



Sanya Young

## **Can You Keep A Secret?**

### *The Law of Confidentiality*

It is often said that the law does not protect ideas. However, a person who has an idea or has knowledge of previously undisclosed information may be able to prevent others from using or disclosing that information if he can demonstrate that the latter is bound by an obligation. The law of confidence determines when such obligations exist. The law of confidence can - as opposed to copyright, which is only concerned with the protection of the form in which information, idea or thought is permanently expressed e.g. in written or recorded form - protect the content of the information, idea or thought. It is a beneficial yet, for the most part, unexplored area of the law which functions as a vital supplement to the statutory intellectual property framework that currently exists.

In order to establish a claim for breach of confidence, one must show that:

1. The information is capable of being protected. It must have a quality of confidence about it, namely, it must not be something which is public property or public knowledge though it need not be novel or inventive;
2. the person to whom the information is disclosed owes the discloser an obligation or a duty to keep the information confidential; and

3. the person to whom the information is disclosed used the information in such a way that breached that duty.

No restrictions are placed on the subject matter which is protected by breach of confidence. As a result the action has been used to protect the concept of a new television programme, customer lists, marital secrets and even the genetic structure of a nectarine tree. The information can also be protected regardless of the manner in which it is manifested, whether it is in writing, drawings, photos, or where it has been disclosed orally. There are, generally, four limitations placed on the type of information that may be protected under this action. These include trivial information, immoral information, information that is vague and information in the public domain. Interestingly however, in the English case of *Mills v MGN*, the court held that the address of Heather Mills (model and then wife of Paul McCartney) was protectable despite the “relatively trivial character of the information” when weighed against the potential security risk if the information was disclosed.

The obligation of confidence is clear if it is expressly communicated to the recipient of the information that it is being imparted in confidence. In many cases, the relationship between the parties implies the obligation of confidence, for instance, in a business partnership, employer/employee, lawyer/client relationships or other relationships of trust or confidence (including family and marital relations).

In some cases, an obligation of confidence may arise from the way the information is communicated between the parties. The test for whether there is a duty of confidence is to ask “would a reasonable person have realised that the information was given to them in confidence?”

Special considerations apply in relation to the application of the breach of confidence action between employee and employer. It is common for contracts of employment to contain express provisions addressing the duty of confidence owed by an employee to his or her employer. However, even where the contract of employment does not

contain express provisions in this respect, one is often implied in the employment relationship.

This duty of confidence embraces the protection of trade and commercial secrets, including information which is given to the employee during the course of employment as well as information which he generates in the course of his work. Although the law may imply a duty of fidelity, inclusion of terms dealing with the duty of confidence to the employer in a contract of employment at least have the effect of focusing an employee's attention on the importance of not misusing confidential information. If there are express terms in a contract of employment which strengthen this duty they must be clear and unambiguous. However, this does not mean that an employer can prevent his employee from using the skill or knowledge which he has acquired as a result of his employment. In other words, an employee is entitled to use his normal skill or knowledge in future employment and can only be prevented from using special knowledge and trade secrets acquired from his previous employment.

Should it ever become necessary to disclose confidential information to a third party the person possessed of the confidential information should ask the confidante to sign a simple confidentiality agreement or non-disclosure agreement. This confidentiality agreement should contain the date of the disclosure, the name and contact details of the confidante, the nature of the information, the purpose of the disclosure and a clear acknowledgement by the confidante that the information being disclosed is confidential and is only being disclosed for a specific purpose. The agreement should also have an express provision that the confidante undertakes not to disclose the information without consent.

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