exercise or executive discretion, without trial, lay uneasily with ordinary concepts of the rule of law. It was further held by the Divisional Court in *R v Secretary of State for the Home Department, ex parte Hindley*, *The Times* 19 December 1997, that in exercising his broad discretion confirmed by s. 29, the Home Secretary was entitled to fix a whole life tariff to be served by Myra Hindley, a mandatory life prisoner, even though an earlier Home Secretary had considered a provisional tariff of 30 years, as that period had neither been fixed nor communicated to the prisoner. The court considered that the present Home Secretary's policy, announced in November 1997, in taking into account issues such as the prisoner's exceptional progress in custody, was commendable. Lord Bingham CJ, delivering the judgment did, however, state that there was room for serious debate as to whether the task of fixing the tariff should be undertaken by the judiciary, as in the case of discretionary life prisoners, or as at present by the executive, for Myra Hindley had clearly felt that she was held hostage to public opinion, although no longer judged a danger to anyone, because of her notoriety and the public obloquy which would befall any Home Secretary who ordered her release.

It is submitted that early reform of the procedure ought to be introduced to bring it in line with the procedure under s. 28 of the 1997 Act which applies to discretionary lifers, automatic lifers and those sentenced to detention during Her Majesty's pleasure. The result would be a clear and uniform procedure applied to all cases of life imprisonment, in which the judiciary would set the tariff, i.e. the relevant part of the sentence which the prisoner would have to serve before being considered for release on licence by a Lifer Panel of the Parole Board, presided over by a senior judge. It would avoid the criticism levelled at Secretaries of State that they would be more susceptible than judges to be influenced by public clamour and pressure from the media when deciding on matter of punishment, and would also properly leave all decisions relating to punishment to the judiciary.

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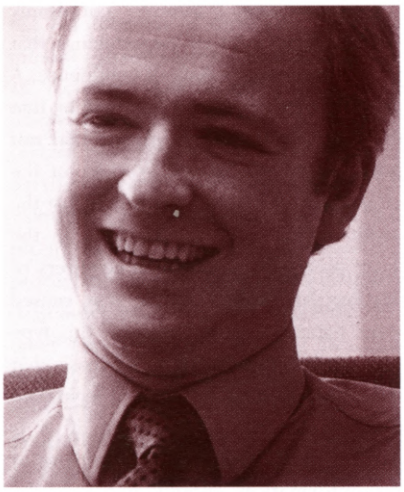
Commercial Law

Confidentiality letters – protecting disclosed business secrets

by Nigel Thorne



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It was reported in the business press, that when Barclays Bank plc put their investment banking arm up for sale, a number of potential purchasers were concerned about the severity of the restrictions in the confidentiality agreement they were presented with. The sale process will have involved Barclays providing confidential information about their investment banking arm to the potential purchasers. Barclays will have been concerned that potential purchasers may have been tempted to use the confidential information for their own commercial purposes, rather than simply for the purpose of evaluating the acquisition, or that they may simply have been careless as to whom they gave access to the confidential information.

When a business is up for sale and confidential information is given out, there may be a concern that companies who have expressed an interest in acquiring the business are on a fact-finding exercise, with no intention of undertaking an acquisition. This suspicion will be particularly strong where the potential acquirer is a competitor. Even if a competitor has a genuine interest in the acquisition they may not turn out to be the successful acquirer. A vendor who fails to sell their business or the actual acquirer of the business will be concerned as to who has obtained confidential information during the sales process and, if they are a competitor, what they could do with it.

As a result it is normal for a potential purchaser to be asked to enter into a confidentiality agreement before they are provided with sensitive information. However, placing legal obligations on a potential purchaser is not necessarily the whole answer in practical terms. A vendor may not know that confidential information is being used or distributed for purposes unconnected with the sale. Even if they suspect that it is being used for commercial advantage it may be difficult to prove. Therefore a vendor should consider holding back the most confidential information about their business, such as customer lists, until the sales contract is about to be signed.

DUTIES OF CONFIDENTIALITY

Depending on the circumstances there may be common law duties of confidentiality. The type of information involved and the relationship between the parties at the time of disclosure will be the key factors. There would seem to be little doubt that business information concerning corporate strategy, customer lists and pricing will, if not in the public domain, give rise to a duty of confidence if handed to a third party as part of a sales process. However, common law duties will rarely be relied on, essentially for three reasons:

- a document setting out the type of information that is confidential and the duty of confidence in relation to that information will serve to emphasise the existence of the duty and the importance that the vendor places on it;
- if the duty of confidence is thought to have been breached, a provider will have greater confidence approaching a court for an injunction or other relief or remedy, if they are armed with an agreement between the parties which

recognises or imposes the duty of confidence;

- the party seeking to rely on a written confidentiality agreement may take the opportunity of including other restrictions or covenants beyond a straightforward duty of confidence.

TYPES OF TRANSACTION

Confidentiality agreements are not used solely in relation to business sales although this is one of their major uses. Whenever businesses hand confidential information to third parties they should consider asking for an express written confidentiality undertaking. This applies to employee and consultancy agreements, as well as in the early stages of commercial alliances, such as joint ventures, or on the negotiation of technology or licensing arrangements. Typically, in the initial stages of a new relationship with an individual or organisation, a business will seek a confidentiality undertaking which may ultimately be extended or reinforced in a contract that is the result of the parties negotiations. On a business sale, the duty of confidentiality will be reversed in the sale contract itself, as the purchaser will be concerned that the vendor does not use or exploit commercially sensitive information about the business that it has purchased.

SUFFICIENT CONSIDERATION?

In preparing a confidentiality agreement it is necessary to consider whether it will form a binding agreement. While the agreement is, typically, in the form of a letter from one party to another, the recipient must sign an acknowledgement that it agrees to be bound by the terms and conditions of the letter. A confidentiality letter will typically express itself to be the agreement of one party to provide the information in consideration for the other party providing the confidentiality undertaking. However, if information has already been provided by the time that the letter is signed by the parties, there may be concern that only past consideration has been given. If this is a concern then it is advisable to have the agreement executed as a deed.

WHAT IS CONFIDENTIAL?

Confidentiality letters are sometimes drafted on the basis that they apply duties of confidentiality to all the information supplied, whether or not it happens to be information which is already in the public domain, or information which is known to the recipient, or information which is not by its nature secret or confidential. If this is the case there may be a concern that the letter itself could be prejudiced on the basis that it is an unreasonable restraint of trade. A better approach is to limit the duty of confidence in a confidentiality letter to information which is actually confidential, which is not known to the other party and which is not in the public domain.

On the sale of a business, a vendor will typically be very concerned to maintain confidentiality, as otherwise the sales process and the confidence of the employees and customers are likely to be undermined if it is generally known that the business is up for sale. Therefore a confidentiality letter will commonly state that not only information provided, but also the fact that the negotiations themselves are being conducted, is confidential.

WHO SHOULD BE A PARTY?

The recipient of confidential information is likely to pass on that information to a number of employees, solicitors, accountants and other agents and possibly to actual or proposed financiers. The provider of the information is therefore going to be concerned about the risk of deliberate or accidental misuse, by a third party, of that information. A requirement for the recipient to ensure that all employees and third parties provide direct written confidentiality undertakings to the information provider may be considered. However, this is usually considered too cumbersome, unless the circumstances are unusually sensitive. Therefore the provider will commonly place obligations on the recipient in a confidentiality agreement to:

- notify third parties who receive the information that it is confidential and that it is provided in such a way that duties of confidence are created;
- limit the third parties to whom the recipient may provide the confidential information, for example, to specified key employees and advisers and even particular individuals within professional firms.

DEALING WITH INFORMATION

A confidentiality letter will often set out details of how a recipient should deal with the confidential information when it is received. For example:

- that copies are not taken or that copies are only given to specified individuals;
- that information shall not be incorporated in other documents or, if it is, that the documents must be destroyed on the request of the provider;
- to keep the information supplied in a specified place;
- on request, to deliver the information back to the provider.

FORCED DISCLOSURE

While, in most cases, the recipient of confidential information will be prepared to enter into a confidentiality undertaking, they will be concerned that if they are forced in law to make disclosure of confidential information to a third party then this should not amount to a breach of the agreement. A recipient may be required to disclose information in certain circumstances, for example to Customs & Excise, the Inland Revenue or a financial services regulator. It is therefore advisable to include a carve out for this type of forced disclosure. A provider of the information may want to impose an obligation on the recipient to inform it if such forced disclosure occurs.

OTHER RESTRICTIONS AND UNDERTAKINGS

Confidentiality letters commonly include restrictions or undertakings that go beyond a simple duty of confidence. A provider may include an undertaking that the recipient of the information may not poach employees of the provider of the information. It has been reported that the width of this type of restriction, in the letter presented to potential acquirers of Barclays' investment banking arm, caused some concern. A restriction of this type may not be enforceable on the basis that the employer does not have a legitimate interest to protect. However, if it is drafted on the basis that the recipient of the information should not use the information that they receive in such a way as to poach senior or key employees of the provider of the information for a certain period, and if the circumstances are otherwise appropriate, it is thought that a court is likely to be prepared to enforce this type of clause. A court will also probably draw a distinction between preventing the recipient of the information soliciting senior employees and upholding an absolute restriction on the recipient employing any such employees.

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