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Case No: BL-2018-002121

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 11 July 2019

BEFORE:

HIS HONOUR JUDGE HODGE QC
(Sitting as a Judge of the High Court)

BETWEEN:

BHANU CHOUDHRIE

Claimant/Respondent

- and -

SIMRIN CHOUDHRIE

Defendant/Applicant

MR JEREMY REED & MR SAMUEL CARTER (instructed by **Kingsley Napley LLP**) appeared on behalf of the **Claimant/Respondent**
MR JUSTIN RUSHBROOKE QC & MS VICTORIA JOLLIFFE (instructed by **Payne Hicks Beach**) appeared on behalf of the **Defendant/Applicant**

APPROVED JUDGMENT

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1. **JUDGE HODGE QC**: This is my extemporary judgment on an application by the defendant, Mrs Simrin Choudhrie, to strike out a claim which is now limited merely to seeking declaratory relief which has been brought against her by her estranged husband, Mr Bhanu Choudhrie, by way of a claim form issued on 24 September 2018 and served on the defendant by hand at her home on the following day.

2. The defendant (and applicant) is represented by Mr Justice Rushbrooke QC, leading Ms Victoria Jolliffe (of counsel). They are instructed by Payne Hicks Beach. The claimant (and respondent to the application) is represented by Mr Jeremy Reed and Mr Samuel Carter (both of counsel) instructed by Kingsley Napley.

3. The particulars of claim were served with the claim form. After several agreed extensions of time for service of the defence, and just before the last of those time extensions was due to expire, the defendant issued her present application to strike out the claim form and particulars of claim on 13 December 2018. The issue raised by the defendant's application is whether this claim, which is brought by the claimant against his estranged wife to protect information which is said to be confidential to him, should be permitted to continue or whether it should be struck out under CPR 3.4(2)(a) and/or (b) as disclosing no reasonable grounds for bringing the claim and/or as an abuse of the process of the court.

4. The evidence in support of the application takes the form of the defendant's first witness statement dated 12 December 2018 and a witness statement from her solicitor, Mr Dominic Crossley, a partner in Payne Hicks Beach, dated 13 December 2018. The evidence in answer to the application comprises one open witness statement from the claimant dated 12 April 2019; two confidential witness statements from the claimant dated 12 April and 13 June 2019; a confidential witness statement from Mr Pheroze Sorabjee, a senior partner with a firm of tax advisors and business consultants, Jeffcote Donnison LLP, dated 3 April 2019; a confidential witness statement from Mr Rustam Soli Dubash, a commercial litigation solicitor and partner in Penningtons Manches LLP, dated 4 April 2019; a confidential witness statement from the claimant's uncle, Mr Sumant Kapur, dated 12 April 2019; a confidential witness statement from the claimant's father, Mr Sudhir Choudhrie, dated 12 April 2019; and a confidential witness statement from Mr Christophe Sierro, the founder of a Swiss wealth management company, Mt Fort Advisors SA, also dated 12 April 2019. There is evidence in reply from the defendant in the form of a second witness statement, together with a confidential schedule, dated 1 July 2019.

5. The hearing of this application was originally estimated to last for one full day, beginning at 10.30 am on Tuesday, 9 July. In the event, the hearing continued into a second day until about 2.15 pm yesterday when I adjourned to 11 o'clock this morning (Thursday, 11 July) in order to deliver this extemporary judgment. Although the subject-matter of the claim is confidential information, with the active co-operation of all concerned, including the court, it has proved possible to conduct all but about 30 minutes of this hearing (between about 10.30 and 11 o'clock yesterday morning) in open, rather than closed, court.

6. The parties to this litigation were married in April 2003. Almost ten years later, in February 2014, the claimant, together with his father, was arrested and questioned by the

Serious Fraud Office ("the SFO") in relation to an investigation into affairs concerning Rolls-Royce. In connection with this investigation, the claimant was represented by a firm of solicitors called BCL. On 8 May 2017, the defendant petitioned for her divorce from the claimant. There are on-going, and hotly-contested, financial remedy proceedings in the Family Court between the parties and, as a result, although a decree nisi has been pronounced, it has not yet been made absolute. In those family proceedings, the claimant is represented by another firm of solicitors, Vardags, although the defendant is represented by the solicitors retained in this litigation, Payne Hicks Beach.

7. The issue of the claim form in this litigation had been preceded by exchanges of correspondence, first between Vardags and Payne Hicks Beach, and then between the claimant's present litigation solicitors, Kingsley Napley, and, first, the defendant and then her solicitors, Payne Hicks Beach. The defendant's counsel have summarised the terms of this correspondence at paragraphs 17 to 43 of their skeleton argument. In particular, Mr Rushbrooke relies on a letter from Payne Hicks Beach dated 10 October 2018 which, in his oral reply, he described as "the most important document in the case".

8. Payne Hicks Beach's letter to Kingsley Napley of 10 October 2018 sets out at length the basis upon which it is said that the claim (which by then had been issued and served) is factually and legally misconceived. Of particular relevance to this application, the defendant's solicitors stated as follows:

> (1) Certain aspects of the claimant's complaint had now been dropped from his current claim but they were said to "speak volumes" as to the claimant's intentions and his willingness to provoke litigation without any proper basis for doing so. The thrust of the claimant's complaint is now said to be that the defendant has 'failed' to provide confirmation that she owes the claimant a duty of confidence and has 'failed' to confirm that she has not misused the claimant's confidential information.
>
> (2) In relation to what has come to be known as 'the October 2017 event', the claimant had explicitly provided information about that event to the defendant "because he thought she should be aware of it in the event that she was approached by journalists or other media interest". (I note that although that assertion continues to be denied, even in the amended particulars of claim, its accuracy has been confirmed at paragraph 30 of the claimant's first confidential witness statement where he says that, in addition to imparting information about the October 2017 event chiefly to enable the defendant to provide the claimant with emotional support and comfort because she was still his wife, he had also wanted her "to be forewarned in case she was approached by the media".)
>
> (3) The defendant unequivocally confirmed that, to the best of her recollection and belief, she had not disclosed to any third party any of the contents of the claimant's discussions with his criminal

lawyers (as to which she was said to have had very little recollection) nor any other information that could, on any reasonable view of the law, be described as information in respect of which the defendant owed the claimant a duty of confidence, save to her legal advisors.

(4) The defendant was said to understand her duties of confidence:

> "In case there could be any lingering doubt as to the reliability of [the defendant's] assurances, which there could not sensibly be, and notwithstanding the lack of particularity in your client's case, our client hereby unequivocally confirms that to the best of her recollection and belief she has not disclosed to any third party any of the contents of your client's discussions with his criminal lawyers (as to which she has little recollection save for that which is set out above) nor any other information that could, on any reasonable view of the law be described as information in respect of which she owes your client a duty of confidence, save of course for the disclosures which she has made to her legal advisors for the purposes of obtaining legal advice in respect of the litigation between our clients.
>
> We repeat that our client understands her duties of confidence and has the benefit of our advice and that of Leading Counsel. What she does not understand is what confidential information your client thinks he has disclosed to our client concerning the investigation, why he believes that our client has disclosed it, to whom and when. If he has any legitimate concerns in respect of any particular information it is for him to articulate those concerns and our client will respond to them; he should not have issued misconceived High Court proceedings that are, at best, little more than a fishing expedition. Her position is that your client, aside from the exceptions of attending the meetings, was always secretive and became more so following his arrest and service of the divorce petition. She has also observed that, for cultural reasons, our client is not expected to engage in or be privy to his business affairs (although she has explained to us that your client brought her into one aborted property development project in an apparent attempt to placate her when she found out about [a certain matter]."

The letter invited the claimant to withdraw the claim and to pay the defendant's costs, failing which it was said that she would issue an application to strike out or stay the claim.

9. On 8 November 2018, Kingsley Napley wrote at length to Payne Hicks Beach, purporting to rely on information which did not form part of the claim, and taking issue with the factual assertions in the 10 October letter. Kingsley Napley's letter said that it would be "wholly disproportionate, and is unnecessary, at this stage to particularise each and every item of confidential information at this stage". A vast amount of confidential

information had been disclosed to the defendant over a long period of time. In relation to the threatened strike out application, Kingsley Napley stated:

> "The content of your letter reinforces the fact that there is an issue between the parties. There appears to be a dispute as to the scope of protection, with our client suggesting that the scope of protection is broader than is accepted by your client."

10. In their written skeleton argument, the defendant's counsel submit that, by any reasonable standards, this is an extremely odd piece of litigation. The court is asked to keep at the forefront of its mind the following striking features:

> (1) The claimant cannot and does not allege that the defendant has disclosed any item of his confidential information to any third party on any occasion in the past.
>
> (2) It follows that he does not claim damages or other compensation from her for breach of confidence.
>
> (3) Nor does the claimant claim a final injunction against the defendant to restrain her from disclosing any of his allegedly confidential information to third parties in the future, nor does he even say that he fears that she will breach her duty of confidence to him in the future.

This being the case, the defendant contends that the court should scrutinise the claim with particular care in order to understand what it is that the claimant does wish to achieve from this litigation and the basis on which he says that he needs to invoke the court's assistance to achieve it.

11. In essential summary, the defendant's case on the strike out application is as follows:

> (1) As regards CPR 3.4(2)(a), the pleaded case against the defendant fails to identify with sufficient precision or clarity the information which is said to fall within the description of the claimant's confidential information. The problem that this gives rise to is said to be all the more acute for the fact that such description as is given in the particulars of claim of the claimant's confidential information includes information which on its face appears to belong to others ("his relations and business associates and related businesses") and not the claimant. These are said to be fundamental defects in the claim which alone justify the striking out in accordance with existing authority.
>
> (2) Furthermore, the pleaded basis for what is now the only form of relief sought in the claim, namely a declaration that the defendant owes the claimant an equitable duty of confidence, is said to fall far short of what would be needed to amount to a proper cause of action.

The claim to pursue the declaratory form of relief is said to be pointless and unnecessary (in addition to the fundamental defect as regards the description of confidential information previously identified).

(3) This entire dispute is said to be manifestly contrived in the sense that there never was a proper basis for the claimant to allege that he needed the declaration (or the disclosure that was originally sought but which has now been abandoned). On the contrary, the defendant is said at all times to have made clear that she understands her equitable duty of confidence towards the claimant, has not breached her duty of confidence in the past, and has no intention of breaching it in the future. The simple fact is said to be that the claimant will not take 'yes' for an answer.

(4) As regards CPR 3.4(2)(b), the claim is said to be an abuse of the court's process in the sense laid down by the Court of Appeal in the case of *Jameel v Dow Jones & Co Inc* [2005] QB 946 because, even if it discloses a technical cause of action, no legitimate purpose could properly be served by its prosecution. On the contrary, judged objectively, it appears likely to have been brought by the claimant to oppress and cause needless expense to his estranged wife, whom he has embroiled in other expensive pieces of litigation in other Divisions of the High Court which are ongoing. Reliance is placed on the second of the two categories of misuse of process identified by Simon Brown LJ in his judgment in the case of *Broxton v McClelland* [1995] EMLR 485 at pages 497 to 498.

12. The defendant's counsel do not shrink from the submission that, if it is proper for a claim such as the present to go forward, it would be possible in nearly all cases where a marriage or long-term relationship has broken down for a wealthy individual to bring proceedings in confidence for a declaration against his or her spouse or partner, almost as of right. Whatever assurances he extracts from her, however unable he is to point to any breach of confidence on his wife's part, he would be permitted to pursue a claim for such limited relief simply by asserting that he is not satisfied by those assurances and that, in the claimant's own words (at paragraph 8 of his first witness statement), he wants "to be sure that there is clarity as to the duty of confidence that the defendant owes to me". That, the defendant's counsel submit, cannot be the state of the law.

13. As to that floodgates argument, Mr Reed (for the claimant) submitted that it is a bad point. If it is appropriate in this case to seek declaratory relief, so be it. That is not a reason to refuse to grant declaratory relief in the present case, still less to strike out the claimant's claim. The court can only strike out the claim if it is certain that the claim for declaratory relief is bound to fail.

14. By an application notice served in unissued form on the defendant's solicitors on the evening of Tuesday 2 July, less than a week before the hearing of the present application began, the claimant seeks to amend his particulars of claim so as to widen the categories of confidential information in substantial respects. The draft amended particulars of

claim were served on the defendant's solicitors as long ago as 12 April 2019 under cover of the same letter as the evidence served in opposition to the strike out application. No explanation was provided for the proposed amendments; instead, the claimant's solicitors baldly requested that the defendant's solicitors "confirm that your client consents to these amendments".

15. It is appropriate for me to refer at this point to the proposed amended particulars of claim. At paragraphs 1 to 3, the parties are identified. It is said that they married on 13 April 2003, that the defendant petitioned for divorce on 8 May 2017, and that decree nisi was pronounced on 17 January 2018. Decree absolute has not yet been pronounced. It is pleaded that the parties lived together during the course of their marriage until about November 2017.

16. At paragraph 4, it is pleaded that in or about 2013 the Serious Fraud Office commenced an investigation in relation to Rolls-Royce (referred to as "the Investigation"). In or around February 2014, the claimant was questioned by the SFO as part of the Investigation. The fact and the date of that questioning was said to be confidential until that information was published by, amongst others, the Guardian newspaper. The Investigation was closed on 22 February 2019 and the SFO announced on the same date that there would be no prosecution of associated individuals.

17. At paragraph 5, it is pleaded that, during the course of the parties' marriage, and thereafter whilst still living together until about November 2017, the defendant received information:

(1) directly from the claimant;

(2) from attending meetings between the claimant and his lawyers, such meetings being for the purpose of the claimant giving instructions and receiving legal advice (referred to as "the BCL Meetings");

(3) from attending meetings with the claimant and Rustam Dubash, one of the claimant's solicitors (referred to as "the Dubash Meetings"), such meetings being for the purpose of Mr Dubash summarising and/or explaining to, amongst others, the defendant, matters such as the status of the Investigation and the claimant's legal strategy in relation to it, including by summarising the legal advice received by the claimant from his lawyers and by answering the questions of those present (including answering the defendant's questions); and

(4) from attending meetings (some of which were also attended by other members of the claimant's family) with the claimant and Mr Christophe Sierro (referred to as "the Other Assets Meetings"), which meetings concerned the claimant's and his family's assets and holdings other than those comprising or held by the C&C Alpha Group of companies (referred to as "the Other Assets").

18. At paragraph 6, it is pleaded that the information disclosed by the claimant to the defendant (insofar as relevant to this claim) comprised:

> (1) matters concerning the Investigation, his actual or potential conduct in relation to the Investigation, his feelings and concerns relating to the Investigation, and other information pertaining or potentially pertaining to the subject-matter of the Investigation, including the business affairs of the claimant, his relations and business associates, and related businesses (referred to as "the Investigation Information"); and
>
> (2) information relating to his and his family's business and financial interests, including the C&C Alpha Group of companies and the Other Assets, including the nature of those assets, the management of them, and the strategy in relation to them (referred to as "the Financial Information"). It does seem to me that there is some overlap between "the Financial Information" and "the Other Assets Information" (later defined as "the information disclosed to the defendant by Christophe Sierro").

19. At paragraph 7, it is said that the information disclosed to the defendant at the BCL Meetings and the Dubash Meetings (together referred to as "the Legal Meetings") concerned, related to or arose from the Investigation (referred to as "the Legal Information"). At paragraph 7A, it is said that the information disclosed to the defendant at the Other Assets Meetings concerned the detail of the claimant's and his family's business and financial interests and assets, including the investment process, profile, strategy and tactics, asset allocation (both current and intended), asset performance and performance expectations, financial planning matters, administrative and operational matters, and issues in relation to specific transactions (referred to as "the Other Assets Information"). It does seem to me, as I have observed, that the Other Assets Information as so defined is also included within the definition of the Financial Information.

20. At paragraph 8, it is said that the Investigation Information is, and was at all material times, confidential. At paragraph 9, it is asserted that the Legal Information is, and was at all material times, confidential. For the avoidance of doubt, the claimant's position is said to be that the Legal Information is also protected by his legal professional privilege. At paragraphs 9A and 9B, it is said that the Financial and Other Assets Information is, and was at all material times, confidential. The Investigation Information, the Financial Information, the Other Assets Information and the Legal Information are referred to in the proposed amended particulars of claim compendiously as "the Confidential Information".

21. At paragraph 11, it is pleaded that the defendant knew, or ought to have known, that the Confidential Information was confidential and was being disclosed to her in confidence. The particulars of that allegation are then given in the original paragraphs 11.1, 11.2 and 11.3 (as now expanded) and also in new subparagraphs 11.4, 11.5 and 11.6. At paragraph 11.7, it is said that the nature of the information was such that it was obviously confidential.

22. At paragraph 12, it is pleaded that, in the premises, the defendant owes, and has at all material times owed, the claimant an equitable duty of confidence in respect of the Confidential Information. At paragraph 13, it is pleaded that the defendant was thereby under a duty:

> (1) not to disclose the Confidential Information to anybody; and
>
> (2) not to use the Confidential Information for any purpose other than:
>
> > (i) for providing moral support and comfort to the claimant; or
> >
> > (ii) expressing a view on the relevant matters to the claimant and/or his family.

I note that there is said to be no express exception in relation to the matter addressed at the end of paragraph 30 of the claimant's first confidential witness statement, namely disclosure for the purpose of any approach by the media.

23. At paragraph 14, exceptions are then carved out of the pleaded duty of confidentiality. For the avoidance of doubt, it is said to be accepted by the claimant for the purposes of this claim that:

> (1) the aforesaid duty would not preclude the defendant from making confidential disclosures to her lawyers in good faith for the purpose of obtaining legal advice or for legal proceedings (including to her matrimonial lawyers instructed in the financial remedy proceedings against the claimant);
>
> (2) the aforesaid duty would not preclude the defendant from disclosing or using such confidential information in a like manner to a member of the public who is not subject to such a duty who had received the relevant confidential information from the public domain; and
>
> (3) the aforesaid duty would not preclude the defendant from making such disclosures as were required by law or ordered by a court of competent jurisdiction.

I note that there is no pleaded exception in relation to representatives of the media who may approach the defendant seeking information about the October 2017 event and who might appear to have knowledge of such event from a source other than the defendant herself.

24. At paragraph 15, it is said that by letters dated 16 August and 7 September 2018 the claimant sought to obtain the defendant's confirmation that she owed the claimant an equitable duty of confidence in respect of the Investigation Information and the Legal

Information and was thereby subject to a duty as described in paragraph 13 above in relation to that information.

25. At paragraph 16, it is pleaded that the defendant has failed to give the aforesaid confirmation. The defendant has responded (such as by letter dated 14 September 2018) to the effect that she is "aware of her duties of confidentiality and will abide by her obligations" but she has failed to give specific confirmations which would enable the claimant to know whether the duties of confidentiality that the defendant says she will abide by are of the same scope as that asserted by the claimant. Specifically, the defendant has failed to acknowledge that she owes the duty specified in paragraph 13 (as caveated by paragraph 14).

26. At paragraph 17, it is said further that, by letter dated 14 September 2018, the defendant denied that certain information concerning an event in October 2017 was disclosed to her solely for the purpose of providing emotional support and comfort to the claimant. The defendant has failed to specify what other purpose she contends it was disclosed for, and she has failed to specify whether she accepts that such information is subject to an equitable duty of confidence owed by her to the claimant. Even in the amended particulars of claim, there is no reference to the later identification of the" other purpose", as set out in Payne Hicks Beach's letter of 10 October 2018 (previously cited); nor is there any acknowledgment of the acceptance (at paragraph 30 of the claimant's first confidential witness statement) that a subsidiary purpose of the disclosure of the October 2017 event was for the defendant to be fore-warned in case she was approached by the media. The defendant's counsel note, and emphasise, that the amended particulars of claim contain no reference to any letter subsequent to the letter of 14 September and, in particular, contain no reference to the Payne Hicks Beach letter of 10 October 2018.

27. Paragraph 18 pleads as follows:

> "In the premises, the claimant seeks and is entitled to a declaration that the defendant owes and has at all material times owed the claimant an equitable duty of confidence:
>
> (1) not to disclose the Confidential Information to anybody; and
>
> (2) not to use the Confidential Information for any purpose other than:
>
> > (i) for providing moral support and comfort to the claimant; or
> >
> > (ii) expressing a view on the relevant matters to the claimant and/or his family
> >
> > subject to the caveats in paragraph 14 above."

28. Paragraphs 19 through to 22 originally claimed that the defendant should disclose on oath the names and addresses of all persons to whom she had disclosed the Confidential Information, together with full particulars of such disclosure, and also particulars of the uses that the defendant had made of the Confidential Information. In the claimant's

skeleton argument dated 5 July 2019 (and thus last Friday) a footnote (numbered 2 at page 2 of the skeleton) noted that the defendant had also applied to have the disclosure relief struck out and indicated (for the first time) that the claimant was content to withdraw that element of relief so that that was no longer "in issue". Reference was made to paragraph 76 of the skeleton argument. Paragraph 76 merely says (under the heading 'Disclosure Order'):

> "C will not pursue the relief set out in paragraphs (C) and (D) of the Prayer as part of this claim."

No explanation is given as to why the provision of information was originally sought and is now being abandoned.

29. Paragraph 23 of the proposed amended particulars of claim makes it clear that the claimant does not seek equitable damages or an account of profits from the defendant. The claim is now for a declaration in the terms of paragraph 18 of the amended particulars of claim, subject to the caveats pleaded in paragraph 14. Definitions are then given for the purposes of the declaratory relief. There is also a claim for costs, together with interest on such costs, for such period and at such rate as the court shall deem fit, and for further or other relief. There is no claim for damages, an account of profits, or any form of injunctive relief.

30. The defendant opposes the application to amend the particulars of claim, principally because they are said to do nothing to cure the fundamental defects in the original pleaded claim. On the contrary, they are said to compound the difficulties caused by the lack of specificity in the description of the claimant's Confidential Information and the inclusion of information which, on its face, would appear to belong to other parties rather than the claimant himself. Moreover, it is said that the attempt to expand the categories of confidential information, and also the evidence served by the claimant in opposition to the strike out application, merely serve to underline:

> (1) how little there is in dispute between the parties in terms of what really matters;
>
> (2) how expensive nevertheless it will be to try this claim, given the approach of the claimant to litigating it to date; and
>
> (3) how contrived the dispute is.

31. No explanation is said to have been given as to why the new categories of information now need protection when there was no suggestion that they did at the time the dispute was generated in correspondence last year. The explanation that has now very belatedly been given in evidence for amending the particulars of claim is said to be deeply unsatisfactory, to put it charitably. The defendant emphasises that the Financial Information, the Other Assets Information and the sub-category of Legal Information relating to the Investigation which the defendant received at the Dubash Meetings, are all entirely new classes of confidential information which are sought to be introduced (long after the initial complaint was made) for the first time on 12 April 2019

32. Further, it is said that the claimant's attempts to drag in the defendant's allegedly dishonest conduct towards him in respect of what are said to be entirely irrelevant personal matters is even more contrived, and a transparent attempt to prejudice the court into overlooking the lack of substance in the claim. It is also said to be deeply hypocritical on the claimant's part, and to add further support to the inference that the claimant is misusing the court's process by pursuing these proceedings.

33. It is said by the defendant's counsel that the draft amended particulars of claim exacerbates, rather than cures, the problems flowing from the description of the claimant's confidential information in the original particulars of claim. This is not just a question of lack of specificity but also an attempt to include (yet further) information which, on its face, if confidential at all, is said to belong to parties other than the claimant.

34. It is said also to be telling that, whilst the categories of confidential information are so significantly expanded in the amended particulars of claim, the pleaded bases for the claim for a declaration remain unchanged. They are said to be the same exiguous bases as appeared in paragraphs 15 to 18 and 19 to 21 of the original particulars of claim. In other words, it is said by the defendant that no new reasons are advanced as to why the claimant is entitled to a declaration as to the equitable duty of confidence the defendant owes to him in respect of the much wider classes of confidential information now sought to be protected, or why the court should infer that the defendant has disclosed the much wider classes of confidential information to some (unidentified) third party or has otherwise misused the same. It is said that the claimant's failure, or inability, to plead a more solid basis for his entitlement to declaratory relief simply cannot be overlooked; rather, it only serves to underline the contrived nature of the claim.

35. It is also said by the defendant's counsel that the evidence relied on in support of the application to amend leaves much to be desired. No explanation has been given as to why information that is now said to be in need of protection as confidential information was not included in the original complaint. The fact that the way in which the claimant put his case shifted so significantly in his solicitor's pre-action correspondence makes it all the more important for an explanation to be provided. What is said in paragraph 2 of the evidence in support of the application is that:

> "It became apparent that the dispute between the parties as to the scope of the duty of confidence owed by the defendant to the claimant extended beyond the two classes of confidential information referred to above."

In paragraph 5, it is said that the amended particulars:

> "... reflect the current scope of the dispute between the parties as to the scope of the duty of confidence."

It is said by the defendant's counsel that that will not do because it begs the very question raised by the application.

36. On the defendant's case, there is said to be no dispute about the scope of the duty of confidence owed by the defendant, other than the artificial one generated by the claimant. The only exception to this that has emerged in the course of the litigation is as to whether the fact and timing of the October 2017 event could properly be protected as confidential information belonging to the claimant. But even if it could, or arguably could, that dispute is said to be an arid one because the defendant has made it clear that she has no intention of disclosing those facts to anyone: see paragraph 36 of her second witness statement.

37. Notwithstanding all these points, through her solicitors the defendant has made it clear that, in the interests of proportionality, she is content to pursue her strike out application by reference to the proposed amended claim rather than the original claim. That is not a good reason for her to consent to the amendments, however, and she does not do so. The defendant's position is that, if the claim falls to be struck out in its proposed amended form no less than its original form, no useful purpose would be served by the grant of permission to amend.

38. I have already summarised the basis of the defendant's application. It was developed in the defendant's counsel's written skeleton argument and in Mr Rushbrooke's oral submissions. In essence, the defendant submits that she has done nothing that invades the claimant's rights. It is not alleged by the claimant that he fears that, without declaratory relief, the defendant will misuse any particular item of confidential information. There is no reasonable case for a declaration. The relief sought is said to be of no practical use to the claimant and is therefore pointless. The information in respect of which the court's jurisdiction is invoked is insufficiently specified, characterised and itemised. Not all of the information is said to be the claimant's confidential information, and that is said to be a separate and freestanding objection.

39. On the abuse of process argument, reliance is placed on *Jameel* abuse. It is said that declaratory relief would achieve so little of practical benefit that it would be disproportionate to allow the claim to proceed. In other words, it is said that the game is not “worth the candle”. Reliance is also placed on the second of the two categories of misuse of process identified in *Broxton v McClelland*. This is not a claim to vindicate any right that is properly in issue between the parties. Rather, it is said to be designed to cause the defendant problems of expense, harassment and prejudice beyond those ordinarily encountered in the course of properly-conducted litigation.

40. The claimant's position, in summary, is that there is a real need for declaratory relief in all the circumstances and that the bringing of this strike out application, and the evidence given by the defendant in support of it, reinforces the justification for this court determining, after a trial, the categories of confidential information in respect of which the defendant owes the claimant a duty of confidence. There appears to be little or no remaining trust between the parties, between whom there is other ongoing litigation. The claimant does not accept the defendant's evidence filed on the application and believes that she has deceived him in a serious respect.

41. In outline, the claimant's response to the three main limbs of the application is as follows:

42. First, the categories of confidential information are pleaded in sufficiently clear and precise terms for the defendant to understand the case she has to meet. No further particulars are needed from the claimant at present in order for her to plead her defence. The conventional route for the defendant to seek further particularisation would be by way of Part 18 Request. Alleged inadequate particularisation is said not to be a ground for striking out a claim at this pre-defence stage. If the real issue is one of particularisation, then it is submitted that it is a matter of appropriate case management in the relatively unusual circumstances of this case. Whilst it would often be for the claimant to particularise the confidential information, there are said to be cogent reasons in this case why a different course is appropriate. In particular:

> (1) The particularisation by the claimant would be an onerous task and is unnecessary in the circumstances. Moreover, if it is the case that the defendant has forgotten the confidential information, this will be reminding her of it. A very strict confidentiality club would need to be created if sensitive confidential information was to be recorded in writing.
>
> (2) The defendant asserts that she does not really remember any information that falls within the scope of the pleaded categories. That being the case, if there is any dispute, then it would be much more proportionate, in the circumstances of this unusual case, for the defendant to set out all the information that she recalls as falling within those categories and in respect of which she disputes the confidentiality. That would enable there to be a proportionate, and cost-effective, focus on what is really in issue. That is said not to be in any way reversing the burden of proof but is simply a proportionate and effective case management tool in the instant case. In circumstances where the defendant's own evidence is that she remembers little, it is said that it ought to be easy for her to articulate the scope of what she disputes.
>
> (3) The defendant's recent evidence appears to take a 'clarity' point in respect of the public domain caveat. If the defendant remembers so little, and if she says that some of the information which she does remember (and which falls within any of the categories of confidential information) is in the public domain, then she can plead this in her defence. It is said not to give rise to any practical problem.

43. In the alternative, if the court were to determine that the claimant ought to itemise precisely the confidential information falling within each category, then he would ask for the opportunity to do so. His failure to do so to date should not give rise to the remedy of striking out in the unusual circumstances of the present case. Insofar as the defendant's objection is really one of lack of particularity, then the claimant's fall-back position is that (insofar as the court holds that further particulars should be given by the claimant, and at this stage) the claimant ought to have an opportunity to provide such particulars following a direction to that effect; the remedy of striking out the claim would be inappropriate.

44. Secondly, there is a proper need for declaratory relief, which this application has brought into even greater focus. The defendant's stance that she has had legal advice on her duty of confidence is not sufficient; the real issue is whether the classes of confidential information with which the claimant is concerned are subject to the defendant's duty of confidence, as to which there does appear to be a real issue, and in respect of which the defendant has provided no comfort or assurance. The comfort purportedly given by the defendant is said to be abstract and illusory. There are, at the very least, reasonable grounds for bringing a claim for declaratory relief. The claimant's position is that the real need for the declaratory relief sought has been borne out clearly by this application, including the defendant's evidence and stance. There is a real need for such relief. However, this is not the trial of the claim; rather, it is a strike out application. The claim should only be struck out if the claimant has no reasonable grounds for bringing the claim (not that he might not win, or even that he is unlikely to win.) It is said to be a low threshold, and to be surpassed by the claimant's case.

45. Although the particulars of claim do not plead an actual breach of confidence by the defendant, that does not support the application for strike out. On the contrary, it demonstrates that the claim is exactly the sort where a declaration of rights may usefully be invoked in that:

> (1) there is a dispute between the parties as to the nature of the right claimed; and
>
> (2) there is a dispute between the parties as to what their rights would be in the event that the defendant in the future disclosed or used confidential information for purposes other than those identified in the form of the declaration sought.

46. It is said that the defendant's refusal to provide the confirmation sought gives rise to legitimate concern on the part of the claimant that an illegitimate disclosure or use of the confidential information either has already been made by the defendant or may be made in the future. It is said to be plain that there is disagreement as to the scope of the duty of confidence owed by the defendant to the claimant. Whilst she appears to accept that she owes a duty in principle, the defendant completely avoids addressing the central issue of whether that duty extends to the pleaded categories of information. The defendant makes no attempt to grapple with this central point, and that is said to be the mischief, and the reason why the claimant needs declaratory relief. Despite claiming that she recalls nothing, the defendant continues to equivocate.

47. The claimant is said to have no comfort that the defendant recognises that her duty of confidence extends to the categories of information that he says it ought to cover. Indeed, there are now said to be two points of real dispute that have been “flushed out” by this application so far:

> (1) In relation to the event in October 2017, which the defendant asserts is “not capable of protection as confidential information”. The claimant fundamentally disagrees with that.

(2) In relation to information that the claimant has disclosed to the defendant but which concerns non-parties. The defendant's position is that this is not protected by her duty of confidence to the claimant. Again, the claimant fundamentally disagrees.

These are said to be the only significant points on which the defendant has already set out her position, and there is said to be a fundamental disagreement between the parties on both points. That is said to reinforce the claimant's real need for declaratory relief. The defendant's application itself is said to demonstrate that there is an issue between the parties that needs to be resolved.

48. The purpose of the declaration sought is to provide clarity and certainty around the existence, and the scope and the extent, of the defendant's equitable duty of confidence owed to the claimant. That is said to meet a real and pressing need, particularly in circumstances where:

(1) the defendant has refused to clarify the extent or scope of the duty that she accepts that she owes to the claimant and the defendant has failed to confirm that her duty to the claimant encompasses the pleaded categories of information; and

(2) the claimant has good reason to doubt the defendant's trustworthiness.

49. Thirdly, as to abuse of process, the claimant brings this claim out of a genuine desire to obtain the declaratory relief sought and not for any improper purpose or ulterior motive. The claimant's evidence on this point is said to be clear, and the defendant's assertions to the contrary should be rejected. There is said to be a legitimate need for the relief claimed. The claim is brought for a legitimate purpose and is not brought to oppress or cause needless expense. The legitimate purpose of the claim has been reinforced by the defendant's present application, and the defendant's stance both on this application and in response to the claim, namely her failure to engage with the pleaded categories.

50. The claimant submits that the litigation is not, objectively judged, oppressive. On the contrary, the claimant seeks a legitimate remedy and the defendant steadfastly refuses to engage and proffer the relief sought or any proper comfort. Whilst it is recognised that litigation such as this involves expense, there is no suggestion that this litigation will impose financial hardship on the defendant or have any material adverse impact on her, particularly bearing in mind that there are ongoing financial remedy proceedings.

51. My attention was drawn to the fact that in the matrimonial proceedings the claimant has been required to provide financial support for his wife in connection with (amongst others) the present litigation. This litigation is therefore effectively being financed on both sides by the claimant. It is said that this is a legitimate claim, brought for a legitimate purpose. The claim should only be struck out on the grounds of alleged improper purpose in a clear and obvious case; and that threshold is said not to be met.

52. This is said to be a case where the non-pecuniary relief sought by the claimant is reasonable and necessary. The ambit of the dispute will depend upon the scope of the defendant's challenges, which she has not yet set out. It is said to be clear from the evidence that:

(1) there is upset and a deep lack of trust between the parties;

(2) there is clear disagreement as to the only two specific points that the defendant has already set out; and

(3) the defendant has completely failed to engage with the pleaded categories of confidential information despite the fact that she could obviously have done so.

53. In all the circumstances, it is said that the claimant is seeking what, if granted, would give him valuable relief. It cannot be valued in monetary terms. The costs of the proceedings would be somewhat lower if the defendant had engaged with the pleaded categories and identified the information that she recalls and what she asserts ought not to fall within the scope of her duty of confidence. If she does not remember much (as she asserts) or has not disclosed much (as she also asserts), then this exercise ought to be tolerably straightforward for the defendant. The claimant submits that this is litigation that is certainly "worth the candle". The claimant makes the point that he is having to fund both sides of this litigation, at least to some extent, so that reinforces the genuineness of the claimant's decision to seek declaratory relief.

54. Mr Reed emphasises that, for the purposes of the present application, the claimant does not need to show that the declaratory relief will be granted at trial; on the contrary, it is the defendant who needs to show that the claimant has no reasonable grounds for bringing this claim for declaratory relief. That is said to be a low threshold which the claim surpasses. In reliance on the decision of the Court of Appeal in the case of *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, [2004] PNLR 35, the claimant submits that an application to strike out should not be granted unless the court is certain that the claim is bound to fail. It is said to be striking that, in all the circumstances, and despite suggesting that there is no need for relief because she understands her duties, the defendant has failed to offer any specific assurances in respect of the specific categories of confidential information at which this claim is directed. Those submissions were developed by Mr Reed in the course of his oral submissions.

55. It is appropriate at this point that I should briefly address the two areas of live dispute that the claimant says have been flushed out so far. The first is the October 2017 event. The starting-point is the decision of Megarry J in the well-known case of *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415. At page 419, Megarry J stated that three elements were normally required if, apart from contract, a case of breach of confidence was to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, the 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. That

third element is not present in the present case; and it is for that reason that declaratory relief is being sought.

56. Megarry J proceeded briefly to examine each of those requirements in turn. At pages 420 to 421, Megarry J considered the second requirement: that the information must have been communicated in circumstances importing an obligation of confidence. It seemed to him that if the circumstances were 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 that should suffice to impose upon him the equitable obligation of confidence.

57. In the present case, I have to consider whether the information about the October 2017 event has the necessary quality of confidence and, secondly, whether it was imparted to the defendant in circumstances imposing a duty of confidence upon her. I have to decide those issues on the basis of the evidence that is presently before the court rather than speculating about the evidence that may be produced at trial.

58. Mr Reed emphasises that the information about the October 2017 event is a matter of some substance which even now is not in the public domain. It is said to be objectively sensitive information that has the necessary quality of confidence. Mr Reed asked rhetorically: "Why does the defendant have this information?" It is because she was told about it by the claimant. He confided it to her. It does not matter why he did so; the relevant point is that it was disclosed to the defendant by the claimant in circumstances which imposed upon her an equitable duty of confidence. That is because it was imparted to her in circumstances of confidence.

59. Mr Rushbrooke says that the claimant cannot make a case out of the negative feature that the defendant has not asserted that the information is not confidential. He also emphasises that this is not a privacy claim but is a confidential information claim, although he then goes on to say that there is nothing in the law of privacy that would have assisted on this issue. Mr Reed emphasises that this is an interim application and not a trial. The claimant does not wish this information to be in the public domain. It is certainly not information that is trivial or incapable of protection. As I say, I have to approach this matter on the basis of the evidence that is before the court, although I may anticipate (but not speculate about) other evidence that may become available during the course of this litigation.

60. At paragraph 30 of his first confidential witness statement, the claimant discloses that he informed his wife of the October 2017 event chiefly to enable her to provide him with emotional support and comfort because she was still his wife. Despite having petitioned for divorce, she was, in October 2017, still living in the main family house. He was living in a mews house connected to the main house. They would cross paths and at the very least greet one another several times a day. Any suggestion that they had separated entirely by that date is inaccurate. He says, "I did also want her to be forewarned in case she was approached by the media." There is nothing there to suggest that the claimant indicated in any way to the defendant that information about the October 2017 event was in any way confidential, or that it was imparted to her in circumstances imposing any duty of confidence upon her. It is for the claimant to make out at least an arguable case of confidentiality.

61. What is the evidence from the defendant herself? At paragraph 6, she confirms that she has not disclosed any information about the SFO investigation to third parties (apart from discussing it with her lawyers or as required by law, which she understands that her husband accepts she is allowed to do). She then goes on to explain why:

> "This is because I do not know anything about the detail of the Investigation and, in any event, I do not want to discuss it with others."

There is nothing said there that indicates in any way that she feels that she was under any duty of confidence in relation to information about the October 2017 event. At the time the information about the October 2017 event was imparted to the defendant, strictly she and the claimant were still married because no divorce decree had been pronounced, but divorce proceedings were then pending. Separate litigation solicitors had been instructed by both parties.

62. In my judgment, the claimant is being unduly sensitive about the October 2017 event. In my judgment, it adds little, if anything, of substance to matters that are already in the public domain. There is no suggestion, even in the claimant's evidence, that it was ever expressly said to be confidential to himself. There is no express suggestion in the claimant's evidence that, when he disclosed information about the October 2017 event to his wife, he ever told her that she should keep that information to herself. On the basis of the evidence before the court, I do not consider that the information about the October 2017 event has the necessary quality of confidence. Moreover, in my judgment, there is no sufficient evidence that it was imparted to the defendant in circumstances which imposed any duty of confidence upon her. In my judgment, no reasonable person, standing in the shoes of the defendant, would have realised, on reasonable grounds, that her husband, whom she was then in the process of divorcing, was giving the information about the October 2017 event to her in confidence.

63. In relation to the October 2017 event, and on the basis of the evidence before the court, I am satisfied that the information cannot properly be characterised as confidential information. On this issue, I accept the submissions of Mr Rushbrooke and reject the competing submissions of Mr Reed.

64. On the other issue of apparent dispute, however, I prefer the submissions of Mr Reed to those of Mr Rushbrooke. I accept that the duty of confidence extends to information about the business affairs of the claimant's family, their companies, and their business associates and related businesses.

65. Although the case was not referred to in oral submissions, paragraph 31 of the claimant's skeleton argument makes the point that potentially there may be more than one person to whom a recipient of confidential information owes a duty, and that it all depends on the circumstances. Reference is made to the speech of Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46 at pages 127F to 128B. Mr Reed acknowledges that that was a dissenting speech; but, rightly in my judgment, he submits that there does not appear to have been any material difference in approach between their Lordships on this particular point:

> "In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired. If it has been acquired in such circumstances that it would be a breach of confidence to disclose it to another, then courts of equity will restrain the recipient from communicating it to another. In such cases, such confidential information is often and for many years has been described as the property of the donor, the books of authority are full of such references; knowledge of secret processes, 'know-how', confidential information as to the prospects of a company or of someone's intention or the expected results of some horse race based on stable or other confidential information. But in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship."

66. Mr Reed also makes reference to a passage at paragraph 85 of the judgment of the Court of Appeal, delivered by Lord Neuberger MR, in *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116. In that passage, Lord Neuberger appears to have recognised that the confidentiality of communications between husband and wife would extend not only to matters relating to the former's own work but to the affairs of his parents and siblings. At paragraph 3-182 of *Toulson & Phipps on Confidentiality* (3rd edn), when addressing the question of who may sue, the authors state that, "As a general principle, the person suing must be someone to whom the relevant duty of confidence is owed". I accept Mr Reed's submission that the duty of confidence is owed to, and is enforceable by, the person who confides the information, as well possibly as the subject of the confidential information itself.

67. In the course of Mr Reed's oral submissions, I posited two examples of disclosures between husband and wife during the course of their marriage. The first was that of a husband who discloses to his wife that his brother is actively gay; all three individuals are strict Muslims living in a community where active homosexuality is considered to be offensive. Another example might be a brother who lives in a country where homosexual acts are illegal and where the law is strictly enforced in the criminal courts. In such circumstances, I have no doubt that the husband would have a right to enjoin any threatened disclosure by his wife of his brother's homosexual behaviour. Another example that I gave was that of a practising barrister who discloses confidential information about a client to his wife, who then threatens to disclose such matters to the newspapers. In my judgment, the barrister, as well as the client, would have a right to restrain such threatened disclosure. The husband could do so in such cases because it was he who had confided the confidential information to his wife in circumstances where the information clearly had the necessary quality of confidence and had been imparted to its recipient in circumstances impliedly imposing a duty of confidence upon her.

68. In his reply, Mr Rushbrooke accepted that some family secrets might be capable of protection at the instance of the person confiding them; but he said that all would depend upon the nature of the information and the circumstances of the disclosure. Mr Rushbrooke posited the hypothetical case of a board director of Rolls-Royce who

discloses information about a proposed take-over to his wife. If she were to threaten to disclose that information to a third party, Mr Rushbrooke suggested that any judge hearing an application for injunctive relief by the husband, rather than by Rolls-Royce itself, would send the husband packing. He would do so, Mr Rushbrooke submitted, because the confidential information belonged to Rolls-Royce, and not to the husband. The husband would be seeking to obtain relief in relation to confidential information which was not his. I accept Mr Reed's submission that Mr Rushbrooke is wrong on this. I accept Mr Reed's submission that, if a wife receives information in confidence from her husband, he can sue his wife in relation to any threatened disclosure because he is owed a duty of confidence by the wife as the person who disclosed the confidential information. I am satisfied that the person confiding the information is someone to whom the relevant duty of confidence is owed, even if it may be owed elsewhere in addition.

69. Mr Rushbrooke had a second point which was that, even if he was wrong (as I think he is), some of the information in question was not disclosed to the defendant by the claimant himself but was provided during the course of family meetings and so it was information provided outside the scope of the marital relationship. In my judgment, at least on the evidence presently before the court, that does not seem to me to be a sufficient answer to the point. The fact is that the information was disclosed in the course of family meetings which the defendant was attending precisely because she was the wife of the claimant; and, in relation to that information, there is certainly arguably a duty of confidence on the basis that the information was information possessing the necessary quality of confidence which had been imparted to the defendant in circumstances imposing a duty of confidence upon her.

70. That deals with the two areas of what are said to be live dispute that the claimant says have been flushed out so far. I turn, then, to the substance of the application. The principles governing the grant of declaratory relief were recently outlined by O'Farrell J in the case of *Office Depot International (UK) Ltd v UBS Asset Management (UK) Ltd* [2018] EWHC 1494 (TCC) at paragraphs 46 through to 49. At paragraph 46, O'Farrell J said that the court had "a wide jurisdiction to grant declaratory relief". At paragraph 47, she said that declaratory relief would be granted "only where there is a real dispute between the parties". Reference was made to Lord Diplock's speech in the case of *Gouriet v Union of Post Office Workers* [1978] AC 435 at page 501, letters G to H:

> " … the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

At paragraph 48, it was said that declaratory relief would "be granted only where the terms of the declaration sought are specified with precision".

71. At paragraph 49, O'Farrell J said this:

> "As between the parties to a claim, the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle

of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court's power to grant declaratory relief is discretionary. The court has to consider whether, in all the circumstances, it is appropriate to make such an order: *Financial Services Authority v Rourke* [2011] EWHC 704 per Neuberger J:

> 'It seems to me that when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.'"

72. To similar effect are observations of Marcus Smith J in the case of *The Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch). At paragraph 20, Marcus Smith J said that the court's jurisdiction to grant declaratory relief derived from section 19 of the Senior Courts Act 1981. By CPR 40.20, the court might grant declaratory relief, whether or not any other remedy was claimed. However, the then current edition of *Civil Procedure* noted (at paragraph 40.20.2) that claims for declarations alone ware "unusual, and that generally declarations were sought and granted together with other forms of relief". At paragraph 21, Marcus Smith J said that the power to grant declaratory relief was discretionary. "When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration."

73. The judge went on to make six specific points, the first of which was that "there must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute." At paragraph 22(3), Marcus Smith J addressed the existence of a real and present dispute and the potential for interference in a foreign process. As to the former, the judge said that "the need for a real and present dispute between the parties, that is resolved by the making of the declaration, is central to the question of whether a declaration should be made."

74. Mr Rushbrooke also placed reliance upon the refusal by Arnold J to grant declaratory relief in the case of *Force India Formula One Team Ltd v 1 Malaysia Racing Team SDM BHD* [2012] EWHC 1621 (Ch). At paragraph 5, he said that the case was not one in which declaratory relief was appropriate. He accepted the submissions of counsel that any declaration the court made would have to be a balanced one which set out the findings in favour of each side properly. To reflect the court's findings would result in a declaration of such complexity that the judge did not believe that it would serve any useful purpose.

75. The judge went on to cite words from *Zamir & Woolf* at paragraph 7.24 as applicable:

> "The court may then take the view that no declaratory relief is necessary as the judgment as a whole sets out the opinion of the court with greater clarity than a declaration would."

I accept Mr Reed's submission that that case is of no direct assistance to the defendant in the present case because what was said there was said in the context of a judgment delivered after a full trial of the issues in which all matters had adequately been addressed.

76. An authority not addressed in the defendant's counsel's skeleton argument but which was cited by Mr Rushbrooke in his reply was the decision of David Richards J in the case of *Pavledes v Hadjisavva* [2013] EWHC 124 (Ch). Mr Rushbrooke cited the case as an example of one where a declaration was appropriate. That was a case where a declaration was made as to rights of light; and Mr Rushbrooke emphasised that the dispute was tightly focussed and crystallised and was neither speculative nor contingent. Here, by way of contrast, there was said to be no issue to which a declaration in the terms sought would bring resolution and finality. The alleged dispute in the present case was very different from that in the case before David Richards J. Here there is no tightly-focussed or crystallised dispute to which a declaration would bring any element of finality. Mr Rushbrooke submitted that no case had been cited to this court which would justify the need for declaratory relief of the kind sought here.

77. In his reply, Mr Reed addressed the judgment in *Pavledes*. He emphasised that the first sentence of paragraph 40, where it was said that "the fact that the claimants need not show an imminent threat of the infringement of the rights of light enjoyed by their property does not mean that a declaration should be made", was entirely neutral and that the converse also applied. Mr Reed emphasised that at paragraph 25, David Richards J had noted that there was nothing requiring an actual or imminent infringement of a legal right before a declaration would be made. The willingness of the courts in appropriate cases to make declarations as regards rights which might arise in the future, or which were academic as between the parties, suggested that the court's jurisdiction was not so tightly constrained. Paragraph 45 was said to support the notion that equivocation on the part of a defendant might be enough to justify the grant of declaratory relief, as where there was an absence of positive confirmation that there was no issue between the parties.

78. Mr Reed relied upon what was said at paragraph 47: that "the declaration sought by the claimants is directed to an issue which has been a very live issue between the parties and which had not been resolved". Mr Reed submitted that there were some live issues already and, in the absence of confirmation of the full position by the defendant, there might well be others. Mr Reed referred to the question posed at paragraph 48: "Would it be just and would it serve a useful purpose to grant declaratory relief?"; and he submitted that the issues in dispute between the parties could properly be resolved by the grant of declaratory relief in the present case. He also referred to the last paragraph of the judgment (paragraph 52) where, having concluded that a declaration should be granted as to the claimants' rights, the judge indicated that he would need to hear full argument on the precise terms of the declaration and would invite counsel to seek to agree the terms of the declaration, failing which there would have to be further

submissions on it. That was said to show that there was a certain fluidity or flexibility as to the precise terms of any declaration.

79. I bear all of those points in mind. I also bear firmly in mind the points made by Mr Reed that, for the purposes of this application, the claimant does not need to show that the declaratory relief will be granted at trial; rather, it is for the defendant to show that the claimant has no reasonable grounds for bringing the claim for declaratory relief. I bear also in mind that an application to strike out under CPR 3.4(2)(a) should not be granted unless the court is certain that a claim is bound to fail. Mr Rushbrooke rightly makes the point that the authority cited for that proposition by Mr Reed, the case of *Hughes v Richards*, was a case where the judge had refused to strike out a claim brought by children, as well as their parents, on the basis that it was arguable that the defendant accountants owed a duty of care to the children, as well as to the parents, and the existence and scope of any duty could only be determined after a full trial. Mr Rushbrooke points out that, inevitably, whether something is bound to fail means different things in different contexts.

80. I accept that the central question on this limb of the strike out application is whether the amended particulars of claim disclose reasonable grounds for bringing a claim for declaratory relief. In my judgment, that question admits of a resounding negative answer. I accept the submissions of the defendant (and applicant) on this point. In my judgment, there is no need for declaratory relief. There is no real prospect of any declaration being granted at trial in any meaningful sense. It would serve no useful purpose.

81. Mr Rushbrooke was right to speculate as to what might happen if the defendant should decline to engage further in the litigation and did not serve a defence. The claimant would then have to move forward to obtain judgment in default of defence. Would the court in those circumstances grant any - and, if so, what - declaration? I cannot see that any meaningful declaration could properly be granted along the lines sought by the amended particulars of claim. I am satisfied that there would be no utility in a declaration in the general, caveated, and diffuse terms sought by the claimant by his amended particulars of claim. I cannot see that any declaration would resolve matters definitively between the parties or would give any real comfort to the claimant. It would not assist him; and, as such, the court would decline to grant any declaration. The claim essentially fails on the grounds that there is no clear, crystallised and articulated dispute in relation to which declaratory relief could properly be granted, and any declaration would therefore have no utility whatsoever. There is no actual crystallised dispute but only a contingent, and speculative, dispute. The only two matters in dispute that have been identified I have already satisfactorily addressed earlier in this judgment.

82. In the exercise of the court's discretion, I cannot see that there is any real prospect of any declaration being granted in the terms sought, or which would achieve any measure of clarity or finality for the claimant. I do not see the lack of particularity relied upon by the defendant as a ground for striking out or as providing such a separate ground. Rather, it feeds into the question whether any useful purpose would be served in granting a declaration in any terms that might properly be sought by the claimant. Those considerations also feed into the alternative ground of strike out on the grounds of abuse of process. If, as I have found, there is no real prospect of a declaration being granted,

then it does seem to me that to pursue the claim would be an abuse of process on *Jameel* grounds.

83. The issue of abuse of process was addressed in the judgment of Sir Murray Stuart-Smith, speaking for the Court of Appeal in the case of *Wallis v Valentine* [2002] EWCA Civ 1034, [2003] EMLR 8. At paragraph 31, Sir Murray Stuart-Smith cited from the judgment of Simon Brown LJ (with which Nourse and Waite LJJ had agreed) in *Broxton v McClelland* [1995] EMLR 485 at pages 497 to 498. There, Simon Brown LJ had set out the relevant principles when considering strike out for abuse of process. Motive and intention as such were said to be irrelevant. The fact that a party who asserted a legal right was activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent was said to be nothing to the point. Accordingly, instituting proceedings with an ulterior motive was not of itself enough to constitute an abuse of process. An action was only that if the court's processes were being misused to achieve something not properly available to the claimant in the course of properly-conducted proceedings.

84. Simon Brown LJ said that the cases appeared to suggest two distinct categories of such misuse of process. The second was said to be:

> "The conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation."

Simon Brown LJ went on to recognise that only in the most clear and obvious case would it be appropriate, upon preliminary application, to strike out proceedings as an abuse of process so as to prevent a claimant from bringing an apparently proper cause of action to trial.

85. Sir Murray Stuart-Smith went on to add three matters. First, the conduct of the proceedings was not confined to the conduct of proceedings after the issue of the claim form, but included the initiation of the claim itself. Secondly, at the interlocutory stage, the test was an objective one, to be ascertained by reference to what a reasonable man placed in his situation would have had in mind when initiating or pursuing the action. The third related to the relevance of the overriding objective. It was necessary to apply the overriding objective in all categories of litigation, and to have regard to proportionality.

86. Those principles were applied by Tugendhat J in the case of *Abbey v Gilligan* [2012] EWHC 3217 (QB), [2013] EMLR 12. At paragraph 181, Tugendhat J recognised that *Jameel* abuse might apply in a breach of confidence case, and one instance he postulated was where a claimant never had any realistic prospect of obtaining a declaration such as he sought because it would serve no useful purpose. He concluded that such a claim was an abuse of process for the reasons given in *Jameel* and should be struck out on the basis that the costs of the case were out of all reasonable proportion to the benefit that could accrue to the claimant were he to have succeeded.

87. In my judgment, my decision on the first ground of the strike out application means that the claim should be struck out also for *Jameel* abuse. The considerations on the first limb of the strike out application also feed into the ground of strike out on abuse of process. I therefore find it unnecessary to go on to consider whether, as a separate ground of strike out, the case falls within the second of the categories of misuse of process identified in the *Broxton* case. I am satisfied that the claim should be struck out on the grounds:

> (1) that it discloses no reasonable grounds for bringing the claim for a declaration; and
>
> (2) consequently, that it is an abuse of the court's process under *Jameel* principles.

So, for those reasons, I will accede to the application by the defendant and strike out the claim; and it follows that I will also refuse the application to grant permission to amend the particulars of claim.

(After further submissions)

88. This is my extemporary judgment on the claimant's application for permission to appeal from the extemporary judgment on the substantive strike out application which I delivered before the short adjournment. This judgment should be read in conjunction with that earlier substantive judgment, and indeed that earlier substantive judgment should also be read in the light of the judgment I am about to deliver.

89. The application for permission to appeal is directed to two related matters. The first is the substantive overall decision on the strike out application. Mr Reed (for the unsuccessful claimant) submits that the matter really borders on a point of principle. He says that the question the court had to consider was whether, in circumstances where the defendant had failed to give confirmation as to the true extent of her accepted duty of confidence, and in circumstances where she had failed to engage substantively with the claimant and his solicitors, the court erred in failing to find that the dispute had crystallised sufficiently to mean that there was an arguable claim to invoke the jurisdiction to grant declaratory relief.

90. Mr Reed points to the fact that, on the court's finding, the defendant has taken one point which the court has said is bad in law. The claimant says that she has taken a second legal point that is also wrong, even though the court was with her on that. In those circumstances, Mr Reed submits that there is a real prospect of satisfying the Court of Appeal that the case crossed the line so as to fall within the band of cases in which declaratory relief alone might serve a legitimate purpose. He submits that there is a real prospect of showing that the defendant's failure to engage with the claimant and his solicitors gave rise to at least an arguable claim for declaratory relief.

91. In relation to the second legal point on which the court has ruled against the claimant's case, that of the October 2017 event, Mr Reed takes three points. First, he submits that the court has lowered the threshold in relation to the necessary quality of confidence

and/or has imposed an additional requirement (which is unwarranted) of substantiality. Secondly, he says that the court has failed to approach the matter on a correct procedural basis. He submits that, in the context of what was a strike out application, the court has effectively dealt with it on a summary judgment basis and, in doing so, it has looked at the witness evidence and it has therefore set the bar too high. The third point taken by Mr Reed is that, on the relationship point, the court has adopted an unduly restrictive approach, without taking sufficient account of the guidance in *Argyll v Argyll* as to the lack of any need for any express declaration of confidentiality in relation to communications passing between husband and wife.

92. In my judgment, there is no real prospect of success on appeal and therefore permission to appeal should be refused. Although Mr Reed has made reference to a point of principle, he has not argued that there is some compelling reason why an appeal should be heard if it has no real prospect of success. Realistically, he could not do so because this is an intensively fact-sensitive case and therefore there is no compelling reason why an appeal should be heard if it lacks any real prospect of success.

93. So far as the general approach is concerned, there is no dispute as to the applicable law governing either claims for breach of confidence or governing the circumstances in which the jurisdiction to grant declaratory relief is capable of being invoked. Mr Reed's criticisms relate very much to the application of established law by this court rather than to its formulation of any novel principle of law. In those circumstances, it seems to me that, since I am satisfied that I have correctly applied the law, it should be for the Court of Appeal to say whether there is a real prospect that I have failed properly to apply established and well-known legal principles.

94. So far as the point about the defendant having taken one point which I have found to be bad in law is concerned, I am entirely satisfied that, having resolved that issue in the sense for which the claimant has contended, there is no need to grant any declaratory relief to that effect; and it is very difficult to see how declarations in the terms sought would achieve anything more - indeed, given their loose terms, they would achieve very much less - than the clarification that has been provided in my judgment. To that extent, it seems to me that, at trial, the judge would take the view that was taken by Arnold J in one of the cases cited to me, the case of *Force India* (cited in my substantive extemporary judgment). The trial judge would take the view that was expressed by Arnold J at paragraph 5 of his judgment in that case, namely that it is unnecessary to grant express relief in declaratory terms because the judgment I have delivered on the issue is sufficiently clear and adequate to serve the claimant's purpose.

95. So far as the specific points in relation to the October 2017 event are concerned, I do not consider that there is any substance in the submission that I have either lowered the threshold of the necessary quality of confidence or imposed an additional requirement of subjectivity. In any event, I also held that the information was not imparted to the defendant in circumstances imposing any duty of confidence, and that formed an independent ground for my decision. I do not consider that I have ignored the guidance provided by Ungoed-Thomas J in the case of *Argyll v Argyll*. Here, as I made clear in my judgment, although the marriage was still subsisting at the relevant time, the parties were already engaged in divorce proceedings, with separate firms of solicitors acting for them. In those circumstances, and particularly given the subsidiary reason as to why the

claimant says that he imparted this information to the defendant, it seems to me that it was necessary to make it clear that the information was being imparted in confidence, and furthermore that it was information which he regarded as confidential and sensitive, before the information could acquire the necessary quality of confidence.

96. So far as the submission that I have had regard to the evidence is concerned, I have indeed had regard to the evidence; but I have done so in the context of an assertion (at paragraph 17 of the existing, and proposed amended, particulars of claim) which is simply contradicted by the claimant's own evidence (at paragraph 30 of his first confidential witness statement); and in the light of the fact that paragraph 17, in asserting that the defendant has failed to specify what "other purpose" she contends the information was disclosed for, is manifestly incorrect in the light of the explanation that was provided (after the original particulars of claim were formulated) in the Payne Hicks Beach letter of 10 October, and long before the amended particulars of claim were drafted in a form which fails to reflect those later developments.

97. It seems to me that I am entitled to have regard to the reality of the position when it appears from the objective correspondence, and the claimant's own evidence, and that I should not ignore that evidence in favour of a position that is manifestly ill-founded on the face of the pleading. Certainly, that evidence was clearly admissible on the abuse of process aspect of the application; and it is not appropriate for the court to engage in an exercise in mental gymnastics in trying to differentiate between evidence relevant to one, but arguably not the other, aspect of it. In any event, in accordance with the overriding objective of dealing with a case justly and proportionately, it seems to me that I am entitled to have regard to the underlying realities rather than what is demonstrated to be a false assertion in the original particulars of claim which is then not corrected in the light of subsequent correspondence and evidence even though an amended form of particulars of claim is later put forward.

98. So, for all those reasons, I do not consider that this is a case where there is a real prospect of success on appeal. If the claimant wishes to pursue the matter on appeal, then he must approach the Court of Appeal for permission. The order should record the fact that I have refused permission to appeal, and that an appeal lies to the Court of Appeal (with the permission of that court), the time for appealing being 21 days from today. It would not be practicable in a form N460 to articulate all of those reasons. The form N460 will simply say that there is no real prospect of success on appeal for the reasons given in this later extemporary judgment; and a copy of both judgments should accompany any application to the Court of Appeal for permission to appeal from that.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge