

**INJUNCTIVE REMEDIES
FOR BREACH OF CONFIDENCE**

Alastair Wilson



Some particular difficulties in framing injunctive relief:

- Sometimes the act of infringement has published the information so that the cause of action has ceased to exist
- Sometimes the information is publicly (but not easily) available
- How do you reconcile the need to protect confidential information with the ex-employee's need to use his skill and knowledge in a new employment?



Where the information has been published

- This generally destroys the right of action so far as the future is concerned
- Though there is sometimes an exception in privacy cases – Per Lord Philips in *Douglas v Hello* [2005] EWCA Civ 595:

"To take an example, if a film star were photographed, with the aid of a telephoto lens, lying naked by her private swimming pool, we question whether widespread publication of the photograph by a popular newspaper would provide a defence to a legal challenge to repeated publication on the ground that the information was in the public domain. There is thus a further important potential distinction between the law relating to private information and that relating to other types of confidential information."



Where the information has been published (contd.) - Springboard Injunctions

- Assuming the cause of action HAS disappeared:
- It used sometimes to be said that although everyone else was now free to use the information in question, the Defendant could be enjoined from getting the benefit of his own wrong-doing
- It is now clear that this is wrong: The *Spycatcher* case in the House of Lords
- Nevertheless, the Defendant may be subjected to a “Springboard Injunction” if his wrongdoing has given him a head start into the market



Springboard Injunctions (contd.)

- The aim is to deprive the Defendant of the headstart he has gained by his misuse of confidential information.
- For example:
 - He may have saved himself three months' development work (in which case it may be appropriate to keep him off the market for three months)
 - But not longer: which means that this point is only likely to arise at an interim injunction stage
- (OR, of course, it may be an important ingredient in calculating damages.)

Information available elsewhere

- It is not essential for success in a confidential information action that the information is a tight secret
- Rightly or wrongly the notion of “relative secrecy” is well established:

Attorney General v Guardian Newspapers (No.2) [1990] 1 A C 109) In the Court of Appeal, Lord Donaldson at 177:

“(3) As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality: O. Mustad & Son v Dösen (Note) [1964] 1 WLR 109. However, this will not necessarily be the case if the information has previously been disclosed to a limited part of the public. It is a question of degree.....”

In the House of Lords, Lord Goff of Chieveley page 282:

“...once it (the information) has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential,) then, as a general rule, the principle of confidentiality can have no application to it.”

- This is another area where a springboard injunction may be appropriate, but not necessarily a very long one. By the time of the trial (as in the *Vestergaard* case) it may be too late.



Ex-employees

- Ex-employees are treated with some generosity by the Courts, both in the enforcement of restrictive covenants (which must be “reasonable”, etc.) and in the enforcement of the law of confidential information.
- *Herbert Morris v Saxelby* [1916] 1AC 688 at 709, *per* Lord Parker of Waddington:

*“Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain **such personal knowledge of and influence over the customers of his employer**, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, **to take advantage of his employer's trade connection** or utilise information confidentially obtained.”*
- Cf. the surprising result in the *Faccenda* case [1987] Ch. 117



Ex-employees (Contd.)

- *Faccenda* identified three classes of information:
 - Not confidential at all, because easily available
 - An employee's "skill and knowledge"
 - True trade secrets
- Only the last of these can be protected, whether by an injunction or a restrictive covenant
- Sounds sensible – but on the facts was the result a just one?
- Yes – but the result might have been different if there had been a non-solicitation covenant to protect "*his employer's trade connection*"
- The *Faccenda* case has been frequently applied subsequently
- But reasonable covenants to protect trade connections can be upheld



Ex-employees (Contd.)

- Assuming the case is only about confidential information, not a covenant to protect a customer connection, then the “skill and knowledge” exception becomes critical:
- Neither a restrictive covenant, nor the general law will protect an ex-employer from using such information.
- But if he oversteps the mark:
 - If the information remains secret, there is no reason why the injunction restraining its use should not be permanent (as it was in the *Vestergaard* case)
 - But what about “derived” information, such as that in the *Vestergaard* case?



Mareva and Anton Piller orders

- Belief that there has been a breach of confidence often provokes a Plaintiff to see the Defendant as a crook.
- So *Mareva* and *Anton Piller* orders are often sought
- But beware: such Orders are not infrequently set aside for non-disclosure.
- And damages may be awarded if they were wrongly granted.

