The silent treatment

Confidentiality agreements Although these can be useful in property transactions, as Rachel Wevill explains there may be limited remedies for breach

Even in the commercial sector, real estate transactions can be emotive. Perhaps it can be explained by the tangible nature of the asset or by the "Englishman's home (office/light industrial site) is his castle" mentality. Whatever the explanation, as a nation we are fascinated by property. However, parties often want to keep their deals away from prying eyes.

Confidentiality agreements are used for many reasons; a purchaser that proposes to build a chemical plant will first want to secure the deal with the developer before facing a potentially hostile public; or the property may form part of a transaction involving a number of bidders, and confidentiality agreements may be put in place while advisers carry out due diligence.

How do the agreements work?

It is a principle of equity that a party that has received information from another in confidence cannot take unfair advantage of it. However, the concept of information received in confidence is vague; putting an agreement in place can clarify the obligation of confidence, support a claim in equity and, if properly drafted, create contractual rights.

The importance of thorough drafting is illustrated in *Vercoe* v *Rutland Fund Management Ltd* [2010] EWHC 424 (Ch); [2010] PLSCS 108. Although equity imports principles, it is often the case that the courts, given the presence of a contract, will assume that the parties have drafted for every contingency they wanted to cover.

In *Vercoe*, Sales J said: "Where parties to a contract have negotiated and agreed terms governing how confidential information may be used, their respective rights and obligations are then governed by the contract and in the ordinary case there is no wider set of obligations imposed by the general law of confidence."

Confidentiality agreements can take the form of deeds or letters of undertaking but, in order to have teeth, the document must contain contractual consideration. This is rarely monetary, but could take the following form: "In consideration of Party 1 supplying Party 2 with, or authorising the supply to Party 2 of information relating to the Property, Party 2 agrees with Party 1 in the terms set out in this agreement."

A prinicple of equity dictates that a party receiving information in confidence cannot take unfair advantage of it

In the absence of a clear fiduciary duty, a successful claimant is likely to obtain damages, not a profit-based remedy

The information that is to be kept confidential should be defined. Often, the definition is initially widely drawn – for example, "all information relating to the Property which is disclosed (whether before or after the date of this agreement)" – but is then limited so that it is ultimately defined more by what it is not than by what it is. In many circumstances, confidential information does not include information that is generally available to the public by other means or that may be agreed between the parties as not being confidential.

Concessions are usually carved out so that the confidential information may be disclosed to professional advisers or, if required by law, to the Stock Exchange or HM Revenue & Customs. Typically, the parties will agree not to use the remaining confidential information to the disclosing party's detriment or to procure a commercial advantage.

There is no statutory limit on the duration of a confidentiality agreement and it is as usual to see it continuing without limitation as it is to see it limited to the first anniversary of completion of the agreement.

Enforcement and remedies for breach

In *Vercoe*, the claimant informed the defendant of a company that was a potential acquisition target. The disclosures were protected under a confidentiality agreement.

The defendant proceeded with the acquisition without involving the claimant, later selling the company at a substantial profit. The claimant sued for breach of confidence (both in contract and in the law of confidence), arguing that, in view of substantial gains made by the defendant, it should be entitled to an account of profits.

Sales J held that the defendant had acted in breach of confidentiality obligations that it owed to the claimant. He considered that the appropriate remedy in respect of (i) the breach of contract and (ii) the equitable claim of breach of confidence was the same: an award of damages assessed by reference to the notional reasonable price that the defendant should have paid to secure a release from the claimant's rights to enable it to proceed with the acquisition without involving the claimant.

However, he continued that:

> In some situations, where the rights of the claimant are of a particularly powerful kind and his interest in full performance is recognised as being particularly strong, there may well be a tendency to recognise that the claimant should be entitled to a choice of remedy (both as between damages and an account of profits, and also possibly as between different bases of calculation of damages, such as by reference to loss actually suffered or by reference to a notional reasonable agreement to buy release from his rights). There are indications in the authorities that this may more readily be found to be appropriate in cases involving infringement of property rights...

This reflects the importance that the law usually attaches to property rights.

The judge said that it may be more appropriate to award an account of profits where the right in question is of a kind that could not be expected to be bought out for a reasonable fee, so that it is accordingly deserving of a particularly high level of protection (such as the promise to keep state secrets that was in issue in *Attorney General* v *Blake* [2001] 1 AC 268). He also commented that in most cases involving property rights, the property would be of a type that is regularly bought and sold in a market where damages assessed by reference to a notional buy-out fee would be deemed to be appropriate and fair.

Useful, but...

Although it might be argued that the judge has left open the door to more substantial profit-based damages in a proprietary context, it should be noted that his comments were *obiter* and that the decision was first instance. *Blake* remains the only case in which the claimant was awarded an account of profits, and the facts – state secrets were at stake – were clearly exceptional.

Confidentiality agreements are a useful tool for use in property transactions. However, it remains unlikely that, in the absence of a clear fiduciary relationship between the parties, a claimant suing under such an agreement would be awarded a profit-based remedy, rather than damages calculated by reference to the consent that should have been paid to secure release from the terms of a confidentiality agreement.

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