

Disclosure and confidentiality: a balancing exercise

Omers Administration Corporation & Ors v Tesco Plc

Introduction

In 2014, the UK Serious Fraud Office (**SFO**) commenced a criminal investigation into Tesco arising out of the falsification of accounts and records. This resulted in a deferred prosecution agreement (**DPA**) with Tesco in 2017, and separate criminal proceedings against three individuals, all of whom were later acquitted.

In Omers Administration Corporation & Ors v Tesco Plc [2019], two groups of shareholders (the "**Claimants**") brought proceedings against Tesco, seeking compensation under the Financial Services and Markets Act 2000 for alleged losses suffered following Tesco's false and misleading statements to the market.

The issue

Tesco had in its possession and control certain documents obtained by the SFO for the most part pursuant to the exercise of its powers under section 2 of the Criminal Justice Act 1987. The SFO provided Tesco with these documents (the "**SFO Documents**") for the purpose of negotiations about the DPA. The SFO Documents included transcripts of interviews and witness statements. As most of the documents had been obtained by or in anticipation of compulsion, the SFO imposed strict restrictions on Tesco as to the use that could be made of the documents.

The parties were agreed that the SFO Documents were relevant to the instant proceedings, but Tesco was caught between its obligations to the parties to the litigation as regards to disclosure, and its obligations to keep the SFO Documents confidential and private, unless otherwise directed by the Court.

Whilst the parties were largely agreeable to disclosure of the SFO documents, some third parties behind the SFO Documents objected to their disclosure.

The difficulty – confidentiality

The Court noted that the difficulty in this case resulted from the fact that the SFO Documents were only in the control of Tesco further to the SFO's exercise of powers of compulsion and on which obligations of confidence were given and relied upon, and the release of the SFO Documents through an established gateway but on the express basis of confidentiality and privacy. Whilst the English Civil Procedure Rules dealt with disclosure, they did not deal with the particular circumstances of the instant case.

The Court held that the determinative test for disclosure was whether the SFO Documents were relevant to the proceedings. However, notwithstanding relevance, the Court had an obligation to consider the value in preserving confidentiality of the documents and "the damage that may be caused by breaking it".

The Court found that confidentiality of itself offered no protection from disclosure. Rather, the question in deciding whether to order disclosure where confidentiality issues arise, is whether the objective of dealing with a case justly and at a proportionate cost could be achieved without disclosure of the SFO Documents.



The balance – public interest v private interest

The court stated that where disclosure or non-disclosure would benefit or prejudice parties, that factor is likely to outweigh other considerations, particularly where the confidentiality asserted is purely private interest confidentiality.

The Court accepted the distinction between public interest and private interest confidentiality as being:

- (a) public interest confidentiality refers to the public interest in maintaining the confidentiality of individuals who provide information under compulsion to prosecuting authorities
- (b) private interest confidentiality refers to the private interest of individuals in maintaining the confidentiality of information relating to them and their rights to privacy and family life protected under Article 8 European Convention on Human Rights.

Where public interest confidentiality is at issue that must yield to the public interest in ensuring that the courts try cases on the basis of all relevant materials, so that it has the best prospect of reaching a just result.

The judgment

The Court referred to a number of factors that should be considered in balancing and assessing disclosure against confidentiality issues. Those factors include any litigation advantage in the event of disclosure or litigation disadvantage in the event of non-disclosure; the strong public interest in “preserving the integrity of criminal investigations”; that the Claimants could have procured the SFO Documents directly from the SFO through the third party disclosure process; and the possibility of a form of restricted order of disclosure.

Ultimately, the Court was firmly of the view that it would not be just to deny the Claimants production of the SFO Documents, as they were likely to be of considerable litigious advantage to the Claimants and possibly even the Defendant.

Conclusion

The judgment illustrates that where documents are provided by parties to regulatory or other enforcement bodies, such as the SFO, even under compulsion of law, those documents may become disclosable in subsequent civil proceedings. This possibility exists notwithstanding strong public interest in maintaining confidentiality in regulatory investigations. If the documents are relevant, and litigation advantage will be gained through production, then disclosure will likely be ordered.

Contact us

If you would like to discuss the impact of this judgment on your business or more generally, please contact:



Matthew Howse

Partner, Dispute Resolution & Litigation

+44 28 9568 0139

matthewhowse

@eversheds-sutherland.ie



Peter Curran

Partner, Commercial

+353 1 6644 990

petercurran@eversheds-sutherland.ie



Conor McAleese

Solicitor, Dispute Resolution & Litigation

+44 28 9568 0826

conormcaleese

@eversheds-sutherland.ie

Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice.

Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.

[eversheds-sutherland.ie](https://www.eversheds-sutherland.ie)

© Eversheds Sutherland 2019. All rights reserved.

EVE.DUB.2179 03/19