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OPINION

The Curious Case of Horseracing Data Caught in a Tangled Web of Relationships – *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300

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Abstract This paper comments on the recent split decision of the English Court of Appeal in *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 concerning the common law action for misuse of confidential information. Although the majority overturned the decision of the trial judge and found in favour of the defendant, this author will explain why the conclusion reached by the dissenting judge is the more compelling.

Keywords Breach of confidence · Misuse of confidential information

1 Introduction

This paper critically examines the recent decision of the English Court of Appeal in *The Racing Partnership Ltd v. Sports Information Services Ltd*,[1] which arose from an appeal against the decision of Zacaroli J in *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd*.[2] Although there were two main issues before the appellate court, the focus of analysis, for present purposes, is purely on the breach of confidence claim in equity and there will be no discussion of the second issue on appeal concerning the tort of conspiracy to injure by unlawful means (or unlawful means conspiracy).

At trial, Zacaroli J found the defendant liable for having misused confidential information over which the claimants had control. The English Court of Appeal,

[1] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300.

[2] *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch).

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however, was split on the breach of confidence claim – with Lewison and Phillips LJJ in the majority (both of whom overturned the trial judge's decision and found against the claimants) and Arnold LJ dissenting (who agreed with the trial judge that the defendant was in breach of confidence).

2 Factual Background

The first claimant – The Racing Partnership Ltd ("TRP") – acquired contractual rights (from 1 January 2017) to supply live betting and horseracing data collated at various racecourses ("the Arena Racecourses") owned by the second claimant ("Arena") to off-course bookmakers. The defendant (Sports Information Services Ltd ("SIS")), as TRP's predecessor, previously held those rights for five years (that is, till 31 December 2016). It was alleged that SIS, notwithstanding that it had lost the right to collect and distribute data from the Arena Racecourses on 1 January 2017, continued to do so until July 2017.

Two types of horseracing data were relevant and vital information for off-course bookmakers: fixed-odds betting prices (or "Betting Shows"), and factual information that is specific to the racecourse and relevant race on the day of the race (or "Raceday Data").[3] Indeed, there was much "commercial value" (albeit "short-lived" and "for a matter of minutes only") in providing such information in real time to off-course bookmakers, for which TRP is now paying (and SIS before it had paid) "substantial sums" to Arena for the exclusive right to do so.[4] In the present dispute, SIS was alleged to have illegitimately supplied Betting Shows and Raceday Data to the Betfred Group ("Betfred") and the Ladbrokes Coral Group ("Ladbrokes").

Insofar as the unauthorised supply of Raceday Data was concerned, SIS had acquired such information through an agreement with Tote (Successor Company) Ltd trading as "Totepool" ("the Tote"). The Tote has had a presence on British racecourses (including the Arena Racecourses) for many years but only, save for a few exceptions,[5] for the purpose of offering a *pool betting* service. The Tote had carried out this service at the Arena Racecourses – by collecting Raceday Data and making it available to off-course bookmakers via a dedicated data feed (the "Tote feed") – throughout the period when SIS was contractually bound to Arena and continued to do so after 1 January 2017. It transpired that from January to July 2017, the Tote had provided to SIS an individualised data feed containing Raceday Data for use for *fixed-odds betting* purposes. Crucially, as found by the trial judge, the

[3] "Raceday Data" includes "weather conditions, the state of the course (the 'going'), the withdrawal or non-running of any horses, changes in jockeys, the 'off' (i.e. the start time), the finish time, any steward's inquiry and the result": *see The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [10].

[4] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [11].

[5] There were "a few occasions when the Tote operated 'Totesport' *fixed-odds betting* outlets on certain TRP Racecourses" but, notably in this author's view, the Tote saw it fit to execute "*separate* agreements" to operate these outlets: *see The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [16] (emphasis added).

data provided by the Tote to SIS during this period included – but also *extended beyond* – data which the Tote typically collected and distributed via the Tote feed for pool betting purposes. Zacaroli J had also found that SIS's employees had gone to the Tote's premises in Wigan in January 2017 for the purposes of obtaining information that was *not* within the Tote feed. Notably, these findings were not challenged by SIS.

At this juncture, it is pertinent to highlight one key aspect of the "Tote Agreement" – entered into between the Tote and Arena – which took effect from 1 January 2013. Interestingly, the Tote Agreement did not contain a term that expressly granted the Tote a right to enter the Arena Racecourses but instead contained provisions which assumed that the Tote's presence at the Arena Racecourses was simply to collect and distribute data to off-course bookmakers for pool betting purposes. Significantly, there was no express term in this agreement that prohibited the Tote from collecting and distributing such data for fixed-odds betting purposes. Indeed, it was "common ground that the Tote Agreement did not contain any express restriction upon the Tote's use of data collected on the Arena Racecourses".[6]

Given these circumstances, the trial judge made no finding as to the extent, if any, of the Tote's right to enter the Arena Racecourses under the Tote Agreement. However, on appeal, Arnold LJ (dissenting) held that it was necessary to imply into the Tote Agreement a term granting the Tote permission to enter the Arena Racecourses (that is, an implied term granting the Tote contractual rights of access), and in particular, for the purposes of collecting and distributing Raceday Data for its pool betting service. This led Arnold LJ to conclude that from January to July 2017, the Tote had exceeded its permission to enter the Arena Racecourses under the Tote Agreement (for having supplied on-course data to SIS for fixed-odds betting purposes) and was therefore on this basis a "trespasser".[7]

3 The Judgment of the English Court of Appeal

This author will now examine, in greater detail, the judgment of the English Court of Appeal in relation to TRP's allegation that the Raceday Data (or, more specifically, the pleaded Key Raceday Triggers) which SIS obtained from the Tote constituted information confidential to the claimants and that by obtaining such data and supplying it to Betfred and Ladbrokes, SIS had acted in breach of an equitable obligation of confidentiality. The classic exposition of the law in this area remains that of Megarry J in *Coco v. AN Clark (Engineers) Ltd* ("*Coco*"),[8] which is too well-known to be repeated here.

[6] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [26].

[7] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [28], [33] and [42].

[8] *Coco v. AN Clark (Engineers) Ltd* [1969] RPC 41 at 47.

3.1 Did the Key Raceday Triggers Have the Necessary Quality of Confidence?

After observing that the doctrine of misuse of confidential information is "all about the control of information"[9] and "is a species of unfair competition",[10] Arnold LJ (dissenting) helpfully laid down the applicable principles as follows:

(a) For information to possess the necessary quality of confidence, it must not be "public property and public knowledge";[11]
(b) Confidentiality is "a relative and not an absolute concept";[12]
(c) The basic attribute which information must possess before it can be considered confidential is "inaccessibility".[13]

The starting point in any confidential information case, however, is "to identify with precision the information which is alleged to be confidential".[14] As will become apparent, this need for the claimant to provide full and proper particulars of all the information alleged to be confidential is particularly acute where the subject matter of protection concerns *compilations* that comprise – in whole or part – information already in the public domain.

In this particular case, TRP pleaded that its "Key Raceday Triggers" constituted confidential information which had been misused by SIS. The expression "Key Raceday Triggers" referred to "non-runners, withdrawals, the off and the result", and "the result", in turn, was defined to mean "in particular … (i) the point in time at which the race has finished, (ii) whether any issue are referred to the Stewards, and (iii) the official outcome of the race taking into account any such issues".[15]

Arnold LJ saw it fit to clarify three matters. First, despite the limitation of Key Raceday Triggers in TRP's pleaded case, Zacaroli J at trial found that *all* of the claimants' Raceday Data (which included weather conditions) constituted confidential information and made an order on that basis. Arnold LJ pointed out that such a finding was not open to the trial judge because, for instance, it is inconceivable that a claim to confidentiality can possibly be made in information as to the weather when (a) races are attended by thousands of racegoers, and (b) races are broadcast "almost instantaneously" on television (which was taken by Arnold LJ to mean the normal time delay imposed on "live" broadcasting – typically seven seconds).[16] Indeed, in tandem with the aforementioned principle that all information sought to be protected must be adequately particularised by the claimant, Zacaroli J ought to

[9] *See also Douglas v. Hello! Ltd (No 3)* [2008] 1 AC 1 at [118] and [124].

[10] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [46].

[11] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [47], citing *Saltman Engineering Co Ltd v. Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215.

[12] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [48].

[13] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [48], agreeing with Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 5.14–5.20.

[14] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [49].

[15] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [50].

[16] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [51].

have confined his analysis on confidentiality to the pleaded Key Raceday Triggers only, and not to have extended it to Raceday Data in their entirety.

Second, Arnold LJ was careful to delineate the "relevant time frame" during which the information comprised in the Key Raceday Triggers would have arguably possessed the necessary quality of confidence. On the facts, the relevant time frame entailed "the short period of time between the information coming into existence and either shortly after the start of the race (for information about non-runners, withdrawals and the off) or shortly after the end of the race (for information about the result)".[17] It was only during this short period of time – lasting for "a matter of minutes only"[18] – that the information in question had value to bookmakers. TRP accepted that the pleaded information would have entered the public domain (and thus ceased to be confidential) after this period.

Third, from the pleadings, it was unclear whether TRP's claim was that (a) each type of information comprised in the Key Raceday Triggers constituted confidential information, or (b) a compilation of some or all of such types of information did. Arnold LJ was of the view that the claim as pleaded was broad enough to encompass both ways of putting the case and therefore re-formulated the question on appeal as follows: whether, during the relevant time frame, either (a) each type of information comprised in the Key Raceday Triggers constituted confidential information, or (b) a compilation of such information did.

SIS sought to challenge Zacaroli J's finding in the High Court that the Raceday Data controlled by Arena/TRP was confidential information during the relevant time frame on four grounds, all of which were addressed by Arnold LJ. First, counsel for SIS submitted that the law only protected information that could properly be described as secret but Arnold LJ correctly pointed out that the true criterion was not secrecy but inaccessibility. The Key Raceday Triggers constituted information that was generally inaccessible to the public during the relevant time frame, with the exception of TRP, the Tote and all racegoers in attendance. It was observed that Arena had sufficient control of the information and did exercise its legal rights to control the information.

Second, counsel for SIS submitted that the trial judge's conclusion was inconsistent with the law of privacy, which only applied to information in respect of which the claimant had a reasonable expectation of privacy. This is clearly an erroneous submission in light of the existing authorities which have sought to distinguish commercial confidentiality from privacy.[19] As Arnold LJ helpfully clarified, "breach of confidence [in equity] and misuse of private information [in tort] are two separate and distinct causes of action which rest on different legal foundations and protect different interests".[20]

[17] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [53].

[18] *Per* Zacaroli J in *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [15].

[19] *See*, *e.g.*, *Douglas v. Hello! Ltd (No 3)* [2008] 1 AC 1 at [118] and [255].

[20] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [70], citing *Vidal-Hall v. Google Inc* [2015] EWCA Civ 311.

Third, counsel for SIS submitted that there was "no need to expand" the law of confidentiality to sporting events but Arnold LJ was of the view that this appeal did not involve any question of expanding the law of confidentiality nor of elevating sports events into some special category for protection. The subject matter of the information was immaterial; more importantly, it was information that could be controlled and thus had commercial value.

Fourth, counsel for SIS submitted that clear restrictions were required if information concerning a sporting event was to be confidential. SIS maintained that sufficiently clear restrictions had not been imposed in this case. One argument was that no contractual restrictions were imposed on the Tote. This was rejected by Arnold LJ who was of the view that the implied term in the Tote Agreement (granting the Tote contractual rights of access to the Arena Racecourses) was limited to collecting and distributing certain Raceday Data for pool betting purposes only. The information obtained by SIS, however, was for a different purpose and extended beyond that typically supplied by the Tote via the Tote feed. Insofar as racegoers were concerned, Arena had also imposed clear restrictions (known as the "Arena Terms") on the use to which those who attended races could make of the information they acquired at the racecourse – for example, through restrictions contained in standard terms and conditions of entry and incorporated into contracts with racegoers upon their purchase of entry tickets. As the trial judge found, the Arena Terms clearly prohibited racegoers from transmitting off-course any information relating to "any race, fixture or other race-related activity" and from communicating with anyone outside the racecourse "for the purpose of or in connection with any betting".[21] Accordingly, Arnold LJ held – in agreement with the trial judge – that Arena did have sufficient control over the Key Raceday Triggers to render the information relevantly inaccessible, and hence confidential.

Finally, in relation to TRP's case that the compilation of the Key Raceday Triggers obtained by SIS was confidential even if none of the individual types of information was, counsel for SIS argued that this was a compilation made by the Tote – and not by Arena or TRP – and so the compilation ought to be confidential (if at all) only to the Tote. Arnold LJ was prepared to accept that the Tote might have a claim to confidentiality in the compilation on that basis. However, this did not detract from the claim brought by Arena/TRP "as the parties in control of the constituents of the compilation".[22] In any event, it was observed that "the Tote did not have the [contractual] right to supply Raceday Data which it collected for pool betting purposes for fixed-odds betting purposes, still less did the Tote have the right to supply additional data for the latter purposes".[23]

Arnold LJ concluded his analysis of the first requirement in the *Coco* framework by holding that each type of information in the Key Raceday Triggers was, during the relevant time frame, confidential information. However, even if this was an incorrect finding, a compilation of such information would certainly be confidential to Arena/TRP.

[21] *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [144].

[22] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [76].

[23] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [76].

Lewison LJ (who, together with Phillips LJ, was in the majority in the appeal on the confidence issue) began his analysis of the first *Coco* requirement by emphasising that "TRP's pleaded case on breach of confidence was limited to the 'Key Raceday Triggers'".[24] In this regard, he too agreed with Arnold LJ that the trial judge was wrong in finding that all of the claimants' Raceday Data constituted confidential information. Instead, the correct question that ought to have been considered was whether TRP's Key Raceday Triggers – either individually or in the form of a compilation of the relevant information as a whole – did possess the necessary quality of confidence.

Lewison LJ's decision on this issue was particularly influenced by one important background fact – that is, the races in question were televised "live", such that "[a]nyone with a television set (whether at home or in a bookmaker's office) could have seen for themselves the 'off' and both the finish and the winner in real time".[25] One matter which remained unresolved was what "live" meant in the context of a live broadcast. Although the trial judge described a live broadcast as "almost instantaneous", Arnold LJ thought that there was typically a time lag of "seven seconds". Curiously, Zacaroli J even went so far as to hold that the commercial value in the Raceday Data lasted for "minutes" before the information came into the public domain.

To Arnold LJ's query as to why SIS did not source the Key Raceday Triggers simply by watching television broadcasts of the races, Lewison LJ acknowledged that this could well be because some of the Key Raceday Triggers could not be collected quickly enough simply by watching television. But, in his view, the crucial question ought to have been whether this reason did apply to each and every Key Raceday Trigger (and, in particular, to the off, the finish and the winner).

Given these unresolved questions and controversies, Lewison LJ expressed the view that information which anyone with a television set could receive in real time was unlikely to amount to confidential information. Accordingly, Lewison LJ held that if confidentiality were to subsist by virtue of the commercial value of the information concerned, then this would apply to the compilation as a whole and not severally to each individual Key Raceday Trigger. In other words, "[w]hat was potentially confidential was the compilation".[26]

3.2 Were the Key Raceday Triggers Imparted to SIS in Circumstances Importing an Obligation of Confidence?

The appeal in relation to the second *Coco* requirement was concerned with whether the compilation of on-course data (which included the Key Raceday Triggers) had been imparted by the Tote to SIS "in circumstances importing an obligation of confidence". According to trite law, whether or not an equitable obligation of confidence is imposed on the defendant depends not on the manner in which the defendant comes upon the information (whether as a direct/indirect recipient or

[24] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [177].

[25] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [185].

[26] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [204].

surreptitious taker of the information), but rather on the *knowledge* thereby possessed by the defendant that the information in question is confidential. In other words, if the defendant has actual or constructive knowledge of, or is wilfully blind to, the confidentiality of the information, an obligation of confidence will arise in equity and bind his conscience.[27] Arnold LJ pointed out that the contention between the parties on this issue was not as to the law, but its application to the facts of the case.

From the evidence available, Zacaroli J at trial found that the information provided by the Tote to SIS did go beyond that which it collected for pool betting purposes and distributed via the Tote feed.[28] It was also not in dispute, as understood by Arnold LJ, that SIS had obtained all of the information comprised in the Key Raceday Triggers.[29] While it is unclear what the "additional" information (extending beyond "Tote data")[30] the Tote had supplied to SIS actually comprised, the resolution of this matter is not crucial for present purposes.

The first submission made by counsel for SIS was that the trial judge had asked himself the wrong question in addressing the second *Coco* requirement. While Lewison and Phillips LJJ agreed with this submission, Arnold LJ in the minority took a contrary view and was not satisfied that the trial judge had made any error of principle in his reasoning.

Secondly, it was submitted that SIS had acted entirely reasonably in relying upon the assurances, warranties and indemnities it had received from the Tote and that the trial judge had held SIS to far too high a standard. Arnold LJ again disagreed, preferring instead the analysis adopted by the trial judge who had paid close attention to the details of the assurances given.

Significantly, although it was not aware of any contractual prohibition upon the Tote supplying it with, *inter alia*, the Key Raceday Triggers (because there was no such contractual prohibition), SIS was nevertheless cognisant that the Tote had no contractual right/entitlement to collect and distribute on-course data at the Arena Racecourses. Given SIS's knowledge of all the facts and surrounding circumstances,[31] Arnold LJ opined that a reasonable person standing in the shoes of SIS would have appreciated that the absence of a contractual prohibition could not be equated with a right – notwithstanding the Tote's "roots as a government franchise"

[27] *See*, *e.g.*, *Coco v. A N Clark (Engineers) Ltd* [1969] RPC 41 at 48; *Attorney-General v. Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281; *Force India Formula One Team Limited v. 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [224]; *Wade v. British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch) at [48]; *Primary Group (UK) Ltd v. Royal Bank of Scotland plc* [2014] EWHC 1082 (Ch) at [223]; *Matalia v. Warwickshire County Council* [2017] EWCA Civ 991 at [46].

[28] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [205]–[209].

[29] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [80] (and *cf* also [202] for Lewison LJ's views).

[30] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [84]. According to Arnold LJ, "[t]he reference to 'Tote data' must mean the data which the Tote supplied as part of the Tote feed for pool betting purposes …": *see The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [102].

[31] As set out by the trial judge in *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [184]–[185].

– to supply the information, particularly to SIS for fixed-odds betting purposes (when the Tote's operations, as SIS certainly knew, had all along been restricted to pool betting). Furthermore, it was found that SIS had, in the end, obtained from the Tote (additional) information that went well beyond "Tote data" and even that specified in Appendix 2 to the "Tote HoT" (which referred to the Tote's contract with SIS for the supply of information).[32]

In Arnold LJ's view, the trial judge did not hold SIS to too high a standard nor did the judge's conclusion require SIS to have the legal knowledge and powers of analysis of a High Court Judge or even a majority of Law Lords. Accordingly, because SIS was found to possess the requisite knowledge that the Key Raceday Triggers were confidential to Arena/TRP, Arnold LJ agreed with the trial judge that, at least from January 2017, SIS was bound by an equitable obligation of confidence in respect of the Key Raceday Triggers. Its appeal against the finding of misuse of confidential information was therefore dismissed.

In allowing SIS's appeal, however, the majority led by Lewison LJ were clearly more sympathetic towards SIS. Lewison LJ sought to address the second *Coco* requirement by asking this question: should SIS (or a reasonable person in its shoes) have realised that the Tote was bound by an (equitable) obligation of confidence even though there was no contractual restriction on the Tote's ability to collect and disseminate on-course data at the Arena Racecourses? The answer given by the majority was "no", for the following reasons:

(a) SIS neither actually knew that, nor turned a blind eye to whether, the Tote was unable lawfully to provide it with such information;
(b) SIS did not close its eyes to the potential problem and instead took steps (as evidenced by the email of 29 November 2016 which showed that SIS did make enquiries of the Tote)[33] to satisfy itself that the Tote had the authority to supply it with the relevant information (which the Tote confirmed to be "Tote data");
(c) It was significant that Arena and the Tote were in a contractual relationship and that there was no bar (or contractual prohibition) on the Tote's collection and dissemination of such information, whether in the express or implied terms of the contract;
(d) The Tote had given assurances and a contractual warranty to SIS that it could provide the data and it was reasonable for SIS to have relied on the warranty (on the basis that the Tote knew far more about its relationship with Arena than SIS).

Accordingly, Lewison LJ found it "difficult to see what else a reasonable person should have done [in the circumstances]".[34] He was of the view that the trial judge had attributed to the reasonable person a degree of legal knowledge and analytical skills which were inappropriate.

[32] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [15].

[33] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [92].

[34] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [206] (and *see also* [170] where Phillips LJ expressed a concurring view).

Both Lewison and Phillips LJJ were in agreement that Zacaroli J, by starting with his own legal analysis of the situation and then asking whether that was nullified by the Tote's warranty, had approached the question from the wrong starting point. As elucidated by Lewison LJ, "[t]he correct starting point … was the warranty and assurances that the Tote had given; and then to ask whether SIS should have second guessed them", to which the only answer was "no".[35] It was observed by both judges that the Tote was an apparently respectable/reputable counterparty and commercial life would be made much more difficult if a counterparty had to second guess the truth of such a warranty (particularly one given by the party best placed to assess its own entitlement to provide the information). The majority of the Court of Appeal therefore decided that SIS was not bound by an obligation of confidence and its appeal ought to be allowed on that ground.

4 Commentary and Analysis

This author will now comment on the decision of the English Court of Appeal – with references made also to Zacaroli J's judgment at trial where appropriate – in line with the breach of confidence framework famously established by Megarry J in *Coco*. The discussion therefore begins with an analysis of the first *Coco* requirement, namely whether the Key Raceday Triggers did possess the necessary quality of confidence.

4.1 The First *Coco* Requirement

Both the trial judge and Arnold LJ took the view that confidentiality could subsist in Raceday Data (or, more accurately, the pleaded Key Raceday Triggers) because, in addition to its "commercial value", it was information over which Arena/TRP had "sufficient control" to enable them to impose upon SIS an equitable obligation of confidence.[36] While this author does not disagree with this line of reasoning, the commercial value of the information concerned is but one, perhaps significant, factor pointing towards a finding of confidentiality.[37] After all, why else would TRP (and formerly, SIS) pay substantial sums to Arena for the exclusive right to collect and distribute data to off-course bookmakers for fixed-odds betting purposes? It is, however, not determinative of the question. Rather, it has been acknowledged elsewhere that the overall *inaccessibility* of the information in question remains a "particular touchstone" in the law of confidence.[38] As Lord Walker has clarified, "the confidentiality of any information must depend on its nature, not on its market

[35] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [208].

[36] *Cf* also *Douglas v. Hello! Ltd (No 3)* [2008] 1 AC 1 at [124].

[37] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [153]: "… the fact that TRP (and, before it, SIS) was willing to pay substantial sums for the benefit of an exclusive right to collect and disseminate the information to off-course bookmakers engaged in fixed-odds betting is a strong indication of its confidential nature."

[38] *Cray Valley Ltd v. Deltech Europe Ltd* [2003] EWHC 728 (Ch) at [52].

value".[39] Indeed, Arnold LJ in the instant case also agreed that the "basic attribute" which information must possess before it can be considered confidential is "inaccessibility",[40] which is ultimately the "true criterion".[41]

On the facts, while the information comprised in the Key Raceday Triggers was clearly accessible to the Tote and all racegoers in attendance, it is at least arguable that a compilation of such information – even if not individually – would still be regarded as being generally *inaccessible* to the public *during the relevant time frame*. As Arnold LJ rightly observed, the relevant time frame must refer to the "short period of time" between the information coming into existence and it entering the public domain. Unfortunately, there was no clarity in the judgments of both the High Court and Court of Appeal as to precisely when such information would become public property and public knowledge. *Quaere* was this "shortly after the start of the race (for information about non-runners, withdrawals and the off)",[42] "shortly after the end of the race (for information about the result)",[43] "a matter of minutes",[44] "almost instantaneously … by way of TV coverage",[45] or "typically seven seconds" ("the normal time delay imposed on 'live' broadcasting")?[46]

Obviously, once the information comprised in the Key Raceday Triggers has been publicly disseminated (for example, by TRP to off-course bookmakers for fixed-odds betting purposes) or comes into the public domain as a result of races being broadcast "live" (or "almost instantaneously") on television, confidentiality is lost forever. But within the "short period" *before* this occurs, it is submitted that TRP ought to be able to legitimately stake a claim to confidentiality in such information. Contrary to Lewison LJ's expressed scepticism,[47] this author is respectfully of the view that there is indeed much to commend in the rhetorical question posed by Arnold LJ in paragraph 68 of his judgment: why, if not for the commercial value in (and confidential nature of) the entire package of time-critical information specially supplied by the Tote to SIS,[48] did SIS not source the Key Raceday Triggers simply by watching television broadcasts of the races? Relevantly, Zacaroli J at trial sought to explain the phenomenon in the following terms:[49]

[39] *Douglas v. Hello! Ltd (No 3)* [2008] 1 AC 1 at [299].

[40] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [48].

[41] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [67].

[42] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [53].

[43] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [53].

[44] *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [15].

[45] *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [147].

[46] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [51].

[47] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [186].

[48] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [148].

[49] *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [152] (emphasis in original).

> … the data is time critical to the period *before* a race starts, so that televising the race is, by definition, too late. Even if the television pictures capture certain events before the start of the race, it is highly unlikely that they would capture in sufficient detail the elements which go into the Raceday Data, and certainly not packaged in a form which would provide bookmakers with the requisite information fast enough.

In other words, the desired information would not have been available to SIS via the television route quickly and accurately enough to satisfy the needs of SIS's customers.

Additionally, it is further submitted that TRP's claim to confidentiality in the Key Raceday Triggers is in no way undermined despite there being potentially thousands of racegoers at such races. It must be emphasised that the Arena racecourse (being privately owned) is not a public place,[50] even though members of the public clearly have access on race day because of the contractual relationship between the parties arising from the purchase of entry tickets. Only those who have a licence to attend races have access to all the on-course data which, by virtue of the control exercised by Arena through the contractual restrictions (namely, the Arena Terms) imposed on all racegoers regarding the use of such information, should rightfully remain on-course. In the context of horseracing at the Arena Racecourses, racegoers collectively do not, in this author's view, represent the general public.

This is where it may be helpful to distinguish between (a) a sporting event, to which many members of the public have contractual rights of access, that takes place on private property (for instance, the Arena Racecourses), and (b) a sporting event (such as a marathon foot-race) that takes place on premises or in an environment where members of the public have free and unfettered access. It is posited that information gleaned from the former scenario, with appropriate control mechanisms in place, is arguably capable of attracting the necessary quality of confidence.[51] It will clearly be more difficult (if not impossible) to sustain a similar argument in respect of the latter.[52]

Ultimately, much will of course depend on the actual facts and circumstances of each case. But, for the foregoing reasons, it is submitted that information comprised in the Key Raceday Triggers did remain generally inaccessible to the public *prior to* the information entering the public domain very shortly after its coming into existence.[53] Or, in the words of Arnold LJ, "[t]he information comprising the Key

[50] Indeed, even the Tote was found by Arnold LJ to be "a trespasser on the Arena Racecourses during the period from January to July 2017 in so far as it collected and distributed Raceday Data for fixed-odds betting purposes": *see The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [42] (and *see also* [28] and [33]).

[51] In Arnold LJ's opinion (with which this author respectfully agrees), "[t]he fact that the information here relates to a sporting event rather than a celebrity wedding [referring to the facts in *Douglas v. Hello! Ltd (No 3)* [2008] 1 AC 1] is immaterial": *see The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [71].

[52] *Cf* the views expressed by Lord Walker (dissenting) in *Douglas v. Hello! Ltd (No 3)* [2008] 1 AC 1 at [300].

[53] This brings to mind the notion of "short-term commercial secrecy" or "short-term confidentiality", as coined by Lord Walker in *Douglas v. Hello! Ltd (No 3)* [2008] 1 AC 1 at [273] and [295], respectively.

Raceday Triggers was inaccessible from any public domain source during the relevant time frame".[54]

Separately, although Lewison and Arnold LJJ disagreed on whether the individual pieces of information within the compilation (that is, the Key Raceday Triggers individually) could be said to have been independently confidential, both were prepared to accept that confidentiality could attach to the compilation considered as a whole. To this author, this is a timely reminder that especial care must be exercised in the analytical process whenever the subject of the confidentiality enquiry concerns compilations. This is to guard against the inadvertent extension of legal protection to any underlying public domain information.

As regards confidentiality in the compilation as a whole, one concern raised (by counsel for SIS as well as Lewison LJ) was that the compilation of data obtained by SIS from January to July 2017 had been made by the Tote, and not by Arena/TRP.[55] In other words, the compilation in question ought to be confidential, if at all, to the Tote only (and not to Arena/TRP), because it was the Tote which did the work of collecting the data and distributing it to SIS. Is it, however, true that any claim to confidentiality in the compilation as a whole – on the basis that the information had been compiled by the Tote – can only be asserted by the Tote itself and not by anyone else?

On the facts, the horseracing information assembled by the Tote was distributed to SIS by contractual agreement (termed the "Tote HoT" by Arnold LJ).[56] If the Tote were minded to stake a claim to confidentiality in the resulting compilation (which Arnold LJ was prepared to accept),[57] it could have easily done so pursuant to its rights under the contract. Obviously, both Arena and TRP were not privy to the Tote HoT and did not have any contractual rights to confidentiality. But the relevant question for our purposes is whether Arena/TRP, pursuant to the action for breach of confidence, could nevertheless have asserted any rights *in equity* to the information hitherto compiled by the Tote (either individually or as a package).

It is submitted that there is no reason in principle why equity cannot intervene – in the name of justice and fairness – to allow Arena/TRP to assert confidentiality rights to the Tote's compilation which may then be enforced against SIS, an unauthorised recipient of confidential information. After all, this amounts, in substance, to a claim by Arena/TRP to confidentiality in *information per se* (no doubt assembled by the Tote in this instance). The constituents of the compilation made by the Tote, at bottom, comprised information in which Arena/TRP had a legitimate *interest* and over which they had sufficient *control*. As the learned authors of *Gurry on Breach of Confidence* have perceptively observed, "[a]t its core, the action for breach of confidence enables any person who has an *interest* in information that is confidential to prevent others who have received, or acquired, the

[54] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [68].

[55] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [75] and [204].

[56] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [15].

[57] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [76].

information with notice of its confidential quality from using or disclosing the information".[58]

On this basis, a careful assessment must be made to determine whether the information contained in the Tote's compilation is, on the whole, generally *inaccessible* to the public. It should also be pointed out that the form in which the information has been expressed in the compilation (that is, its organisation and presentation) and, indeed, the identity of the compiler in question are typically immaterial considerations insofar as the confidentiality enquiry is concerned. This is quite unlike the authorship-originality enquiry in the law of copyright where it is clear that only the author of an original work (or the party to whom the author's copyright has been assigned) has *locus standi* to mount a claim for copyright infringement.

Relevantly, all of the information contained in the Tote's compilation (which included the Key Raceday Triggers)[59] that was disseminated to SIS had emanated from the Arena Racecourses and was fully accessible to the Tote by virtue of its on-course presence (as legitimised by the Tote Agreement). The crux of the enquiry, in light of Lord Hoffmann's exhortation that it is all about being "in control of the information" (and particularly information with "commercial value"),[60] ought to be this: who – in the absence of any contractual arrangement and proprietary rights in information – is in control of, and can therefore legitimately assert confidentiality rights to, such information?

The information in question was clearly within the dominion and control of Arena/TRP.[61] Arena was in control of all the on-course data (Raceday Data) precisely because it was the owner of the Arena Racecourses and could license the exclusive rights for the dissemination of such information to other third parties – like TRP (and formerly SIS) – for substantial sums. Further, all racegoers on race day were contractually bound by the Arena Terms, which prohibited them from transmitting off-course any information relating to "any race, fixture or other race-related activity" and from communicating with anyone outside the racecourse "for the purpose of or in connection with any betting".[62] If, as alluded to above, the Tote could have potentially staked a claim to confidentiality in its compilation, then why is it that Arena/TRP cannot likewise assert – in equity – confidentiality rights to the *same* type(s) of information (either individually or as a compilation), particularly when Arena/TRP were the parties in control of, and with a legitimate interest in, the information?

On balance, therefore, this author is of the view (in respectful agreement with Arnold LJ) that Arena/TRP did have (a) sufficient control over the Key Raceday

[58] Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 1.01 (emphasis added).

[59] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [80].

[60] *Douglas v. Hello! Ltd (No 3)* [2008] 1 AC 1 at [118] (and repeated at [124]). *See also The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [46].

[61] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [76]; *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [157].

[62] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [65] (and *see also* [12]).

Triggers to render the information – in particular, in the compilation as a whole – relevantly inaccessible (and hence confidential) during the relevant time frame, and (b) *locus standi* to initiate proceedings against SIS for breach of confidence notwithstanding that the compilation of data obtained by SIS had been made by the Tote (and not by Arena/TRP).

4.2 The Second *Coco* Requirement

Insofar as the second *Coco* requirement is concerned (namely, whether the Key Raceday Triggers were imparted to SIS in circumstances importing an obligation of confidence), there were, to this author, essentially two questions that the court had to resolve in light of the established law:

(a) Did SIS (an indirect recipient of information) have the requisite notice/knowledge, objectively assessed, that the compilation of information (which included the Key Raceday Triggers) it had obtained from the Tote was confidential to Arena/TRP? In other words, would a reasonable person standing in the shoes of SIS have realised that the information supplied by the Tote was confidential to Arena/TRP?
(b) Could SIS have reasonably relied on the assurances and contractual warranty given by the Tote to rebut the imposition of the equitable obligation of confidence, if any?

To put matters simply, what would a reasonable person be expected to understand in the circumstances and how high a standard should SIS be held?

First of all, it is clear from the manner in which the two questions above have been framed (and hopefully from the analysis that follows) that this author does not, with respect, agree with the majority's view that the trial judge had approached this issue from the wrong starting point. Instead, the starting point must be to examine the second *Coco* requirement by asking, from equity's perspective, what a reasonable person would have understood in the circumstances, so as to determine whether the defendant's conscience ought to have been bound by an obligation of confidence. One might, on this basis, legitimately ask whether it is at all appropriate to speak of a "correct starting point" in an enquiry of this nature. Indeed, as long as an objective assessment has been made by the trier of fact of *all* the relevant facts and circumstances before the court (as did Zacaroli J in regard to the effect, if any, of the warranty and assurances given by the Tote), it is difficult to see why the trial judge should be alleged to have made any error of principle in his reasoning (as Arnold LJ correctly pointed out). It is therefore to a holistic assessment of the knowledge possessed by SIS as regards the confidentiality of the information obtained from the Tote, in light of all the evidence, that the discussion must turn in due course.

But first, a word on the Tote. It is true that there was an existing contract between the Tote and Arena (namely, the Tote Agreement) and that there were no contractual restrictions/prohibitions contained therein (neither express nor, as the trial judge found, implied) regarding the Tote's use of the information it had collected from the Arena Racecourses. It must be borne in mind, however, that even if there were to

exist such confidentiality clauses in the Tote Agreement, they would simply go towards delineating the scope of the Tote's *contractual* obligations of confidentiality vis-à-vis Arena. Notably, express contractual restrictions/prohibitions of this nature do not preclude or negate the potential imposition upon the Tote of *equitable* (and *distinct*) obligations of confidentiality vis-à-vis Arena; and, *a fortiori*, in the absence of such provisions.

As is well established, confidentiality obligations arising out of a contract do not necessarily bear the same contours as obligations of confidentiality in equity and it is important not to conflate the two duties of confidence. Respectfully, contrary to what Lewison LJ may have suggested at paragraphs 196 to 201 of his judgment, the existence of a contractual relationship between the parties does not preclude the claimant, aside from a claim for breach of confidentiality arising in contract, from pursuing an alternative cause of action against the defendant for breach of the *equitable* duty of confidence. The legal framework within which the duty of confidence falls to be pleaded is, of course, distinct in each case.

Further, because the express confidentiality provisions will primarily govern the existence and scope of the contractual duty of confidence owed by the contracting parties, it is true that the court will not, ordinarily, impose additional or more extensive obligations of confidentiality in equity.[63] Nonetheless, while it will not usually be unconscionable to use information in conformity with (or in a manner that does not offend) the terms consensually agreed, there are occasions when equity may intervene to impose a duty of confidence where, for instance, the contract "does not necessarily assuage conscience, and equity may yet give force to conscience".[64] As acknowledged by Hildyard J in *CF Partners (UK) LLP v. Barclays Bank plc*, "wider equitable duties of confidence" may well be imposed "in circumstances that are not ordinary".[65] For example, this could arise "where the obligations of the parties in respect of information with the quality of confidentiality are not clearly prescribed or governed by the contractual terms but where the use of certain information would plainly excite and offend a reasonable man's conscience".[66] Hildyard J noted that in such circumstances, "an equitable duty not to use the information having that quality would be recognised, even if that went further than the definition, duration or restraint prescribed by the contract".[67]

A fortiori, in a case like this where the Tote Agreement did *not* contain any express/implied contractual stipulation of confidentiality, it is submitted that equity ought to step in to impose a duty of confidence upon the Tote if (as did the trial judge and as Arnold LJ agreed)[68] it is ultimately found, through the lens of a reasonable person, that the Tote's conscience had been negatively impacted (this

[63] *See Vercoe v. Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) at [329].

[64] *CF Partners (UK) LLP v. Barclays Bank plc* [2014] EWHC 3049 (Ch) at [133].

[65] *CF Partners (UK) LLP v. Barclays Bank plc* [2014] EWHC 3049 (Ch) at [132].

[66] *CF Partners (UK) LLP v. Barclays Bank plc* [2014] EWHC 3049 (Ch) at [132].

[67] *CF Partners (UK) LLP v. Barclays Bank plc* [2014] EWHC 3049 (Ch) at [132].

[68] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [155]–[167]; *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [89].

notwithstanding the Tote's subjective knowledge in honestly believing that it was not bound by any contractual restriction/prohibition).[69] In any case, it was due to the Tote's roots as a government franchise that probably explained why there were no "detailed" contracts in place that restricted the Tote's ability to provide the relevant data.[70]

Significantly, Arnold LJ went so far as to observe that the Tote – in supplying data to SIS for fixed-odds betting purposes – was in fact a "trespasser" on the Arena Racecourses during the period from January to July 2017,[71] a view with which this author respectfully agrees. Notwithstanding that the Tote Agreement did not contain any express restrictions upon the Tote's use of data collected at the Arena Racecourses, the Tote had only ever undertaken a pool betting service. In other words, its presence on the Arena Racecourses was typically for the sole (and unobjectionable) purpose of collecting data for pool betting purposes. Indeed, there was nothing in the evidence to suggest that before January 2017, the Tote had ever entered the Arena Racecourses to collect and supply data to any third party for fixed-odds betting purposes. Further, on the "few occasions" when the Tote operated "Totesport" fixed-odds betting outlets on certain TRP Racecourses, the Tote saw it fit to execute "separate agreements" for these.[72] This may well suggest that the Tote was fully cognisant of the need to obtain a separate licence from the owner of the relevant racecourse for *any* activity that went *beyond* its offering a pool betting service. As such, it is argued that the Tote ought to have known that it could not, in good conscience and without the relevant authorisation, collect and disseminate data to any person/entity off-course for purposes unconnected with pool betting, particularly if the Tote knew of TRP's existence (and that of SIS formerly).

In sum, the author posits that it is only if the Tote had been granted a contractual *right* or *entitlement* to use the information concerned for purposes *expressly* sanctioned by Arena that it will then be redundant to contemplate the imposition of an equitable obligation of confidentiality upon the Tote. Otherwise, it is maintained that equity ought to impose a duty of confidence, particularly in contractual relationships where there are no express/implied stipulations of confidentiality, whenever a party receives or acquires information in circumstances importing an obligation of confidence.

It is apposite, at this juncture, to focus the analysis on what a reasonable person in the position of SIS would be expected to have understood in the circumstances – in other words, to determine whether SIS knew or ought to have appreciated that the information obtained from the Tote was confidential. Having decided that the Tote, because it had collected and distributed the relevant data for purposes beyond pool betting, was bound by an equitable obligation of confidence, Zacaroli J was of the

[69] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [159]; *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [195].

[70] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [204].

[71] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [33] and [42].

[72] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [16].

view that SIS was likewise bound because "it knew essentially the same information that was known to the Tote".[73]

Before examining what SIS actually knew or ought to have known, brief mention should be made of Lewison LJ's observation that in situations where the defendant had obtained allegedly confidential information from a party that is in a contractual relationship – as regards the collection and dissemination of such information – with the party in control of the information, the defendant (or a reasonable person in his shoes) "would surely expect to find any bar on the dissemination of information in the express or implied terms of the contract".[74] This, with respect, is a rather curious observation. It may be enquired how probable it is for a typical defendant (whose status is that of an *indirect* recipient of information) to know of the existence of a contract between the party who had imparted allegedly confidential information to him and the party who is in control of such information, let alone the express terms contained therein or terms that may be implied by the court?

In any event and for the reasons given above, even if the defendant did know of such a contract, the absence of a "detailed" contract with concomitant restrictions does not necessarily mean that the indirect recipient of information cannot, in equity, be deemed to have possessed the requisite *knowledge* that the information imparted to him was confidential in nature or that the information had been imparted to him in breach of confidence.[75] It all depends on what the defendant actually knew or ought to have known in the circumstances when deciding whether the defendant ought to be bound by the equitable obligation of confidentiality. It is certainly not at all determinative that "the Tote had a contract with Arena",[76] particularly when TRP's claim against SIS for misuse of confidential information is one rooted in equity. Instead, in respectful disagreement with Lewison LJ that "one should [not] be looking for a contractual *right* to disseminate information, but a contractual *prohibition* on doing so",[77] it would have been far more prudent for SIS to have satisfied itself that the Tote did have the contractual *right* or *entitlement* to disseminate the information concerned for fixed-odds betting purposes – for instance, by seeking clarification or permission from Arena/TRP directly. SIS was, on the contrary, found by the trial judge to be fully aware that the Tote did *not* have any contractual entitlement to supply it with the relevant information for fixed-odds betting purposes.[78]

Turning now to a closer examination of what was precisely, or ought to have been, within SIS's knowledge, it was decided by the trial judge that SIS neither actually knew that, nor turned a blind eye to whether the Tote was unable lawfully

[73] *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [183].

[74] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [198].

[75] *See Attorney-General v. Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281.

[76] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [200].

[77] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [204] (emphasis in original).

[78] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [184].

to supply it with the relevant information.[79] Even if it is accepted that SIS did not possess actual or Nelsonian knowledge of the Tote's inability to provide the data for fixed-odds betting purposes, the question nevertheless remains as to whether it ought to have so known (as would any reasonable person in its position). To this, Zacaroli J gave an affirmative answer (confirmed by Arnold LJ on appeal) and therefore held that the second *Coco* requirement had been satisfied.[80]

This author respectfully agrees and is of the view that there was sufficient evidence in this case to put SIS on "notice" (that it was only prudent for SIS to have further sought a licence directly from Arena/TRP) and for the tribunal concerned to reach the conclusion that SIS had been fixed with *constructive* knowledge of the confidentiality of the Key Raceday Triggers. Zacaroli J had already made significant findings of fact in relation to what SIS actually knew in paragraphs 184 and 185 of his judgment, to which this author would like to add the following observations, particularly for emphasis:

(a) Given its history as TRP's predecessor, SIS would have had considerable horseracing knowledge and must have known – in light of the erstwhile SIS-Arena relationship – that the Tote's presence on the Arena Racecourses (as legitimised by the Tote Agreement) was to collect and distribute data via the Tote feed for pool betting purposes *only*. To elaborate, a contract came into existence between SIS and Arena from about 1 January 2012 which gave SIS, *inter alia*, the right to collect and distribute to off-course bookmakers data from the Arena Racecourses. SIS had apparently "paid an eight-figure sum for the package of rights" and "a further eight-figure sum in fees" over the duration of the agreement.[81] On the other hand, the Tote Agreement came into effect from 1 January 2013. This agreement granted the Tote permission to enter the Arena Racecourses for the purposes of collecting and distributing data via the Tote feed for its pool betting service. In this author's view, SIS must have been well aware that the Tote's on-course presence was solely to collect and supply data for its *own* pool betting purposes.[82] Were it not for this (implied) limitation upon the Tote, why else would SIS (and now TRP) be willing to fork out such sums of money pursuant to its agreement with Arena? Accordingly, when SIS subsequently obtained data from the Tote (from January to July 2017) for its fixed-odds betting service, it, at the very least, ought to have known that the information in question was clearly confidential to Arena/TRP and that the Tote's conduct in this respect had *not* been expressly sanctioned (hence the observation by Arnold LJ that the Tote was a "trespasser" during this time).

[79] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [201].

[80] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [188].

[81] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [3].

[82] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [16]: "The Tote had carried out this service at the Arena Racecourses during the period covered by the SIS-Arena Agreement and continued to do so after 1 January 2017."

(b) As regards the latter point in the preceding sentence, SIS was well aware from the outset (as gleaned from its internal documents) of the legal risks and uncertainty surrounding the Tote's ability to supply it with the relevant data and that this was a potentially "controversial" matter.[83] SIS, in all its wisdom, ought to have exercised greater prudence and taken further precautions than to be content in relying upon the Tote's assurances and contractual warranty, an issue to which this author will shortly address.

(c) From what had transpired in an email, SIS was fully aware of the time-critical nature of the information and must have also known that the as yet publicly *inaccessible* information specially supplied by the Tote had particular commercial (and hence confidential) value – because, rather than to obtain the Key Raceday Triggers through "live" television broadcasts, SIS had decided to enlist the Tote's assistance in this regard.[84]

(d) SIS, in all likelihood, did obtain from the Tote *all* of the information comprised in the Key Raceday Triggers. Arnold LJ's understanding was that this particular fact was not at all in dispute. Lewison LJ was, however, more sceptical (because the trial judge made no specific finding in this regard) but eventually maintained that even if SIS did obtain from the Tote all of the information comprised in the Key Raceday Triggers, such information simply corresponded to (or was compatible with) information which the Tote "was entitled to collect (albeit for the purposes of pool betting)".[85] It may well be that the Key Raceday Triggers merely corresponded to the sort of information that the Tote was entitled – impliedly under the Tote Agreement – to collect as part of "Tote data". But, as argued above, SIS nevertheless knew or ought to have known that the Tote had all along collected and disseminated "Tote data" for pool betting purposes *only*.

(e) In the event, Zacaroli J found on the available evidence that the information provided by the Tote to SIS went well beyond what the Tote collected for pool betting purposes and distributed via the Tote feed.[86] As mentioned above, while it is not entirely clear what the "additional" information (extending beyond "Tote data") the Tote had supplied to SIS actually comprised, the resolution of this matter is not crucial for present purposes. What truly matters is that SIS was ultimately aware – because its employees had attended the Tote's premises in Wigan in January 2017 for the purposes of obtaining information that was *not* within the Tote feed[87] – that it had designedly acquired far more information than it had originally bargained for pursuant to the Tote HoT. This, it is suggested, implicates SIS in conduct akin to the

[83] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [196].

[84] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [149].

[85] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [202].

[86] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [205]–[209].

[87] *See The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [207].

surreptitious and *unauthorised* taking of (additional) information that was confidential to Arena/TRP. After all, it was SIS's account of the evidence that it had ostensibly relied on the Tote's assurance that it was *only* "Tote data" that was to be offered by the Tote. In this author's view, due weight should therefore be accorded to such *unconscionable* conduct on SIS's part which, when examined in the round, ought to be sufficient to taint (or adversely affect) SIS's conscience. In other words, the totality of the evidence reveals that SIS had embarked on a course of conduct from January 2017 from which it may be *inferred* that SIS did, at the very least, possess constructive knowledge of the confidentiality of the Key Raceday Triggers and that the imposition of an equitable obligation of confidence upon SIS would indeed have been justified.

Notwithstanding the foregoing arguments, there is the further question of whether SIS could have reasonably relied on the assurances and contractual warranty provided by the Tote. "Yes" was the answer given by the majority because the Tote (no doubt a respectable/reputable entity) "knew far more about its relationship with Arena than SIS"[88] and was therefore "best placed to assess its own entitlement to provide the information".[89] It is acknowledged that SIS did make enquiries of and receive assurances from the Tote. To that end, it was found that SIS had not been wilfully blind to the Tote's inability to lawfully provide the information. This author is, however, of the view that SIS (as would a reasonable person in its shoes) ought to have made further enquiries or that of a different nature so as to have reached the opposite conclusion.

Crucially, SIS and the Tote, together with Ladbrokes and Betfred, were all *related* parties. Arnold LJ (as did the trial judge) referred to them collectively as "the Conspirators" – all "related to each other" – before setting out the precise (commercial) relationships between them.[90] Of immediate and alarming concern to this author is the extent to which SIS could have judiciously and in good conscience relied on assurances and warranties supplied to it by a commercially related party that was also, at once, its *co-conspirator*. Is this not, in the words of Phillips LJ, a "clear countervailing [indication]" that would have been sufficient to "override" the contractual assurance provided by the Tote and put SIS on "notice" that would have required it to make further or different enquiries?[91] Indeed, a reasonable person on these facts – particularly when viewed against the backdrop of the second issue on appeal concerning the tort of conspiracy to injure by unlawful means – would likely have come to the view that SIS's conscience must have been adversely affected by its seemingly blinkered reliance upon the Tote's word and that SIS had failed to exercise due diligence in not seeking further clarification or approval *directly* from Arena/TRP as to the legitimacy of its dealings with the Tote from January 2017.

[88] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [204].

[89] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [170].

[90] *See The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [18]; *The Racing Partnership Ltd v. Done Brothers (Cash Betting) Ltd* [2019] EWHC 1156 (Ch) at [42].

[91] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [170].

In any event, insofar as the second *Coco* requirement is concerned, such assurances and contractual warranties are never determinative. Instead, it is the overall *constructive* knowledge possessed by SIS (dating back to the inception of the SIS-Arena relationship in January 2012) as to the confidential character of the information concerned that is critical to the assessment and the fact that SIS, an indirect recipient, had received the information from a *commercially related co-conspirator* that (at least in this author's view) was clearly in breach of the equitable obligation of confidence. It bears repeating that SIS was fully aware that the Tote was relying solely on its "roots as a government franchise" and did not have any contractual right or entitlement to disseminate the relevant data, particularly for fixed-odds betting purposes. In the circumstances, it was, legally speaking, unsafe for SIS to have simply relied on the Tote's assurances and contractual warranty. Equally, it is respectfully submitted – contrary to the view taken by the majority as to the "correct starting point" – that it is not at all advisable to begin the analysis of the second *Coco* requirement by turning first to the contract between SIS and the Tote and then asking whether SIS should have second guessed any of the contractual stipulations therein.

5 Conclusion

At its heart, the dispute between TRP and SIS can effectively be distilled to a single question: how high a standard should SIS be held? It is evident from the outcome of this appeal that there are two distinct camps.

Lewison and Phillips LJJ in the majority expressed the view that a reasonable person in the shoes of SIS would not have done anything differently and it would be unwise to attribute to the reasonable person a degree of legal knowledge and analytical skills which were inappropriately exacting. In appealing to practicalities, Lewison LJ cautioned that "commercial life would be made much more difficult if a counterparty had to second guess the truth" of a contractual warranty.[92]

Arnold LJ in dissent as well as Zacaroli J at trial reached the opposite conclusion on the basis that SIS could have done better and taken more prudent measures – beyond merely making enquiries of and receiving assurances and contractual warranties from the Tote – to rebut the imposition of the equitable obligation of confidence (as borne out by the evidence in their view). Indeed, Arnold LJ made it plain that "SIS knew all of the facts which gave it notice that the Key Raceday Triggers were confidential to Arena/TRP".[93]

[92] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [208].

[93] *The Racing Partnership Ltd v. Sports Information Services Ltd* [2020] EWCA Civ 1300 at [101].

From the tenor of this paper, the author is clearly in support of the minority camp which, it is submitted, has in no way held SIS to too high a standard. It is hoped that the UK Supreme Court will likewise agree if and when this matter goes on further appeal.