

CHANCERY DIVISION

COCO v A.N. CLARK (ENGINEERS) LTD [1969] RPC 41

MEGARRY J:

In this case, questions of some interest arise in relation to the equitable doctrine of confidential communication. The subject-matter of the dispute is a two-stroke engine for a moped, or motor-assisted cycle. Mr. Mowbray, for the plaintiff, moves for an interlocutory injunction against the defendant company. The relief claimed on the motion is an order that the defendants do not until after trial of this action or until further order in the meantime, without the previous consent of the plaintiff, 'make or sell by any director, employee, servant or agent any Scamp moped or any other machine in the design, development or manufacture of which the defendant has used directly or indirectly any confidential information the property of the plaintiff.'

In essence, the plaintiff's case is as follows. In 1965 he began market research into the possibility of producing and selling a new moped: and, being skilled in such matters, he proceeded to design such a machine. By March 1967 the first batch of pistons to his design had been made for him in Italy and sent to him in England.

In April 1967 there was the first contact between him and the defendant company about the proposed moped, and the company expressed interest in making it. By a letter dated 24th April 1967 the company suggested to the plaintiff that he should bring the prototype that he had built down to the works of the company with him; and this was done. Over the next three months there were many discussions between the parties, and the plaintiff supplied the company with information, drawings and other aids towards the production of 'the moped, such as a list of possible suppliers of parts for the machine; and this came to be known 'by the plaintiff's name as the Coco moped. The company in its turn did work on the plaintiff's ideas, and also put forward for the plaintiff's consideration certain draft documents to regulate the financial and other arrangements between them, but these documents were never signed, nor were terms ever agreed in any other way.

On 20th July 1967 there came the breach between the parties. Mr. A. N. Clark the managing director of the defendant company, told the plaintiff that the method of transmission in the Coco moped was creating a very big problem and that the company had decided to make its own moped to a design different from that of the plaintiff ...

...

The plaintiff's belief, stated in his first affidavit, is that 'at some time before 20th July 1967 Mr. Clark made up his mind to get my engine for the defendant without paying for it' ...

...

... [T]he plaintiff at first accepted the defendant company's assurance that the moped which the company was going to produce, known as the Scamp moped, would be to a different design. However, as more and more details of this machine became available through advertisements in trade papers in February and March 1968 the plaintiff became more and more suspicious that the engine would in substance be the same as his engine, and that the defendant company was making use of the information which he had provided for the purposes of the proposed Coco moped. In a letter dated 17th April 1968 the defendant company admitted that the piston and carburetter were of the same type, and this confirmed the plaintiff's suspicions. He relies strongly upon the piston being one that he had designed, obtained from the Italian company that had manufactured samples for him to his design.

Mr. Clark says that he does not believe that there is any element of significant originality in the piston and that the defendant company had no difficulty in ordering it; but, subject to a saving for any further evidence that might emerge, the defendant company accepts that the piston used in the Scamp is in fact that designed by the plaintiff.

... [T]he Scamp moped ha[s] gone into production, and about 200 a week are now being sold. The Coco moped is not in production and there is no suggestion of any plans for putting it into production...

Mr. Mowbray bases himself on the defendant company's misuse of information given to the company under circumstances of confidence. The essence of his case is breach of confidence ...

...

The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of 'use, confidence or trust'; and a couplet, attributed to Sir Thomas More, Lord Chancellor avers that:

'Three things are to be helpt in Conscience;
Fraud, Accident and things of Confidence.'

In the middle of the last century, the great case of *Prince Albert v. Strange* (1849) 1 Mac. & G. 25 reasserted the doctrine.

In the case before me, it is common ground that there is no question of any breach of contract, for no contract ever came into existence. Accordingly, what I have to consider is the pure equitable doctrine of confidence, unaffected by contract. Furthermore, I am here in the realms of commerce, and there is no question of any marital relationship such as arose in *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302. Thus limited, what are the essentials of the doctrine?

Of the various authorities cited to me, I have found *Saltman Engineering Co. Ltd.*

v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203; Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. [1960] R.P.C. 128 and Seager v. Copydex Ltd. [1967] 1 W.L.R. 923; [1967] R.P.C. 349 of the most assistance. All are decisions of the Court of Appeal.

I think it is quite plain from the Saltman case that the obligation of confidence 'may exist where, as in this case, there is no contractual relationship between the parties. In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation.

In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed.

First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must 'have the necessary quality of confidence about it.'

Secondly, that information must have been imparted in circumstances importing an obligation of confidence.

Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

I must briefly examine each of these requirements in turn.

First, the information must be of a confidential nature. As Lord Greene said in the Saltman case at page 215, 'something which is public property and public knowledge' cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components.

... I think there must be some product of the human brain which suffices to confer a confidential nature upon the information ...

...

The second requirement is that the information must have been communicated in circumstances importing an obligation of confidence. However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances

which negative any duty of holding it confidential. From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence.

...

It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence ...

I ... add that I doubt whether equity would intervene unless the circumstances are of sufficient gravity; equity ought not to be invoked merely to protect trivial tittle-tattle, however confidential.

Thirdly, there must be an unauthorised use of the information to the detriment of the person communicating it ... At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect. The point does not arise for decision in this case, for detriment to the plaintiff plainly exists. I need therefore say no more than that although for the purposes of this case I have stated the propositions in the stricter form, I wish to keep open the possibility of the true proposition being that in the wider form.

...

...I feel no difficulty about the second condition. I think that the circumstances under which the information was given were plainly circumstances which imported an obligation of confidence. From the first, the whole object of the discussions was that the defendant company should manufacture a moped based on the plaintiff's design, and the plaintiff imparted his information with that object alone. I cannot think that the information was given under any circumstances save those of an implied obligation to preserve any trade secrets that emerged ...

...

I feel no doubt ... that there was here an implied obligation of confidence.

...

I turn to the first and third conditions. It is far less clear whether they are satisfied.

How far is the information confidential in nature, and how far has the defendant company made an unauthorised use of any information that was confidential in nature? If there has been any such use, it clearly has been an unauthorised use to the detriment of the plaintiff; but the plaintiff's claim must fail if what the defendant company has without authority used to his detriment was not confidential in nature.

...

I remain in almost complete darkness as to the extent to which the ideas were common to the moped world ... I can only say that, on this motion, that evidence and the evidence of the plaintiff have in my judgment fallen well short of what is requisite for interlocutory relief. ...

...

In my judgment... the real issue of fact is one which on this motion I cannot properly resolve, so that prima facie my duty is to adjourn the matter to the trial.

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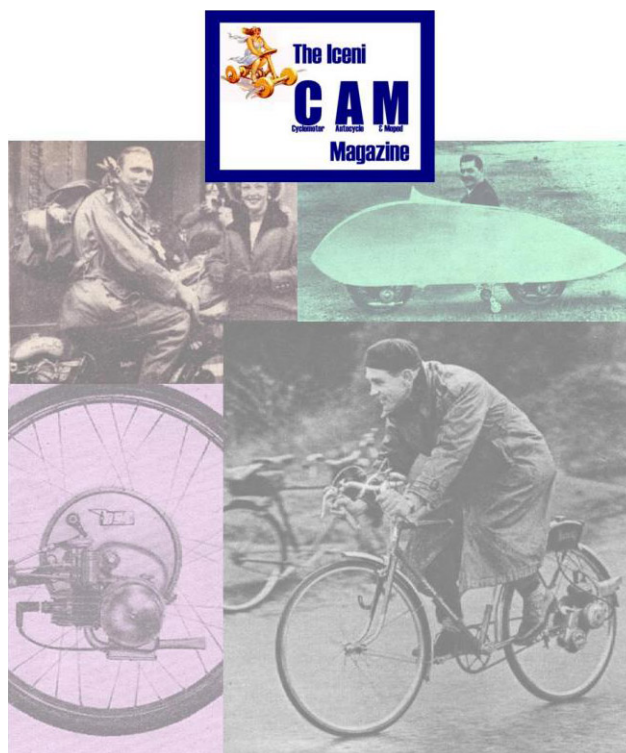
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It seems to me that one factor which should be considered in the granting or refusing of interlocutory relief is what the suppliant is trying to protect. A product on the market may need protection against rivals in cases where a mere idea for a product, neither on the market now nor planned to be put on the market at any foreseeable date, may not. Furthermore, I must bear in mind the effect on the defendant company of granting the injunction sought: for it would halt their production and throw idle some 35 or 40 of their staff, as well as removing from the British market the only moped with a British-made engine and leaving its place vacant for a rival moped with a British engine which, it is said, is now being developed.

It may be that what I have said presages a simple refusal of interlocutory relief; but I do not think that this would be right. Mr. Alexander has offered to undertake that the defendant company will keep an account of a royalty of 5s. 0d. per Scamp engine manufactured, this being the amount offered by the defendant company when the negotiations broke down...

... A royalty at the rate of 5s. 0d. per engine on the first 50,000 made was in large degree agreed to by the plaintiff in his letter of 22nd July... If the defendant company is right, of course, there will be no obligation to pay the plaintiff anything. If the defendant company is wrong it must make a payment which may be more than 5s. 0d. per engine or may be less. But, doing the best I can on the material now before me, it seems to me that this rate of payment is a sensible figure to adopt for the interim period until the trial of the action. Accordingly, subject to undertakings being given by the defendant company on the basis that I have mentioned, I dismiss the motion.

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