IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00224

BETWEEN	**WINFIELD BOBAN**	**CLAIMANT**
AND	**MEDICAL TECHNOLOGIES (MEDITECH) LTD.**	**1ST DEFENDANT**
	DONOVAN ST. L. WILLIAMS	**2ND DEFENDANT**

Interlocutory Application - Breach of confidence – Right to protection of privacy of communication - Quia timet injunction to restrain disclosure of identity

Joan Thomas instructed by E.D. Davis & Associates for the Claimant / Respondent

Georgia Hamilton instructed by Georgia Hamilton & Co for the 1st Defendant / Applicant

Michael Gonzalez for the 2nd Defendant

IN CHAMBERS

Heard: 10th and 18th November 2016

BATTS J,

[1] This dispute concerns the ownership of 40,000 shares in the 1st Defendant. The determination of the claim will rest significantly on the resolution of factual issues surrounding the circumstances in which the shares were acquired. The authorised share capital of the 1st Defendant is 100,000 shares, 40,000 of which were transferred

to the Claimant in or about December, 2008 .They were thereafter transferred to the 2nd Defendant in or about April, 2009.

[2] The Claimant says that the shares are being held on trust for him whilst the 1st Defendant says that the Claimant has no interest in the shares. The 1st Defendant says that the 2nd Defendant holds the shares on security for or on behalf of an individual who made monetary loans or investments to the 1st Defendant. I will refer to this individual as **A**. The 1st Defendant says that this arrangement was to assure the confidentiality of **A's** relationship with it.

[3] The Claimant is the former Chief Executive Officer and a former Director of the 1st Defendant which is a company incorporated under the laws of Jamaica. The 2nd Defendant is an Attorney-at-law.

[4] This judgment does not concern the substantive claim. It concerns interlocutory relief sought by the parties pending the determination of the claim. At this interlocutory stage the court will not embark on a trial of the matter. I make no factual findings as it relates to the ultimate issues for determination. There were two applications before the Court. The first was filed on the 16th August, 2016 by the Claimant who sought orders for disclosure and orders to restrain the 1st Defendant in its dealings with its shares and assets. The second application was filed by the 1st Defendant to prevent the disclosure of **A's** identity and his connection to the 1st Defendant.

[5] The Claimant's application came on for hearing on November 9th, 2016. That date was treated as the first hearing of the Fixed Date Claim Form and I proceeded to make the usual case management orders and orders agreed upon. The 1st Defendant's application was adjourned to the 18th November, 2016 to allow time for the 1st Defendant to file a sealed copy of a supplemental affidavit, for the eyes of the Judge only.

[6] On the 18th November, 2016 the 1st Defendant proceeded with its application to restrain the Claimant from disclosing **A's** identity. Having heard submissions and considered the evidence presented I ruled in favour of the 1st Defendant and made the

orders at paragraph 27 of this judgment. I promised then to put my reasons in writing at a later date. This judgment fulfils that promise.

[7] Counsel for the 1st Defendant premised her submissions on the rights of the parties to a reasonable expectation of privacy. The Claimant opposed the application. I am grateful to both Counsel for the assistance provided and, although I will not refer to them to a fulsome extent, Counsel should rest assured that their submissions were carefully considered.

[8] The principles on which the court relies when considering whether to grant an injunction are those stated in the oft cited decision of **American Cyanamid v Ethicon** [1975] 1 All ER 504. That decision was endorsed and explained by the Judicial Committee of the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UK PC 16. I find it useful to refer to the words of Lord Hoffman in **National Commercial Bank v Olint** (above). At paragraph 17 he explains ;

> *" 17. In practice however, it is often hard to tell whether either damages or the cross undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408: ' It would be unwise to attempt even to list all the various matters which may be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."*
>
> *18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring, the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' case."*

[9] I believe also that Lord Diplock's caution in **American Cyanamid** at page 510 is worthy of repetition in full:

> *"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.*
>
> *Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the Defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.*
>
> *Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.*

> *I would reiterate that, in addition to those to which I have referred, there are many other special circumstances of individual cases."*

[10] Their Lordships in the Privy Council made it clear that a "box ticking" approach is not always helpful. In a case such as the present, for example, the relief being sought is an injunction at the interlocutory stage. However, it does not directly relate to the cause of action in the claim. The 1st Defendant is the applicant and wishes to prevent the Claimant making public certain information prior to the trial date. The court must first consider whether the 1st Defendant has a legal basis for such relief.

[11] The 1st Defendant's Application to the court was prompted by the Claimant's action of exhibiting documents in support of its application for interlocutory relief which disclosed **A's** identity. The 1st Defendant fears that the disclosure may become public. It is as a consequence of this fear that it filed a Notice of Application for Court Orders on the 9th day of November, 2016 seeking the following relief;

> *"1. All parties are restricted from disclosing any information or making any comment, whether public or private, or passing on to any person any information pertaining to the proceedings herein save and except for the limited purpose of obtaining professional advice for the purposes of prosecuting their respective claim or defence herein, as the case may be.*
>
> *2. The file herein shall be retained in the private custody of the Registrar of the Supreme Court*
>
> *3. The time for filing and serving this Notice of Application is abridged.*
>
> *4. Costs to be costs in the Claim.*
>
> *5. The 1st Defendant's attorneys-at-law to prepare, file and serve the Orders herein."*

[12] The grounds on which the 1st Defendant sought the orders were as follows;

> *"1. The 1st Defendant wishes to vigorously defend this matter and requires the above orders to prevent its being inhibited in mounting the said defence.*

> *2. The 1st Defendant has only recently retained counsel in these proceedings and given counsel's hectic schedule, she was delayed in taking full instructions and advising on the matter.*
>
> *3. The 1st Defendant knows of no detriment to the Claimant or any other party that could arise from the granting of the orders herein.*
>
> *4. The granting of the orders herein will enable the court to proceed with the claim fairly and expeditiously."*

[13] At the crux of the 1st Defendant's application was the submission that the parties are entitled to a reasonable expectation of privacy. That expectation is said to have arisen out of an arrangement, understanding or agreement between the parties at the time when the business commenced. There was, it is said, no legitimate public interest in the confidential information being made public. The information was not yet in the public domain. On the facts of this case, the 1st Defendant argued, the right to privacy should prevail over the right to freedom of expression because of the implications for **A** and the 1st Defendant's ability to prosecute its defence if the confidence was not respected.

[14] An examination of the law relating to breach of confidence is useful in assessing whether the 1st Defendant is entitled to enforce its reasonable expectation of privacy. The law relating to breach of confidence has developed from equitable principles. Lord Keith of Kinkel in the House of Lord's decision of **Attorney – General v The Observer Ltd and others** [1990] 1 AC 109 at page 255 paragraph D, stated as follows;

> *"The Crown's case upon all the issues which arise invokes the law about confidentiality. So it is convenient to start by considering the nature and scope of that law. The law has long recognized that an obligation of confidence can arise out of particular relationships. Examples are the relationships of doctor and patient, priest and penitent, solicitor and client, banker and customer. The obligation may be imposed by an express or implied term in a contract but it may also exist independently of any contract on the basis of an independent equitable principle of confidence: Saltman Engineering Co. Ltd v Campbell Engineering Co. Ltd. (1948) 65 R.P.G. 2003."*

[15] The authority of **Coco v A.N. Clark (Engineers Limited)** [1969] RPC 41, which was approved and applied by the court in **Attorney – General v The Observer Ltd and**

others (cited above), concerned the equitable doctrine relating to confidential information and outlines three elements of the tort of breach of confidence. Justice Megarry stated that this doctrine applies to situations where as here there was no contractual relationship, (page 47):

> *"I think it is quite plain from the Saltman case that the obligation of confidence may exist where, as in this case, there is no contractual relationship between the parties. In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation.*
>
> *In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed.* ***First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.*** *I must briefly examine each of these requirements in turn."[my emphasis added]*

[16] Megarry J, in determining whether information was confidential in nature considered whether it was already common knowledge. In the case at bar the business relationship between **A** and the 1st Defendant was not public knowledge. In fact it was always understood by the parties that it was confidential. The evidence before the Court supports this. The Claimant in his own Affidavit has referred to the 1st Defendant as a *"silent partner"*. Mr. Athol Hamilton, a director, company secretary and shareholder in the 1st Defendant referred to **A** exclusively as his *"longtime friend".*

[17] The circumstances of the formation of the company as the Claimant alleged them to be were detailed in the Particulars of Claim filed in support of the Fixed Date Claim Form. At paragraph 5 he states;

> *"On or about the year 2007, Mr Athol Hamilton, Trudy-Ann Ricketts****,*** ***a silent partner*** *and the Claimant agreed to form the company*

> *Medical Technologies (MEDITECH) Ltd, a company whose core business was the importation and / or distribution of medical supplies (sic), and the development of medical (sic) supplies and medical supplies technology (sic)." [my emphasis added]*

[18] The Claimant in an affidavit filed on August 16th, 2016 in support of his Application for Court Orders recalls the details of formation in similar terms at paragraph 2 of that Affidavit he states;

> *"In the year 2007 Mr. Athol Hamilton, Trudy-Ann Ricketts, **a silent partner** and myself agreed to form the company Medical Technologies (MEDITECH) Ltd." [my emphasis added]*

On each recount the Claimant kept confidential the name of the person whom he asserts to be the silent partner.

[19] Athol Hamilton in his Affidavit on behalf of the 1st Defendant also kept **A's** identity confidential. His evidence is contained in an affidavit filed on November 9th, 2016. I will refer to excerpts of the relevant portions of his Affidavit.

> *"7. That the circumstances in which Meditech was incorporated are as follows;*
>
> *a. That round about 2007, Trudy and I were looking for a business opportunity and, given my background as a biologist, **one of Trudy's cousins, who is also one of my longtime friends**, suggested that there were emerging opportunities in the importation and distribution of medical supplies as well as the development of medical supplies and medical supplies technology; and*
>
> *b……*
>
> *8. That, indeed, round about the time that Trudy and I were promoting Meditech, it was my said **longtime friend** who introduced me and, by extension, Meditech to the Claimant. The Claimant and my said **longtime friend** had been business associates for some time before this……..*
>
> *9……*
>
> *10……...Whilst my **longtime friend** kept making advances to Meditech, he had concerns about a potential conflict of interest given his status, at the time and did not wish to become a*

> *shareholder in Meditech. He was also very concerned about having some form of security for these advancements and, as Meditech did not have an asset base,* ***my longtime friend****, the Claimant and I discussed the matter and we decided that the best holding position was for the Claimant to hold some shares on his behalf , as security for all the advances he had made……..*
>
> *11……..*
>
> *12……*
>
> *13……..*
>
> *14. That in relation to paragraph 9, I wish to state that the Claimant's employment contract with the company had nothing to do with the arrangement he had to hold the said shares for* ***my longtime friend,*** *as security for the advances that were made to Meditech..*
>
> *15. ……..*
>
> *16……*
>
> *17……"*

Paragraph 18 of this Affidavit bears significance so far as it highlights to the court the concern of the 1st Defendant over the disclosure of the identity of **A**.

> *"18. … That any meetings Meditech had with the Claimant since his resignation have been with a view to facilitating a tidy resolution of the matter, as I am concerned for the implications that a public fight could have for my said* ***longtime friend****. That the Claimant very well knows this and I am of the firm belief that this claim is filed with the sole intent to exploit this difficulty. That, indeed, Meditech was served at a time when we were awaiting legal advice on how to proceed given the delicate nature of the matter and the missteps that we have made. That Meditech now fully intends to file a claim for rectification of the register of members to have those 40,000 shares restored to it or such declaration as the Court deems fit in these circumstances." [my emphasis added]*

Mr Hamilton also says that while loans from **A** have always been reflected on the 1st Defendant's balance sheet **A's** name does not appear as the lender. As regards Megarry J's first limb, the information clearly had the necessary quality of confidence.

[20] In considering the second limb of the test in **Coco v A.N. Clark (Engineers Limited)** [1969] RPC 41 I am of the view that the information was imparted in circumstances importing an obligation of confidence. Megarry J, made this pronouncement about the second consideration(page 47-48) ;

> *"However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential."*

He then continued,

> *"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."*

On the evidence it seems to me that the information concerning the identity of **A** has been communicated in circumstances which infer a positive duty to hold it confidential. In fact as already highlighted the Claimant himself implicitly acknowledged this duty by referring to **A** as a silent partner and to other individuals concerned in the case at bar by name. If I was to ask the question of the officious bystander, as was done in **Coco v A.N. (Engineers Limited)**, [1969] RPC 41, do you think you ought to have had an express agreement that the identity of **A** remain confidential? The answer in all probability would be "*obviously yes*". In this regard it is appropriate to again refer to Megarry J (page 51) :

> *"In relation to the obligation of confidence the corresponding proposition would be that I must be satisfied not merely that, if asked, the parties would have thereupon made an express agreement that the discussion was to be confidential, but that, if asked, the parties would have said that it was obviously already a confidential discussion. Even applying that more stringent test, I feel no doubt on the evidence before me that there was here an implied obligation of confidence. The circumstances of the disclosure in this case seem to me to be redolent of trust and confidence. Business men naturally concentrate on their business, and very sensibly do not constantly take legal advice before*

> *opening their mouths or writing a letter, so that business may flow and not stagnate. I think the court, despite the caution which must be exercised before implying any obligation, must be ready to make those implications upon which the sane and fair conduct of business is likely to depend. Certainly where the circumstances are such that in the case of a contract the offices of the officious bystander would produce an implied term, in other cases equity would, I think, be at least as ready to imply the equitable obligation. For as Mr. Mowbray pointed out, in equity the question is not one of inserting terms into a contract which is presumed to have expressed all that the parties intended, but is merely one of imposing an obligation based on good conscience in a field unoccupied by any contract. In the case before me I would imply a term if there were a contract, and so, a fortiori, I imply the equitable obligation. This fortunately makes it unnecessary for me to attempt to resolve the degree of less compelling circumstances which would suffice to establish that obligation."*

[21] Upon a review of the evidence it cannot be said the 1st Defendant has no legal basis to prohibit disclosure of the information. The information as to **A's** identity was never in the public domain. The parties at all times recognised that the information was to remain confidential. Finally, and as it relates to Magarry J's third condition the Claimant by attaching certain exhibits to his affidavit filed on 16th August, 2016 and by identifying **A** in his affidavit filed on the 17th November, 2016, clearly threatens to break that confidence if the affidavits were to become public knowledge. Equity will act to prevent a breach of this confidence.

[22] I therefore move on to consider the question of adequacy of damages. I do not believe that damages would be an adequate remedy. This is because once the confidence is breached the effects would be difficult to measure. These involve the public perception (even if erroneous) about **A** and the possibility, as expressed by the Defendant, of A not cooperating with their defence**.** The Claimant on the other hand has not shown that any prejudice would be occasioned to him if the injunction were granted in favour of the 1st Defendant. I accept the submission of the 1st Defendant that the granting of the injunction would not impede the Claimant from pursuing his claim in any way. It is to be observed that the relief granted would not preclude the Claimant from utilizing the information in the pursuit, preparation or presentation of his claim. It does

not extend to the trial or its conduct which will be in public nor to the cross examination of witnesses in respect of the said information.

[23] This is an application for a quia timet injunction in that the 1st Defendant has not yet suffered any detriment. It is therefore pertinent to consider whether the 1st Defendant is likely to suffer detriment if the information is disclosed. I believe it would. The purpose of the arrangement between the parties is to protect **A's** reputation and I suppose also the reputation of the 1st Defendant. I have upon a review of the evidence, and in particular the confidential affidavit filed for my eyes only, found that there is no illegality involved. The 1st Defendant is justified in the view that the disclosure of the confidential information may adversely affect **A** and in consequence inhibit Meditech in mounting its defence.

[24] Lord Keith of Kinkel in **Attorney – General v The Observer Ltd and others** (cited above) thought that detriment was not an essential ingredient in determining whether an injunction should be granted to prevent a breach of confidence. Although, I have found in this case that detriment will accrue I respectfully adopt the words of Lord Keith of Kinkel (at page 255 paragraphs E-G):

> *"It is worthy of some examination whether or not detriment to the confider of confidential information is an essential ingredient of his cause of action in seeking to restrain by injunction a breach of confidence. Presumably that may be so as regards an action for damages in respect of a past breach of confidence. If the confider has suffered no detriment thereby he can hardly be in a position to recover compensatory damages. However, the true view may be that he would be entitled to nominal damages. Most of the cases have arisen in circumstances where there has been a threatened or actual breach of confidence by an employee or ex-employee of the plaintiff, or where information about the plaintiff's business affairs has been given in confidence to someone who has proceeded to exploit it for his own benefit: an example of the latter type of case is Seager v. Copydex Ltd. [1967] 1 W.L.R. 923. In such cases the detriment to the confider is clear. In other cases there may be no financial detriment to the confider,* ***since the breach of confidence involves no more than an invasion of personal privacy.***

> *Thus in Duchess of Argyll v. Duke of Argyll [1967] Ch. 302 an injunction was granted against the revelation of marital confidences. The right to personal privacy is clearly one which the law should in this field seek to protect."[emphasis added]*

He later continues with an example that bears some similarity to the case at bar (page 256 paragraph B) .

> *"The anonymous donor of a very large sum to a very worthy cause has his own reasons for wishing to remain anonymous, which are unlikely to be discreditable. He should surely be in a position to restrain disclosure in breach of confidence of his identity in connection with the donation. So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."*

[25] I am satisfied that the 1st Defendant's application concerned confidential information in respect of which all the parties had an obligation of confidence. This obligation arose from their agreement, understanding or arrangement, it matters not for present purposes which. The fact is that the details surrounding the formation of the company and **A's** involvement as a lender or investor were at all material times understood to be confidential. It is only fair, it seems to me that the parties be held to this arrangement, understanding or agreement, pending the trial of the action.

[26] It is for these reasons therefore that I granted the 1st Defendant's application and made the following Orders;

1. All parties herein are restricted from disclosing or otherwise communicating or publishing or making any comment whether public or private or passing on to any person any information pertaining to the involvement of A with the 1st Defendant Company or this litigation save and except for the limited purpose of the preparation of witness statements and/ or affidavits and/or for obtaining professional advice or expert opinion for the purpose of prosecuting their respective claim ,defence or counter claim, as the case may be, until the trial of this matter commences.

2. The court file in relation to this matter shall be retained in the private custody of the Registrar of the Supreme Court.

3. Costs of this Application to the Defendants to be taxed, if not agreed.

4. The 1st Defendant's attorney-at-law to prepare, file and serve this Order.

[27] I am indebted not only to the respective Attorneys but also to my legal clerk Ms. Carissa Mears for the identification of relevant authorities and whose able assistance facilitated the timely preparation and delivery of this judgment.

DAVID BATTS

PUISNE JUDGE