16 source of the information for the story about her unit purchase, probably because he
17 considers this an inappropriate revelation for a journalist to make. The source or sources
18 for the story about Mrs. Trimble are unclear. In any event, my conclusion concerning
19 Exclusive Resorts and the Appleby Spurling engagement letter is enough to satisfy this
20 requirement.

21
22 I am satisfied there is a good arguable case that KYC has acted in breach of an equitable
23 duty of confidence owed by it to the plaintiffs under the law of the Cayman Islands.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Conspiracy

There are two alleged conspiracies: (1) a conspiracy to breach confidence which, essentially, alleges that KYC obtained the confidential information in circumstances importing a duty of confidence pursuant to an agreement with one or more of the other defendants to obtain, share and use confidential information about the plaintiffs; and (2) a conspiracy to interfere with the economic interests of the plaintiffs by “making unlawful use of the confidential information to harass of (sic) the plaintiffs’ clients and discourage sales of property by the plaintiffs.”

The alleged conspiracy to breach confidence requires proof of an agreement between KYC and at least one other person, with that object. The evidence before me does not make out a good arguable case that there was any such agreement. The critical element – evidence of how and in what circumstances the confidential information was communicated to KYC – is missing. If KYC entered into an agreement with an employee of one of the plaintiffs for the provision of confidential information with a view to publication, that could amount to such a conspiracy. If, on the other hand, an employee of one of the plaintiffs mailed the relevant documents to KYC anonymously and on his own initiative it would not be possible to infer an agreement. Either scenario is equally plausible. In these circumstances, there is no good arguable case of conspiracy to breach confidence.

1 The second of the two alleged conspiracies is not borne out by the evidence. KYC has
2 used the confidential information to contact the prospective purchasers of units and
3 attempt to interview them. The evidence does not support an inference that KYC
4 intended to “harass” the intended purchasers or that its actions had that effect. In
5 addition, there is no evidence that KYC intended to, or succeeded in, discouraging sales
6 of property by the plaintiffs. Accordingly, there is no good arguable case in relation to
7 the claim of conspiracy to interfere with economic interests.

8
9 I conclude, therefore, that neither claim in conspiracy can justify service outside the
10 jurisdiction.

11
12 **Injunction: Order 11 rule 1 (b)**

13
14 Order 11 rule 1 (1) (b) permits service out of the jurisdiction where an injunction is
15 sought ordering the defendant to do or refrain from doing anything “within the
16 jurisdiction.” The statement of claim asks for an injunction restraining KYC from
17 “using or disclosing confidential information” or “communicating” it to any person.

18
19 What effect could such an injunction have within the Cayman Islands? KYC has already
20 stopped sending its newsletters by e-mail to its paid subscribers here. It is certainly
21 arguable that confidential information posted on the KYC web site servers in the United
22 States is “disclosed” or “communicated” to subscribers in the Cayman Islands when they
23 access those web sites. However, none of the activity of KYC which causes the
24 disclosure takes place in the Cayman Islands. The requested injunction can only be

1 effective if it is enforced in the State of Florida.

2

3 The affidavit of Mr. Julin (which has not been contradicted by any evidence from the
4 plaintiffs) establishes very clearly that there is no possibility a Florida court would
5 enforce this injunction. Constitutional provisions in the United States governing freedom
6 of expression are fundamentally incompatible with the law of England and the Cayman
7 Islands. In reality, there is nothing this court can order KYC to refrain from doing within
8 the jurisdiction that will make any difference.

9

10 The second and third requests in the prayer for relief are for an order directing KYC to
11 deliver up confidential information in its possession, destroy copies, and reveal its
12 sources. These, also, must be enforced in Florida to be effective. Again, there is no
13 prospect that a Florida court would grant any assistance to enforce such an order.

14

15 An injunction is a discretionary remedy. If, upon an application for leave to serve out of
16 the jurisdiction, the Court is satisfied that its discretion is unlikely to be exercised in
17 favour of a plaintiff, the request should ordinarily be refused. In *Watson and Sons v.*
18 *Daily Record (Glasgow), Limited [1907] 1 KB 853*, the Court of Appeal set aside an
19 order granting leave to serve a writ (which claimed an injunction) in Scotland because,
20 “even assuming the plaintiff to have a good cause of action, there is no reasonable
21 probability that he will obtain an injunction ...”. The Court must also be satisfied that an
22 injunction is a genuine part of the substantive relief sought and has not

23

1 been claimed merely to bring the action within the terms of Order 11 rule 1:

2 *Rosler v. Hilbery* [1925] 1 Ch 250, at 261 (Court of Appeal).

3

4 The present claim is for an injunction which would be of no use within the jurisdiction
5 and unenforceable outside. In these circumstances, it is entirely likely the Court would
6 exercise its discretion against granting the relief sought. That, in turn, grounds my
7 decision here that there is no good arguable case for injunctive relief. Leave to serve out
8 of the jurisdiction pursuant to Order 11, rule 1 (b) must be refused.

9

10 **Necessary or Proper Party: Order 11 rule 1 (1) (c)**

11

12 Is KYC a “necessary or proper party” to the claims advanced against the other defendants
13 who are within the jurisdiction?

14

15 I have already stated my conclusion that there is no good arguable case in conspiracy
16 against KYC. The question is whether it is a necessary or proper party to the claim based
17 upon breach of confidence.

18

19 There are preconditions to a grant of leave to ~~serve~~ out of the jurisdiction under Order 11
20 rule 1 (1) (c). Service must have already been effected upon at least one defendant within
21 the jurisdiction (although the Court has a discretion to permit service out of the
22 jurisdiction even where service on a local defendant is effected afterwards: *Contadora*,
23 *supra*). This prerequisite has been satisfied. Order 11 rule 4 (1) (d) also requires, where
24 the application is made under rule 1 (1) (c), an affidavit containing the grounds for belief

1 that there is “a real issue” between the plaintiff and the foreign defendant which the Court
2 may “reasonably” be asked to try.

3

4 The term “necessary or proper party” expresses two alternatives; a person may be a
5 “proper” party although not a necessary one: *Massey v. Heynes and Co. and Schenker*
6 *and Co. (1888)* 21 QBD 330; *Wilson Sons and Co. v. Balcarres Brook S.S. Co. [1893]*
7 1 QB 422. Here, it cannot be said that KYC is a necessary party to the action against the
8 other defendants, unless one takes the view that it is necessary to obtain discovery from
9 KYC to determine their source of information. That approach to the issue, however,
10 would run afoul of the rule that leave to serve out will not be granted if the only purpose
11 of joining the foreign defendant to the proceeding is to obtain discovery:

12 Supreme Court Practice, 1999, paragraph 11/1/25, page 98.

13

14 Is KYC a “proper” party? The classic test is whether, if the foreign defendant was
15 present in the Cayman Islands, it could have been joined as a defendant to the same
16 proceeding: *Contadora Enterprises S.A. v. Chile Holdings (Cayman) Limited 1999*
17 *CILR 194 (CA)*; and *Qatar Petroleum Producing Authority v. Shell International*
18 *Petroleum Maatschappijbv [1983]* 2 Lloyd’s Reports at 41. In *Contadora*, the Court of
19 Appeal said: “this depends upon whether a common question of law and fact arises in
20 respect of the claims against each [defendant].”

21

22 Where the joinder of the foreign defendant would confer no real additional advantage on
23 the plaintiff in the litigation, the Court has a discretion to refuse leave: Supreme Court
24 Practice 1999, paragraph 11/1/23, page 97; *Electric Furness Company v. Selas*

1 *Corporation of America* [1987] RPC 23. The example given in the White Book is where
2 the proposed defendant outside the jurisdiction has merely induced the tort of the internal
3 defendant and the total damages will not be increased by the joinder.

4
5 The position is summarized in *Dicey and Morris*, the Conflict of Laws, 12th edition,
6 London, 1993, at page 326 in this way:

7 “Y, who is out of England, must be either a necessary or proper party to the
8 action. If Y is a proper party it is not also a requirement that he be a necessary
9 party; but if adding Y is likely in practice to achieve no potential advantage for
10 the plaintiff, it would not ordinarily be a proper case for service out of the
11 jurisdiction. The question whether Y is a proper party to an action against X
12 depends on this: supposing both X and Y had been in England, would they both
13 have been proper parties to the action? If they would, and only one of them, X, is
14 in this country, then Y is a proper party and leave may be given to serve him out
15 of the jurisdiction. It is not necessary that the alleged liability of Y be joint or
16 several with that of X.”

17
18

19 Two not necessarily consistent principles emerge from these authorities:

20

21 (1) if the foreign defendant were in the Cayman Islands and could be properly be
22 joined as a defendant to the action, then it is a proper party; but

23

24 (2) if adding the foreign defendant is likely in practice to achieve no potential
25 advantage for the plaintiff, it will not ordinarily be a proper case for service
26 out of the jurisdiction.

27

28 I am satisfied that if KYC had a presence in the Cayman Islands and could be served
29 here, it could properly be joined as a defendant in the action. There are common
30 questions of law and fact which arise in respect of the claims against the four defendants.

31 An example is the question of whether the information in question was confidential.

32 However, I am also driven to the conclusion that adding this foreign defendant is likely to
33 achieve no real or practical advantage for these plaintiffs. I have already concluded
34 above that they are unlikely to obtain any of the injunctive relief for which they ask. As I

1 have concluded below, there is no good arguable case that any damage of significance
2 has been sustained. This is a case in which I should exercise my discretion to refuse
3 leave.

4

5 **Breach of Duty: Order 11 rule 1 (1) (f)**

6

7 I turn to a consideration of the test in Order 11 rule 1 (1) (f) – “the claim is founded on a
8 tort, fraud or breach of duty ... and the damage was sustained, or resulted from an act
9 committed, within the jurisdiction.”

10

11 The decision in *Metall und Rohstoff A.G. v. Donaldson [1989] 3 WLR 563* provides a
12 further question for consideration where it is alleged for the purpose of satisfying
13 Order 11 rule 1 (1) (f) that damage was suffered within the jurisdiction. If the tort or
14 breach of duty was in substance committed in a foreign country, the acts constituting that
15 tort or breach of duty must be shown to be actionable under the law of the foreign
16 country in question as well as the law of the Cayman Islands. This is the “double
17 actionability” rule derived from *Boys v. Chaplin [1971] AC 356*. If, however, the cause
18 of action in substance arose within the jurisdiction even though the alleged breach was
19 committed at least partly in the foreign country, the double actionability test does not fall
20 to be considered. (Breach of confidence is not a tort but a breach of an equitable duty:
21 see the discussion in *Toulson and Phipps*, supra, at page 26 ff.)

22

23 In determining whether the impugned conduct “in substance” occurred in the Cayman

1 Islands, the Court of Appeal cautions against examining the various acts in isolation; a
2 relatively broad approach must be taken: *Metall und Rohstoff A.G.*, supra, page 593.
3 Examples of what is meant were provided by the Court of Appeal. In *Diamond v. Bank*
4 *of Montreal Ltd.* [1979] 1 QB 333 and *Cordoba Shipping Company v. National State*
5 *Bank* [1984] 2 Lloyds Rep. 91, the claim was for fraudulent or negligent
6 misrepresentation made by telex or telephone originating outside the jurisdiction but
7 received and acted upon within it. These were held to be claims “founded” on a tort
8 “committed within the jurisdiction.” In *Castree v. E.R. Squibb & Sons Ltd.* [1980] 2 All
9 ER 589, the claim was for product liability concerning a machine manufactured in
10 Germany but purchased in England. It was held that this claim was founded on a tort
11 committed within the jurisdiction.

12
13 The confidential information in question here concerns transactions involving property in
14 the Cayman Islands and a property vendor located here. There is no direct evidence of
15 where the information was conveyed to KYC; it is reasonable to think that at least some
16 of it was communicated to KYC by someone in the Cayman Islands at the time. The
17 information would have been transformed into an article for publication at the office of
18 KYC in Florida. KYC uploaded it to a server located somewhere in the United States for
19 posting on its web sites. Subscribers in the Cayman Islands (and elsewhere) would then
20 have entered a URL into their internet browser in order to download the information from
21 a KYC server and view it on their computer screens. KYC also sent the information by
22 email to subscribers in the Cayman Islands. To do so, KYC uploaded the email messages
23 to a server in the United States, which sent them on to the servers used by the various

1 subscribers. Finally, the subscribers used their own software to download and display the
2 messages on their own computer screens in the Cayman Islands.

3
4 Thus, the claim for breach of confidence alleges a chain of acts and events which
5 collectively constitute the alleged breach of duty. The chain starts with the imparting of
6 the information by someone (we don't know who) to KYC and ends with a paid
7 subscriber in the Cayman Islands viewing the information on a computer screen. Taking
8 the relatively broad approach adopted by the cases I have mentioned, I consider that there
9 is a good arguable case that this claim is founded on a breach of duty which, in substance,
10 was committed in the Cayman Islands. That is so notwithstanding that some of the acts
11 in the chain of events I have mentioned occurred in the United States. In reaching this
12 conclusion, I have derived much assistance from the decision of the High Court of
13 Australia in *Dow Jones v. Gutnick* [2002] HCA 56.

14
15 I conclude, therefore, that any damage sustained by the plaintiffs as a result of the breach
16 of confidentiality "resulted from an act committed within the jurisdiction."

17
18 By its terms, Order 11 rule 1 (1) (f) requires a good arguable case that some damage has
19 been sustained.

20
21 Since it cannot be argued that KYC was under any contractual duty, express or implied,
22 to the plaintiffs, the claim for damages for breach of confidence must be treated as a
23 claim for damages in substitution for an injunction. That view of the pleading raises

1 immediately a further difficulty – if there is no case for the grant of an injunction, an
2 award of damages in lieu of one is not supportable. In *Malone v. Metropolitan Police*
3 *Commissioner* [1979] 1 Ch 344, Sir Robert Megarry, V. – C. said:

4 “under Lord Cairns’ Act 1858 damages may be granted in substitution for an
5 injunction; yet if there is no case for the grant of an injunction, as when the
6 disclosure has already been made, the unsatisfactory result seems to be that no
7 damages can be awarded under this head: see *Proctor v. Bayley* (1889) 42 Ch.
8 d. 390. In such a case, where there is no breach of contract or other orthodox
9 foundation for damages at common law, it seems doubtful whether there is any
10 right to damages, as distinct from an account of profits ...”
11

12 In any event, the evidence before me does not contain a good arguable case that either
13 plaintiff has suffered damage as a result of the breach of confidence. The evidence is
14 scant. Mr. Ryan addresses the subject in paragraph 6 of his first affidavit:

15
16 “The Plaintiffs’ business and reputation have been prejudiced by the continued
17 unauthorized disclosure of confidential information to the Defendants, including
18 personal information relating to prospective purchasers. In particular, the Fourth
19 Defendant has recently used the leaked information to make harassing telephone
20 calls to the purchasers of Unit #312 and Unit #207, at work and at home, making
21 various allegations of a dispute on the title of each property and fraud on the part
22 of the Plaintiffs. Such unauthorized contact by the Defendants to the Plaintiffs’
23 clients is clearly detrimental to the Plaintiffs’ business. Without an order for
24 disclosure of the parties who are leaking such information to the Defendants,
25 prospective sales may be derailed or lost.”
26

27 Mr. Ryan also says (first affidavit, paragraph 33):

28 “If one or more of the Defendants is receiving such confidential information from
29 someone within my organisation, I need to know this as soon as possible so that
30 the relevant person can be dismissed. Equally, if the information is being
31 intercepted in email communications, I need to know so that appropriate security
32 measures can be taken in relation to the Plaintiffs’ IT systems. Until the true
33 position is known, these disclosures are creating significant uncertainty and
34 anxiety among my employees, who are increasingly tense and distrustful of each
35 other. The disharmony of staff in our small office also impacts on the
36 administration of the Plaintiffs’ business. Staff currently feel that they cannot

1 exchange information as freely and openly as before. Productivity and efficiency
2 are being negatively affected by the slower exchange of information from the
3 additional measures which are being put in place by the Plaintiffs to determine the
4 source of the leaks within our organisation.”
5

6 I have already found that the evidence does not establish any harassment of purchasers by
7 KYC. There is no evidence that either plaintiff has lost any income or business
8 opportunity as a result of KYC’s disclosures. There is no evidence that the purchasers of
9 the two units in question – nos. 312 and 207 – have backed out because of the intrusion
10 into their privacy. The purchaser of unit 207 was clearly annoyed by KYC’s inquiries,
11 but the evidence does not go beyond that.
12

13 As grounding for a claim for damages I find the evidence unconvincing. It lacks
14 specificity. In all likelihood, the real cause of the negative impact on “productivity and
15 efficiency” was that an employee of one of the plaintiffs disclosed confidential
16 information in breach of his obligation of confidentiality. Insofar as the claim for
17 damage depends upon disruption in the plaintiffs’ operations, it is the initial leak of the
18 information, rather than its subsequent publication, which has caused any reduction in
19 productivity or efficiency.
20

21 The plaintiffs have the burden of establishing a good arguable case under Order 11,
22 rule 1 (1) (f). That includes the need to show that some significant damage has been
23 sustained as a result of any breach of confidentiality. The affidavit evidence does not rise
24 to a level of cogency which can be described as a “good arguable case” on the question of
25 damage.

1 Conclusion

2

3 For these reasons, the *ex parte* order granting leave to serve KYC out of the jurisdiction

4 is discharged. Counsel may speak to costs if they are unable to agree.

5

6 Dated this 17th day of January, 2005

7

8

Henderson, J.

9 Henderson, J.

10 Judge of the Grand Court

