



Tech Tuesdays

With Musa.

Published: 23rd April 2024

CONFIDENTIAL INFORMATION.

Introduction

Suppose you have a brilliant idea that could revolutionize your industry and change your life for the better but you don't have the funds to implement it. You approach some investors with the view of sourcing funds for your project and this necessitates that you divulge information about your idea to the said investors. Unfortunately, your potential investor steals your idea and implements it without your consent. What recourse is available to you at law and how can you protect your ideas from copycats?

This week, we explore the elements of confidential information and how the law on confidential information can be used to safeguard intellectual property assets.

The Requirements For Information To Be Considered Confidential

Before anyone can be found to have stolen your confidential information, the Court will first examine whether the idea or information was confidential to begin with. His Lordship Megarry J laid down the requirements for information to be adjudged as confidential in the case of *Coco v A.N Clark (Engineering) Ltd* 1969 RPC 41 and distilled them into 3 elements;

1. The information must itself, have the necessary quality of confidence about it;
2. The information must have been imparted in circumstances importing an obligation of confidence; and
3. There must be an unauthorized use of that information to the detriment of the party communicating it.

Let us now unpack these elements one after the other...

The Necessary Quality of Confidence

Information that has the necessary quality of confidence is information which is not public, has commercial value and is not trivial. For example, trade or commercial secrets and government secrets. Once information has entered the public domain or is generally accessible, the principle of confidentiality can have no application to it¹.

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Information Communicated in Circumstances Importing an Obligation of Confidence

The general principle is that information needs to be imparted in a context that mandates confidentiality. The context or circumstances may be express or implied. There may be a contractual term that applies or the circumstances make it obvious that confidentiality applies, for example, in employment relationships, employees generally owe a duty of good faith and fidelity towards their employers. The test to be applied is whether a reasonable person in the shoes of the recipient of the information could have realized that the information was given in confidence².

Unauthorized Use or Threat to Use the Information to the Detriment of the Communicator

Here, the Court considers the detriment that the Plaintiff or communicator of the information stands to suffer or has already suffered due to the unauthorized disclosure of her information. Courts are quite flexible with how they construe the detriment, for example, financial loss, loss of customers etc. The detriment need not be financial, it can be stress or embarrassment.

In *Seager v Copydex Ltd* CA 1967 the Plaintiff (Seager) had invented a carpet grip and negotiations had taken place between the parties about the pricing of the product. During a meeting with Copydex representatives, Mr. Seager disclosed an alternative design which could be produced more cheaply. This design was however, not covered by patent. The Defendant manufactured a grip using that confidential information and Seager sued them.

¹ See *AG v Guardian Newspapers (No2)* [1990] 1 AC 109 HL

² *Douglas v Hello! (No2)* [2005] EWCA Civ 595

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The Court upheld Mr. Seager's claim for breach of an equitable obligation to confidence and awarded him damages on a restitutionary basis. It was held that the law on this subject does not depend on any implied contract, but on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. In conclusion, information must satisfy the 3 elements above for it to be considered confidential and thus be protected. Join us next week, as we dive deeper into confidential information and suggest tips of how to safeguard your intellectual property assets.

Article by Princess Musa Dube

If you have any interest in an in-depth discussion on this subject matter or any Intellectual Property related topics, feel free to contact us at info@gobhozalegalpractice.co.bw Tel: 3116371

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