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The legal fallout from the Panama Papers

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Mossack Fonseca's loss may be other lawyers' gain if the firm's clients decide to bring claims against it, writes Sarah Webb

The political and legal storms continue over the accessing and publication of tax information for the clients of Mossack Fonseca. While the newspapers focus on the political ramifications, clients of the firm are no doubt looking at how they can obtain redress. It is inevitably the rich and famous that the media have concentrated on. What does the footballer or celebrity do about his tax affairs being laid bare in the media?

The media on the whole has been careful in reporting these matters, referring to avoidance not evasion, and emphasising that there is nothing legally wrong with the former. Some newspapers may have overstepped the mark by being overcritical of individuals who have dealt with matters in an entirely lawful way or wandering into the realms of 'guilt by association'.

Defamation proceedings under the new Defamation Act are going to be difficult. While individuals in these cases may be able to satisfy the recently introduced 'serious harm' test, particularly if they have been repeatedly traduced in the media, given the background of these cases they may be reluctant to have their tax affairs pored over in court and subjected to fierce public scrutiny.

A legally safer route may be to bring a claim against Mossack Fonseca for negligence, breach of contract, and possibly breach of confidence.

Mossack Fonseca owed its clients a duty of care and contractual duty to keep their affairs confidential; the firm was aware of the sensitivity of the information and the commercial value attached to it. The fact that so much information was accessed with ease and distributed widely gives rise to a prima facie argument that Mossack Fonseca was negligent or in breach of contract. Clients would have to show loss, but some may well be able to do this if commercial sponsorships are affected because they are considered to be in some way 'tainted'. They may also suffer other financial losses in having to deal with the fallout.

Another possible claim would be for breach of confidence. The information is clearly confidential and Mossack Fonseca was under a duty of confidence, but a client would have to show the firm was responsible for the breach. This requirement may be more difficult to prove, although there have been reports that the leak was internal. In the decision of *Tchenguiz v Imerman* [2010] EWCA Civ 908, the court suggested that a novel form of breach may be by way of access and acquisition.

Those in the media who published the information also face breach of confidence claims as they were aware that they were publishing information without the client's authority and where they had an expectation of privacy.

Breach of confidence claims, as with defamation claims, all face public interest defences. Disclosure of lawful tax avoidance measures, or indeed, in some cases, disclosure of what was lawful tax planning, may not satisfy the public interest defence. Those involved in illegal activities such as money laundering or tax evasion would not be able to bring any claims as there is no protection for iniquity, and their activities would undoubtedly be in the public interest.

What is apparent is that Mossack Fonseca's loss may be other lawyers' gain.

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