Neutral Citation Number: [2019] EWHC 233 (Comm)

Case No: CL-2018-000835

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 28/01/2019

Before:

MR. JUSTICE BUTCHER

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Between:

AWBURY TECHNICAL SOLUTIONS LLC	**Claimant/ Applicant**
- and -	
KARSON MANAGEMENT (BERMUDA) LIMITED	**Defendant/ Respondent**

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MR. DAVID HEAD QC (instructed by **Hogan Lovells International LLP**) appeared for the **Claimant/Applicant.**

MR. ORLANDO GLEDHILL QC and **MR. MATTHEW COOK** (instructed by **Morgan, Lewis & Bockius LLP**) appeared for the **Defendant/Respondent**.

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MR. JUSTICE BUTCHER :

1. The Claimant (to which I will refer as "Awbury") applies for interim injunctive relief to compel the Defendant (to which I will refer as "Karson") to return what it says is confidential information belonging to Awbury and to prohibit the use of such information.

2. Awbury is an insurance solutions structuring and execution boutique based in Connecticut in the United States. Its business focuses on complex financial and economic risks. In the evidence which has been put in for this application it is said that it creates funded opportunities which involve the use of specialised insured financing, the proceeds of which are used to meet, among other things, capital commitments to one or more investment funds. Awbury states that the funded opportunities transactions which it concludes are complex arrangements. It has, it says, executed dozens of funded opportunities transactions to date.

3. Karson describes itself as an independent financial market structuring and platform development company that designs and executes risk, reserve, capital and collateral financing solutions for regulated financial institutions.

4. It appears that a core part of both companies' business is putting together insured financing deals.

5. In insured financing, the investor/financing company limits its risk of loss through an insurance and/or reinsurance policy.

6. The present dispute arises in the context of the use of insured financing for the acquisition of investments in collateralised loan obligations or CLOs.

7. Awbury has been doing CLO insured financing business for several years. It is a new asset class for Karson.

8. On 13th December 2017 a reinsurer with whom Awbury does business (to whom I will refer as "the Reinsurer"), proposed Karson to Awbury as a potential funder for a particular funded opportunities transaction. Awbury consented to the Reinsurer disclosing details of Awbury's business and intended structures and pricing for this proposed transaction to Karson and the Reinsurer did so.

9. On the same day, Awbury and Karson executed a non-disclosure agreement, to which I will refer as the "NDA". It is this NDA which is at the heart of the present dispute and application.

10. The NDA contains, amongst other things, the following provisions:

> "**3.1 Nondisclosure**. Recipient agrees (a) to keep secret and maintain the Confidential Information as confidential; (b) to exercise all reasonable precautions to prevent unauthorized access to the Confidential Information; (c) to return promptly to the Discloser at any time upon the Discloser's request, any and all materials pertaining to or containing any Confidential Information. Recipient shall not disclose the Confidential Information to any person or entity not a party to this Agreement other than Recipient's and its Related Parties' employees or agents or Recipient's professional modeling consultants who (i) have a need to know the Confidential Information for the Permitted Purpose; and (ii) are apprised of the confidential nature of the Confidential Information and of the restrictions set forth herein.
>
> "**3.2 Use Restrictions**. Recipient agrees (a) to use the Confidential Information solely for the Permitted Purpose; and (b) not to assert any intellectual property right in any Confidential Information or any software or other invention or Derivative Information developed using the Confidential Information. Recipient shall not attempt to (1) reverse engineer, decompile, disassemble or reverse translate any software or other deliverable provided by the Discloser, (2) attempt to discover the source code of or trade secrets in any such software or other deliverable, or (3) circumvent any technological

> measure that controls access to such software or other deliverable. The Confidential Information will not be used to provoke an interference with any intellectual property right owned by the Discloser or with any application for any such intellectual property right that the Discloser has filed with respect to any part of the Confidential Information, and will not be used directly or indirectly by Recipient to amend or add any claim in any patent application of any inventor to allow such claim to read on, cover, or dominate any invention (whether or not patentable) disclosed in the Confidential Information."

11. In those provisions "Recipient" means the party to the NDA receiving confidential information thereunder. The "Discloser" means the party disclosing or on whose behalf disclosure is made of Confidential Information. "Confidential information" is defined as follows:

> "**Confidential Information** means all (i) Information disclosed to Recipient by the Discloser or by any Related Party orally, visually, in writing or by way of any other Media; and (ii) all Derivative Information; whether or not such Information or Derivative Information, as the case may be, is marked as confidential except (in either case) any portion thereof that:
>
> "(a) was known to the Recipient before receipt thereof from or on behalf of Discloser or any Related Party;
>
> "(b) is disclosed to the Recipient by a third person who has a right to make such disclosure without any obligation of confidentiality to the Discloser;
>
> "(c) is or becomes generally known to the public without violation of this Agreement by the Recipient; or
>
> "(d) is independently developed by the Recipient or Recipient's employees without reference to the Discloser's information;
>
> *"provided* that only the specific Information that meets the exclusion shall be excluded and not any other Information that happens to appear in proximity to such excluded portion (for example, a portion of a document may be excluded without affecting the confidential nature of those portions that do not themselves qualify for exclusion). All Information (including without limitation, data, software, algorithms, methods and approaches) contained or discerned from any model or other deliverable provided by Karson to Counterparty (other than such Information contained therein that was supplied by Counterparty) is the Confidential Information of Karson. All

> Information (including without limitation, data, software, algorithms, methods and approaches) contained or discerned from any model or other deliverable provided by Counterparty to Karson (other than such Information contained therein that was supplied by Karson) is the Confidential Information of Counterparty."

12. Clause 7 of the NDA provides as follows:

> "**Remedies**. The parties agree that any breach or threatened breach of this Agreement by a Recipient would cause not only financial harm, but irreparable harm to the Discloser; that money damages will not provide an adequate remedy. In the event of a breach or threatened breach of this Agreement by a Recipient, the Discloser shall, in addition to any other rights and remedies it may have, be entitled to an injunction (without the necessity of posting any bond or surety) restraining the Recipient from disclosing or using, in whole or in part, any Confidential Information."

13. By clause 10 of the NDA it is provided that English law is to apply and that the parties agree to English jurisdiction.

14. On 18th December 2017, a meeting was held in which Awbury's David Goldman explained to Mr. Davies and Mr. Hendrix of Karson certain features of the then proposed transaction.

15. On 20th December 2017, Mr. Meynell of Awbury emailed Mr. Hendrix and Mr. Davies of Karson a document entitled "Awbury Funded Opportunities Insurance Business [ ] CLO Risk Retention Vehicle". This document has been referred to as the Concept Summary and I will call it that. The Concept Summary contained a diagram or transaction schematic of the structure which Awbury had conceived and contemplated for the proposed transaction. It also explained the way in which the main components of the transaction were intended to work, including descriptions of the proposed financing and

insurance arrangements. Indicative terms of these financing facilities and of the nonpayment insurance policy were given.

16. The Concept Summary stated:

> "This document is furnished on a confidential basis exclusively to the named recipient ... The information contained herein should be treated in a confidential manner and may not be transmitted, reproduced or used in whole or in part for any other purpose, nor may it be disclosed without the prior written consent of [Awbury]. By accepting this material, the Recipient agrees not to distribute or provide this information to any other person."

17. The covering e-mail under which the Concept Summary was sent by Awbury to Karson stated:

> "Please note that this is highly confidential and may not be distributed by [the Reinsurer] or Karson without the express written consent of Awbury."

18. In the event Karson did not participate in the proposed transaction and did not become a commercial partner of Awbury, the discussions having ended in early 2018.

19. Awbury has since come to fear that Karson has used or will use confidential material from the Concept Summary for its own purposes. The basis, or at least the initial basis, for this fear is as described in the first witness statement of Mr. Feingold. The most important paragraphs for present purposes are paragraphs 39-41 which read as follows:

> "39. Awbury was alerted to the fact that Karson has been using its Confidential Information in conversations with certain reinsurers with which Awbury regularly works. For fear of damaging Awbury's commercial relationship with these reinsurers, I will not name them, but will detail conversations with certain reinsurers to demonstrate that Awbury's concerns

> regarding Karson's use of the Confidential Information have a solid foundation.
>
> "40. I understand from Mr. Meynell that this issue was raised during a telephone conversation on 29 November 2018 with a senior executive from one of our reinsurers, about an unrelated matter. On the call, the executive (who is very familiar with Awbury's business, having entered into a funded opportunities transaction with Awbury in mid-2017) asked Mr. Meynell whether he knew of a company called Karson. The executive told Mr. Meynell that he had had a conversation with Karson (he did not specify the individual he had spoken to) and that Karson had described a transaction structure to him, which he believed was the same as the Awbury fund opportunity transaction structure. The executive reported that Karson had indicated that it could put together a transaction using this structure, and his understanding was that Karson was pitching itself as being capable of doing this type of transaction at a cheaper price than Awbury. As the court will appreciate, this is a matter of great concern to Awbury, whose principals and employees have worked hard over many years to develop a unique and proprietary transaction structure, which no one has (to date) been able to replicate, but which Karson is now trying to copy and undercut so as to poach Awbury's business.
>
> "41. Mr. Meynell, and other colleagues at Awbury, have had similar conversations in recent weeks with another reinsurer, who for the reasons explained above I do not intend to name, which give rise to similar concerns."

20. Awbury contends that when these concerns were first raised on its behalf with Karson on 3rd December 2018 Karson was initially evasive. It then says that its concerns have been increased by evidence which Karson has served in response to this application and in particular by the fact revealed in Mr. Hendrix's first witness statement that Karson anticipates concluding a deal involving a CLO equity transaction in the next four to six weeks.

21. Karson's position in relation to the facts in outline is as follows. First, it denies that it or Mr. Hendrix has breached the NDA or will so do. Secondly, it says that it itself had by December 2017, and before receiving the Concept Summary from Awbury, developed a structure for insured financing which could be

applied to an investment in CLOs. It points to a presentation which it had prepared in November 2017 which showed such a structure. Thirdly, it says that any deal which it may enter into does not involve the same structure as Awbury's or which is shown in the Concept Summary. Fourthly, it says that the Concept Summary contains no or, as I think it was rather put at the hearing, little identifiable Confidential Information.

22. This is an application for an interim injunction. On this hearing it is impossible for the court to decide the merits of contested issues of fact. The way in which the court should approach such applications usually follows that laid down by the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396.

23. In the present case, however, there has been an issue about whether that approach is, or is wholly, appropriate. There are two different points here. The first of those is that Karson contends that the present case is one where it is not correct to apply the test of whether there is a serious issue to be tried. Its contention is that the present case is governed by section 12 of the Human Rights Act 1998 (which I will refer to as the "HRA").

24. In relevant part, section 12 of the HRA provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> "...
>
> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> "(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or

> which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to —
>
> "(a) the extent to which —
>
> "(i) the material has, or is about to, become available to the public; or
>
> "(ii) it is, or would be, in the public interest for the material to be published;
>
> "(b) any relevant privacy code."

25. What is submitted on behalf of Karson is that section 12 of the HRA applies here because what Awbury is seeking is to prevent publication by Karson of confidential information. Publication, submitted Mr. Gledhill QC for Karson, must mean the same as the meaning which is accorded it in the context of defamation cases, namely communication to some person other than the claimant himself.

26. As he did not shrink from saying, any case involving an anticipated communication of any confidential material by the defendant to anyone other than the claimant would raise the question of section 12 and section 12(3) would apply.

27. He referred to *Cream Holdings v Banerjee* [2004] UK HL 44. There it was held that when section 12(3) is applicable:

> "... the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion ..."

28. For its part Awbury submitted that this was not a case to which section 12 of the HRA had any relevance. The merits test which should be applied was the serious issue to be tried test as enunciated in *American Cyanamid*.

29. I confess that the suggestion that section 12(3) of the HRA applies in the present case was a surprising one to me and the development of the argument did not lessen my doubts. The origin of section 12 of the HRA was explained by Lord Nicholls of Birkenhead in *Cream Holdings* at paragraph 15 as follows:

> "When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private life, was among the Convention rights to which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a 'serious question to be tried' or a 'real prospect' of success at the trial."

30. I do not doubt that section 12, including section 12(3), is capable of applying in what may be called a commercial context. The fact that the dispute may be a commercial one does not of itself mean that section 12(3) is inapplicable. So much indeed was stated by Longmore LJ at paragraph 55 of *Boehringer Ingelheim v Vetplus Ltd* [2007] BusLR 1456.

31. However, the court must consider whether the remedy sought is really one which may affect the right of freedom of expression. I do not consider that what is involved here concerns Karson's freedom of expression.

32. What Awbury is concerned to do is to prevent Karson from using the confidential information about the nature of its CLO insured finance scheme in devising and implementing its own CLO insured finance scheme. Any communication of such information would be to potential participants in such a scheme and would be made in confidence.

33. No authority, whether from this jurisdiction or elsewhere, including from European Court of Human Rights, was cited to me which supported the suggestion that that type of communication involved the Convention right to freedom of expression.

34. It is well established of course that some forms of commercial speech do involve that right. The press is a clear case. Some other forms of commercial speech do too, in particular some forms of advertising and communications to consumers.

35. However, where the communication is one that is made only for the purposes of furthering the financial interests of the communicator, the communication is made only to a very limited range of other individuals whose interest in it is simply to further their financial interests, and where there is no question of the information which is imparted being of a journalistic, literary or artistic nature I consider that it will not, some extraordinary feature apart, involve the right to freedom of expression.

36. On that basis I do not consider that section 12 of the HRA is applicable because section 12(1) is not engaged.

37. Furthermore, I doubt that any publication which would be involved in this case is of the type which is envisaged by section 12(3). Here any communications which Karson may make would (i) be to a very limited number of potential commercial counterparties and (ii) would be made in confidence.

38. As to the latter point, the terms of the NDA are Karson's own standard terms and it can be anticipated that any communications which Karson may make of the relevant material would be on strict terms as to confidence. This is borne out by paragraph 6 of Mr. Hendrix's second witness statement and by paragraph 80 of the skeleton argument submitted on behalf of Karson for this hearing.

39. Karson relied on a number of cases to suggest the applicability of section 12(3) to the present case. With one possible exception, they much more clearly engaged, in the sense that an injunction might have affected, the right to freedom of expression than the present and they involved threatened communications which were much more clearly publications.

40. *Boehringer Ingelheim v Vetplus* concerned comparative advertising. *Interflora v Marks & Spencer Plc* [2014] EWHC 4168 (Ch) concerned internet advertising by the use of adverts. As Birss J put it at paragraph 22:

> "What the defendant wishes to do is publish an advertisement and to that extent this injunction could engage its freedom of speech."

41. *Dar Al Arkan v Al Refai* [2012] EWHC 3539 (Comm) concerned injunctions to restrain a campaign of the "wholesale publication of damaging and untrue allegations", in particular via a website: see paragraph [5]. In that context, what Andrew Smith J said in the second sentence of paragraph [136], as well as being obiter, was unsurprising.

42. The case of *S v A* [2018] EWHC 2144 (Ch) is rather less clear. There is no analysis in paragraph [15] as to why the *Cream Holdings* test was applicable, but even that case involved a proposed disclosure of matters to a court in Massachusetts for the purposes of establishing its jurisdiction.

43. None of those cases appears to me to be similar to the present. Accordingly, I am not persuaded that section 12(3) of the HRA is applicable to the present case.

44. The other issue which arises is the approach which the court should adopt as to the significance or otherwise of clause 7 of the NDA, which I have already quoted. This is of potential relevance as I consider that it is apparent from its terms that it is intended, at least in part, to deal with interlocutory injunctions. A case of a threatened breach may well involve an attempt to obtain an interlocutory injunction, and the reference to the Discloser being entitled to an injunction without the necessity of posting any bond or surety would appear most apposite to an interlocutory, rather than a final, injunction.

45. Accordingly, I asked the parties what assistance there was in authority as to the court's approach to such clauses. I was helpfully provided with an analysis of the approach of the courts in a number of jurisdictions to similar provisions. The only English case cited considering an analogous clause was *Warner Brothers Pictures Inc. v Nelson* [1937] 1 KB 209, a decision of Branson J. At pages 220 to 221, he said:

> "…the artiste expressly agrees that the producer shall be entitled to the remedy of injunction. Of course, parties cannot contract themselves out of the law; but it assists, at all events, on the question of evidence as to the applicability of an injunction in the present case, to find the parties formally recognising that in cases of this kind injunction is a more appropriate remedy than damages."

46. That was a case which was concerned with the grant of an injunction after trial, not an interim injunction. It is also right that it was decided long before *American Cyanamid v Ethicon*.

47. I was also referred by Karson to *Quadrant Visual Communications Ltd and others v Hutchison Telephone (UK) Ltd and another* [1993] BCLC 442. That was a specific performance case that is of some relevance in that it was argued that a clause of the contract excluded the ability of the defendant to rely on the clean hands doctrine to oppose the grant of a specific performance. In the Court of Appeal Stocker LJ, with whom Butler-Sloss LJ and Sir George Waller agreed, said at 451 B to D:

> "Even if [the clause covered the clean hands concept], and could bind the parties, it could not have the effect of fettering the discretion of the court. Once the court is asked for the equitable remedy of specific performance, its discretion cannot be fettered. Once the assistance of the court is involved by one of the parties in a discretionary matter, that party is bound by the general discretion of the court to grant or refuse the remedy sought. If Mr. Tabachnik's submission that the court is bound by the terms of the contract and therefore has no discretion to exercise is correct, the function of the court would be reduced to that of a rubber stamp. In my opinion, this could not be and is not the situation."

48. I was referred to authorities from a number of other jurisdictions. Care obviously has to be taken in relation to their use as the requirements for the grant of injunctions may vary from jurisdiction to jurisdiction. Nevertheless, the consideration of these authorities was of assistance.

49. In the laws of all or most States of the United States a finding of irreparable harm is, as I understand it, a necessary condition for the grant of an injunction. It also appears that the use of clauses stating that a breach will cause irreparable harm is widespread, and there are a number of cases dealing with the weight to

be attached to them. The courts of Delaware apparently give full effect to such clauses and usually regard the presence of such a clause as, of itself, enough to satisfy the requirement of irreparable harm. Elsewhere the position is not uniform. There is a significant body of authority which regards the presence of such a clause as not dispositive of the issue but as being a potentially relevant factor when deciding whether irreparable harm has been established. Thus, for example, in *Gramercy Warehouse Funding LLC v Colfin Jih Funding LLC* [2012] US Dist Lexis 3244, a decision of the US District Court for the Southern District of New York, it was said (at *11-*12), citations omitted:

> "Courts have held that contractual provisions conceding irreparable harm are akin to admissions of irreparable harm by the parties thereto. Courts have also held, however, that such bald admissions of irreparable harm, standing alone, are not dispositive. Accordingly, this Court is both required and entitled to make an independent finding of irreparable harm before issuing the extraordinary relief of a TRO. 'The court must perform a standard inquiry into the existence of irreparable harm and simply use the contractual provision as one factor in its assessment.' In doing so this Court must weigh all of the relevant evidence regarding whether irreparable harm could or would exist in the absence of the relief sought. An admission is simply one piece of evidence in that regard. The contractual provision at issue here was made in a particular context - not that before this Court - in a document signed almost six years ago and contains no specificity or reference to particular facts, let alone those facing the Court today. Under the circumstances, the Court declines to give the provision significant weight in this case."

50. The Canadian authorities are divided. An approach similar to that in *Gramercy Warehouse Funding* was adopted by the Ontario Supreme Court in *Jet Print Inc v Cohen* [1999] OJ No. 2864. That case involved a clause which stated that breach would cause irreparable harm and money damages would not be an adequate remedy. Nordheimer J said, at paragraph [27]:

> "The granting of an injunction is an equitable remedy. I do not believe that the parties to a contract can obviate or waive the usual requirements on which a court would need to be satisfied before exercising its equitable jurisdiction. While such a term in the contract might provide some evidence in favour of a finding of irreparable harm, I cannot see that it can be a complete answer to that requirement and thereby preclude the court from enquiring into the issue, particularly in a case such as here where there is otherwise an absence of evidence that would lead to that conclusion."

51. In the Saskatchewan case of *The Height of Excellence Financial Planning Group Inc. V Bergen* [1999] SJ No. 699, the court was faced with a clause which both stated that a breach might cause injury which could not be compensated in law, and also that "the contractor hereby expressly agrees that the company shall be entitled to the remedies of injunction … to prevent a breach or recurrence of a breach". Scheibel J said at [12]:

> "The issue of contractual right to have injunctive relief is not conclusive. It is only one factor, but it is an important factor in the exercise of the discretionary power of the court."

52. Scheibel J then referred to **Waddams: The Law of Contracts** which referred to both an Alabama case and to *Warner Bros. Pictures Inc. v Nelson* as authorities for the propositions that the existence of a clause providing that the promisor will submit to certain remedies is "important in its influence upon an exercise of the discretionary power of the court to grant a temporary injunction" and "relevant and persuasive, though not determinative".

53. Both parties also referred me to the decision of the Federal Court of Malaysia in *AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd* [2014] 3 MLJ 61. In that case the relevant clause provided that the receiving party agreed the damages would not be adequate to compensate the unauthorised use of confidential information and that injunctive relief would be appropriate. The

Federal Court stated (at [12]) that the "mere existence" of such a clause "does not ipso facto entitle the appellant to an interim injunctive relief", and that the test in *American Cyanamid* must still be satisfied. It referred to *Jet Print v Cohen* and to another, United States, decision and stated:

> "Based on the above two cited case authorities we are of the view it is clear that a clause in a contract stipulating that injunctive relief *may* or *shall* be the appropriate remedy where damages may not be appropriate or where there is irreparable harm does not mean that such relief will be granted as of right. The party seeking to secure equitable relief of such a nature must still satisfy a court of law that the pre-requisites for granting injunctive relief are prevalent."

54. Finally, there appears to have been little consideration in the decided cases in relation to such clauses in Australia. However, in *Maggbury Pty Ltd & Anor v Hafele Australia Pty Ltd & Anor* [2001] HCA 70, which concerned the grant of an injunction after trial, Kirby J, in the minority as to whether an injunction should be granted, referred to a clause which said that the innocent party shall be entitled to an injunction in the event of breach, and asked (at [75]):

> "Why should [the defendant] now be heard to resist the remedy to which it expressly agreed in respect of the precise circumstances that have occurred?"

55. Having had the benefit of the citation of these and other authorities I turn to express my own conclusions as to the relevance of clause 7 to the present issue.

56. First, I do not consider that it has any significant relevance to the issue of what has to be established as to the likelihood of a breach occurring for the purposes of the grant of an interim injunction. Specifically it does not bear meaningfully on the question of whether what must be established is a serious issue to be tried as to whether there may be a breach or whether it has to be established that a breach is more likely than not to occur. Either might be described as a

"threatened breach". Further, even if the clause did indicate that a test of a serious issue should be applied, it would not override section 12(3) of the HRA were that section applicable.

57. Secondly, in relation to the question of whether damages would be an adequate remedy, the fact that the parties have agreed that they will not be is not determinative. The Court has to consider this question for itself. The fact that the parties have agreed that damages are not an adequate remedy may be some evidence that they are not, in that the parties, who can be taken to know the business(es) they are involved in, have agreed that they will not be. The provision at least means that the Court will subject any suggestion that damages are an adequate remedy to particular scrutiny but it does not of itself answer the question of whether the damages are an adequate remedy, or relieve the Court from having to consider that question.

58. Thirdly, in relation to the provision that the Discloser "shall be entitled to an injunction" again does not bind the Court to grant an injunction. The Court has to be satisfied that the case is an appropriate one for the grant of an injunction. Nevertheless, the existence of such a clause is a factor which can be taken into account when the Court is exercising its discretion. The weight to be accorded the existence of such a clause will depend on the circumstances, including how far it may be said that the circumstances in which the injunction is sought are those which the parties anticipated when agreeing the clause.

59. Fourthly, in relation to the specific provision that the party may obtain an injunction without the necessity of posting any bond or surety, once again the Court is not bound. Yet on this matter the provision in the clause may be of

considerable weight in relation to the Court's decision. The parties must be taken to have agreed, knowing of each other's identity and financial position, that an interim injunction may be granted, notwithstanding that there is no fortification of any cross-undertaking in damages. Circumstances, including the financial circumstances of the parties, may have materially changed between the entry of the NDA and an application to the Court for an injunction, but if they have not, then I consider that the agreement on the issue is likely to be a matter of some importance.

60. I now turn to consider the application for an injunction in the light of my conclusions on those two preliminary issues as to the appropriate approach. I consider that the right approach is that set out in *American Cyanamid v Ethicon* as subsequently applied and explained, including in *Fellowes & Son v Fisher* [1976] 1 QB 122, 137-140, and that clause 7 of the NDA is of potential relevance in that exercise in the ways that I have described.

61. The first question is whether there is a serious issue to be tried. Mr. Head QC submitted that there was. He said that the nature of the information contained in the Concept Summary, the explicit reference in the Concept Summary to its containing confidential information, and the circumstances in which it was shared all demonstrated that confidential information had been imparted. As to possible breach, he pointed to the evidence of Mr. Feingold at paragraphs 39 to 41 of Feingold 1. He also referred to Feingold 2, and in particular paragraphs 28 to 29 thereof. He submitted that on the limited information which Karson had provided as to the transaction it is planning to enter into there were features which appeared to be taken from the Concept Summary. He submitted that

there were clear indications that Karson had used one of Awbury's concepts in an email of 29th May 2018. He also submitted that it was significant that Karson, although it could have revealed exactly what was the nature of its intended transaction, had refused to do so.

62. It was Mr. Gledhill's submission that, even if he was wrong as to the test being that in section 12(3) of the HRA, there was no serious issue to be tried as to whether his clients had breached or might breach the NDA. He accepted in his submissions before me that the Concept Summary contained at least some information which was probably confidential, but he made detailed criticisms of the evidence which Awbury had adduced suggesting that there had been or might be a breach of the obligation to keep such information confidential. Thus he criticised the evidence in paragraphs 39 to 41 of Feingold 1 on the basis that it was triple hearsay, that the people at the reinsurer and at Karson who are alleged to have been involved are not named, and that it lacked specificity as to the way in which the structure of the projected Karson arrangement is the same as the Awbury arrangements. He submitted that there was clear evidence from Mr. Hendrix that Karson had not used Awbury's confidential information in creating its own proposed CLO insured financing arrangement and had no need to do so because it was already well advanced in devising such an arrangement before receipt of the Concept Summary. He submitted also that the structure of Karson's proposed arrangements is not the same as that of Awbury's.

63. These are cogent submissions, but I have concluded that there is nevertheless a serious issue to be a tried. The test, as I understand it, is the same as whether the claimant's actions are frivolous or vexatious: see *Smith v Inner London*

Education Authority [1978] 1 ALL ER 411, 419. I do not consider that it can be said that Awbury's case is so weak as to fall into that category. Applying the terms of the test itself I consider that there is a serious issue which Awbury can ask the Court to try.

64. As to the issue of whether damages would be an adequate remedy to Awbury were an injunction to be refused, what Awbury submits is that it has an established CLO funded opportunities business. If, as Awbury contends is the case, Karson is able enter the market as a result of use of Awbury's confidential information that will undermine its business because of competition from a competitor using a very similar structure. It is common ground, Awbury says, that the number of players in the relevant market is not huge and so any loss of counterparties to a competitor might be significant. It also relies on the terms of clause 7 the NDA in this context.

65. I accept that if, as I assume would be the case for this purpose, Karson is able to compete with Awbury as a result of Karson's unchecked use of Awbury's confidential information then Awbury would or might well suffer a diminution of business as a result of that competition and that any such losses would be difficult to quantify, and that for that reason damages could not be regarded as an adequate remedy. I reach that conclusion without reference to clause 7 of the NDA. However, it seems to be that that clause does provide some additional support for this conclusion because of its recognition that the misuse of confidential information in this area is likely to lead to harm which is hard adequately to compensate in damages.

66. As to whether, should an injunction be granted and turn out to have been wrongly granted, damages would be an adequate remedy to Karson, I am rather doubtful whether a properly drafted and confined injunction will cause damage to Karson. However, Karson says that it is concerned that an order will interfere with the deal or deals it currently contemplates, will prevent Karson from doing other business of the same kind, and will cause Karson reputational damage and deter third parties from doing business with it. I will proceed on the basis that there is substance in those concerns and that the damage which Karson would suffer from the wrongful grant of an injunction would be very difficult do quantity.

67. There remains an assessment of the balance of convenience. Subject to the question of the terms of the injunction to which I will return, in my judgment this lies in favour of the grant of an injunction. In this regard I consider that it is of significance that Awbury has an established business in relation to funded CLO opportunities at the present time. The evidence is that it has spent large sums in legal, accounting and advisory fees in developing this funded opportunities business over a number of years and that such transactions in 2018 generated substantial current and future net income. By contrast Karson does not at present have a business in the field of this asset class. It does not have a track record in it and its own estimates of the potential income which it may generate from this business are relatively modest compared with those of Awbury.

68. I consider that this tends to indicate that the balance of convenience or, as it may be called, the balance of justice or injustice, lies in favour of the grant of an

injunction. I consider further that the grant of an injunction is also indicated by reason of the terms of clause 7 of the NDA in the way in which I have already explained. Clause 7 is not by any means determinative but is a matter which can be taken into account in the exercise of the Court's discretion. It seems to me that it is a relevant matter in the circumstances of the present case, given that the circumstances in which the injunction is currently sought must be very much the type of circumstances which the parties had, or are to be taken to have had, in contemplation when agreeing clause 7.

69. Finally, and while recognising that it is no more than an imprecise rule of thumb when other considerations are balanced, I consider that the preservation of the status quo, is in favour of the grant of an injunction.

70. In the circumstances, and given that the matter has not been resolved by Karson giving undertakings, I consider that in principle there should be an injunction. I was, however, much pressed with significant arguments as to the difficulty in formulating any injunction which would not give rise to injustice because of the difficulty of identifying what is actually confidential information in the Concept Summary, and as to the danger that Karson may, as a result, find itself unwittingly in breach of the injunction. I consider that these concerns ought to be capable of being met by a properly drafted order.

71. In that regard, I should say the following: first, I can see no particular difficulties in an order that Karson should, insofar as it has not already been done, return the Concept Summary or put it beyond its use. That would involve Karson returning hard copies and deleting electronic copies from its day-to-day operating systems. I do not consider, however, that it is necessary to have an

order which would require to be eliminated all electronic copies which are such as could only be retrieved by computer specialists who are familiar with the recovery of deleted items.

72. Secondly, I consider that an order can be framed as prevent Karson from making use of confidential information *derived from* the Concept Summary. I consider that this is analogous to the order which was granted in *UK Power Reserve Ltd v Read* [2014] EWHC 66 (Ch). However, I should clarify what I consider that that means. It would mean information which was known to Karson only from the Concept Summary or because it had received the information in the Concept Summary. I do not consider that that is too uncertain. Mr. Hendrix states unequivocally in his statement "We have not breached the NDA or otherwise used any of Awbury's confidential information as defined in the NDA". That he can give such an unqualified statement is some indication that there is sufficient certainty about what information is involved.

73. For the avoidance of doubt, however, on the material which I have seen, I do not consider that a structure involving a Lender and a Borrower being Cayman Islands companies owned through a Cayman Purpose Trust with a beneficial owner to be confidential information, nor that such Cayman Islands companies might be administered by Estera Trust (Cayman) Limited. In mentioning those particular matters, that is not to say that the other matters which Mr. Feingold has identified which he says are confidential in the Concept Summary are necessarily correctly so identified, or that in Karson's hands can necessarily be said to have been derived from the Concept Summary.

74. Thirdly, concerns have been raised as to the position of third parties and as to whether they might be in breach of any order if they know if its terms and if what is found to be confidential information is in fact used in any actual or proposed deal which they may do with Karson. I consider that this can be dealt with by making clear in the order that third parties will not be concerned to know or inquire what is the extent of confidential information which Karson may be prohibited from using.

75. I am willing to consider any further submissions which either side may wish to make to ensure that the order granted is sufficiently certain and limited to protecting Awbury's rights, bearing in mind my overall decision that it is appropriate for an order to be made.

[Further Argument]

JUDGMENT ON COSTS

76. I have decided that the costs of this hearing should be reserved in their entirety. I have taken into consideration the guidance provided by the Court of Appeal in *Desquenne et Giral UK Ltd v Richardson* and the decision of Neuberger J in *Picnic at Ascot v Derigs* where it is made clear that the normal order in a case such as this is for costs to be reserved unless it might be said, for example, that the outcome of the hearing of the application for an interlocutory injunction was so plain to the parties that the Court could conclude that an order should be made against the defendant for wasting time and money in fighting the issue or the court had formed a clear view as to the substantive merits. I do not consider that this case falls into either of those categories and therefore I think that the usual order should be adhered to.

77. A specific point has been made in relation to the costs of the Human Rights Act point, but it seems to me that that was a point which was taken as one of a number in resisting the grant of an interlocutory injunction. I do not consider it would be appropriate to hive off the costs relating to that one point, as, though in my judgment it was a point which was plainly wrong, nevertheless it was not in any sense inappropriately taken.

78. Therefore, I am going to reserve all the costs of this interlocutory injunction to the trial judge.

[Further Argument]

JUDGMENT ON PERMISSION TO APPEAL

79. I am not going to give permission to appeal. I do not consider there is a real or realistic prospect of success in relation to this appeal.

80. In relation to the issue under section 12, I regard this at the moment as being a relatively clear case in which section 12 is not engaged. As to clause 7, I do not consider that there is a real prospect of the Court of Appeal taking a different view as to the way in which it is capable of being used and has been used by me.

81. In relation to the application for permission to appeal more generally, that largely relates to questions of discretion.

82. I am not going to give permission to appeal. Mr. Gledhill will have to ask the Court of Appeal itself.
