

REVIEW



Directors' Duties Relating to Confidential Information Post Termination of Office



[back](#) [home](#) [forward](#)



[contact us](#)

February 2015

Directors' Duties Relating to Confidential Information Post Termination of Office

The High Court of England and Wales has recently delivered a judgment clarifying the position regarding the duties of directors holding confidential company information after their directorship has ceased. The consequences of this judgment will likely be felt on the Isle of Man despite the current absence of local reported case law on point.

Decisions of the English Court (save for those of the Privy Council acting in its role as the Island's highest Court of Appeal) are not binding on the Isle of Man but can be persuasive where there is no Manx jurisprudence, Manx statute, or local policy to the contrary. Decisions of the English higher Courts (Court of Appeal, Supreme Court) have the most potential to be persuasive of the Manx Court. Decisions of the English High Court, as in the present case, are generally less persuasive but where there is a high degree of alignment of principle between English and Manx law, the English authority will often be followed in the Isle of Man.

Eurasian Natural Resources Corporation Ltd v Sir Paul Judge [2014] EWHC 3556 (QB)

The brief facts and findings of the case are as follows.

The case involved a claim by the Defendant for strike out and/or summary judgment of the Claimant's claim. The claim against the Defendant alleged a breach of contractual and fiduciary duty in that he allegedly provided

confidential information to an individual posing as a journalist, thereby potentially damaging the company. The claim was based on the notion that the Defendant was subject to an implied term of confidentiality post-termination of his directorship and/or an implied duty to deliver up confidential information once his duties ceased.

The Claimant sought (1) an injunction to prevent further disclosure of the information and (2) delivery up of all documents. The Defendant admitted a duty of confidence both during and after his directorship (but denied breaching the same) and denied an implied duty to deliver up documents. In fact, he argued that he was under a positive duty not to return the documents to the Claimant because at that stage the Claimant was being investigated by the Serious Fraud Office and the Defendant was subject to a section 2 (of the Criminal Justice Act 1987) notice to provide any relevant documentation to the SFO, with the exception of privileged documents. The Defendant thus applied for strike out and/or summary judgment in respect of both of the Claimant's claims.

The Defendant's claim for strike out and/or summary judgment was based on the fact that there was no express term within his Letter of Appointment which required him to do what the Claimant was alleging he must do, nor was there an implied term in relation to the same. To imply a term that term must be reasonable, provide business efficacy

Directors' Duties Relating to Confidential Information Post Termination of Office

and have been the intent of the parties when entering into contract. The Defendant asserted that this could not be the case here, adding that the Letter of Appointment in fact envisages a director holding onto such information because it includes a requirement for it not to be disclosed.

The Court held that there could be no implied term. There was no legal authority in favour, it was not the norm for directors to be subject to such a duty, and such requirement would cause undeniable difficulties for all directors. It would not satisfy the business efficacy test to impose such a requirement. There was furthermore no wider fiduciary obligation of confidence for a departing director. This aspect of the claim was therefore struck out for want of reasonable prospects of success.

For completeness, with regard to the Claimant's injunction application, the Claimant successfully argued that a judge may find that there was a risk of confidential documents being disclosed if no injunction or delivery up was ordered. There was therefore a real and arguable risk and thus the only way to protect the Claimant was by ordering an injunction. This aspect of the claim was therefore permitted to proceed to a hearing.

The Isle of Man Position
Directors' duties on the Isle of Man are still largely governed by the common law, whereas the position in England is that such duties are now enshrined in the Companies Act 2006. Nonetheless, there is little divergence

between Isle of Man law and English law as to the nature and effect of such duties. Equally the same broad approach is taken and the same principles are adopted with respect to the issue of implied contractual terms. For these reasons it seems unlikely that a Manx Court, if faced with the same facts would reach a different judgment to that of Mrs Justice Swift.

In the Isle of Man where there is a significant corporate services industry, the Court's decision will be of particular interest to the many professionals engaged in the provision of director services to client companies, many of whom will no doubt welcome the Court's determination of the issues involved and the avoidance of uncertainty had any term or duty been implied. It makes a great deal of sense that the important issue of confidential information in this context should be dealt with by way of express provision within the contractual documentation relating to a director's engagement. Those engaged in the provision of fiduciary and corporate services should therefore pay close attention to this issue and ensure that adequate provision is made within the terms of their appointments.

The author is Christopher Murphy an advocate in the Isle of Man.

If you have any queries on this topic or at all, please contact Advocate Christopher Murphy on (44) 1624 659800 or cjm@mplegal.im




LEGAL

REVIEW



[back](#) [home](#) [forward](#)

 [contact us](#)

Profiles

Click on a profile to be taken to our web site for full details



Christopher J Murphy
Joint Managing Director
cjm@mplegal.im



John T Aycock
Joint Managing Director
jta@mplegal.im



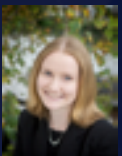
Christopher M Brooks
Counsel
cmb@mplegal.im



Damian P Molyneux
Counsel
dpm@mplegal.im



Consuelo Suay
Counsel
csc@mplegal.im



Nadine V Roberts
Associate
nvr@mplegal.im



Ilsa L Reeves
Associate
ilr@mplegal.im



Victoria C Murphy
Associate
vcm@mplegal.im



Carly L Wilson
Trainee Advocate
clw@mplegal.im



Carol A Young
Conveyancing Manager
cay@mplegal.im