

## **\*447 De Maudsley v Palumbo and Others**

### **Positive/Neutral Judicial Consideration**

#### **Court**

Chancery Division

#### **Judgment Date**

12 December 1995

#### **Report Citation**

[1996] F.S.R. 447

In the High Court of Justice—Chancery Division

Before: Mr Justice Knox

6, 8–10, 13–17, 20–21 November and 12 December 1995

*Breach of confidence—Idea for a night club—Whether information imparted under obligation of confidence—Whether information too vague to qualify as confidential—Whether use of information to such an extent as to be unauthorised.*

*Contract—Whether circumstances gave rise to a contract.*

At a supper party held on November 1, 1989 between the plaintiff, the first defendant and the latter's girlfriend, the plaintiff communicated to the first defendant his idea for a night club which he claimed had five novel features: (1) it would be legally open all night long; (2) of large size with decor of a “high tech industrial” warehouse style; (3) it would have separate areas for dancing, resting and socialising, and a VIP lounge; (4) an enclosed dance area of acoustic design ensuring excellent sound quality, light and atmosphere, with no leakage of those elements beyond its environment; (5) it would employ top disc jockeys from the United Kingdom and around the world.

The plaintiff claimed that the first defendant was so impressed with the possibilities of the idea that he offered to fund it himself or arrange for its financing. Over subsequent weeks the arrangement was elaborated to involve the two other personal defendants and it was intended that the four of them would set up a nightclub through the medium of a company (to be acquired), and share the profits equally between them.

On September 21, 1991 a nightclub named the “Ministry of Sound” was opened by one of the company defendants. The first defendant owned half the issued shares in this defendant, but neither the other personal defendants nor the plaintiff were shareholders. The other personal defendants were involved in the set up and running of the club in different capacities, but the plaintiff had no beneficial or financial involvement of any significance. The company went into compulsory liquidation in December 1991. The nightclub was taken over and run by the other company defendant. The “Ministry of Sound” was open all night and had a dancing area separate from the other areas.

The plaintiff claimed that a contract had been created between himself and the first defendant at the supper party of November 1, 1989 and which was subsequently expanded to include the other personal \*448 defendants and the sharing of profits. He claimed that because he had been excluded from setting up the nightclub and deprived of his share of the profits, the three personal defendants were in breach of that contract.

The plaintiff also claimed that he had revealed his ideas for the nightclub to the first defendant in circumstances which implied confidence. He submitted that the five novel features of the club in combination were original and sufficiently defined to qualify as confidential information and that all the ideas had been incorporated into the “Ministry of Sound” without his licence. Consequently he claimed all the defendants were in breach of confidence by opening and operating the club without his permission. The transfer of the club business incorporating the plaintiff's idea from one company defendant to the other company defendant was alleged to be a further breach of confidence in that it too was effected without licence.

Held, dismissing the action:

- (1) On the facts, no contract had been formed between the plaintiff and the three personal defendants. There was no agreement with a sufficient degree of certainty to be capable of enforcement entered into by persons intending to create a legal relationship. Accordingly the claim for breach of contract failed.
- (2) It was not essential in order to constitute confidential information for the material to be in writing or other permanent form. However before the status of confidential information could be achieved by a concept or an idea, it was necessary to go beyond simply identifying a desirable goal. A considerable degree of particularity was required to show that the idea was capable of being realised as a finished product in the relevant medium. That did not exclude simplicity,

but vagueness and simplicity were not the same. It was also necessary to show that the idea contained some significant element of originality.

(3) The requirements for a literary, creative or entertainment industry idea to achieve the status of confidential information were: the idea must contain some significant element of originality, be clearly identifiable (as an idea of the confider), be of potential commercial attractiveness and be sufficiently well developed to be capable of actual realisation.

(4) In this case all five features of the plaintiff's idea were individually far too vague to constitute confidential information. Furthermore, the only novel idea was that of a nightclub which legally operated all night long. The claim to originality in relation to the combination of the five features also failed, in part because significant aspects of some of the features were not in fact the plaintiff's idea. A combination of features which were not individually novel does not automatically become novel by being added together. Accordingly the ideas did not qualify as confidential.

(5) The test to be applied to determine whether the communication of the confidential information was or was not made in circumstances \*449 which imposed a duty of confidence was objective. Therefore whilst evidence that the parties did not in fact regard themselves as under an obligation to preserve confidence was significant it was not determinative of the issue. The obligation was not avoided simply by not addressing the problem.

*Thomas Marshall (Exports) Ltd v. Guinle [1979] Ch. 228 not followed .*

(6) The existence of a trade or industry practice to treat the type of information in issue as confidential was also a relevant factor.

*Thomas Marshall (Exports) Ltd v. Guinle [1979] Ch. 228 followed .*

(7) On the facts, the evidence was overwhelmingly that the defendants did not believe that they were being told anything unique or confidential. Nothing was said by the plaintiff to take the occasion of the supper party out of the social sphere and put it in a business one. Indeed he admitted that he did not mention confidentiality because of the risk that the first defendant may not have backed the ideas if they were confidential. Furthermore there was no evidence of any trade or professional practice. In the circumstances it was quite impossible to infer an obligation of confidence on the defendants.

(8) In fact the only features of the idea adopted by the defendants' club were that it was legally open all night and had separate dancing area from the other areas, such as the VIP lounge and bars. Use of the plaintiff's idea to such a limited extent would not, in any event, be sufficient to constitute unauthorised use for the purposes of breach of confidence.

The following cases were referred to in the judgment:

*Attorney-General v. Guardian Newspapers (No. 2)* [1990] 1 A.C. 109 .  
*American Cyanamid Co. v. Ethicon Ltd* [1975] A.C. 396 .  
*Coco v. A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41 .  
*Cranleigh Precision Engineering Ltd v. Bryant* [1965] 1 W.L.R. 1293 .  
*Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302 .  
*Fraser v. Thames Television Ltd* [1984] Q.B. 44 .  
*Gilbert v. Star Newspaper Co. Ltd* (1894) 11 T.L.R. 4 .  
*L.A.C. Minerals Ltd v. International Corona Resources Ltd* (1989) 61 D.L.R. (4th) 14, [1990] F.S.R. 441 .  
*Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* (1948) 65 R.P.C. 203 .  
*Seager v. Copydex Ltd (No. 1)* [1967] 1 W.L.R. 923 .  
*Talbot v. General Television Corporation Pty. Ltd* [1981] R.P.C. 1 .  
*Thomas Marshall (Exports) Ltd v. Guinle* [1979] Ch. 228 .

## Representation

Ray de Maudsley , assisted by Pitts Tucker & Co. appeared in person. Andrew Neish , instructed by The Simkins Partnership , appeared for the defendants.

KNOX J:

In this action the plaintiff Mr Ray Andrew de Maudsley (“Mr de Maudsley”) seeks against all the defendants an inquiry as to damages and an injunction restraining breaches of Mr de Maudsley's confidence in his idea for an all night dance club whether by using that idea of disclosing it to \*450 others. The defendants consist of three natural persons and two companies. The three natural persons are Mr James Rudolph Palumbo (“Mr Palumbo”) Mr Humphrey Vlademar Waterhouse (“Mr Waterhouse”) and Mr Justin Charles Berkmann (“Mr Berkmann”). Of the two defendant companies one, Dance Studio UK Ltd (“Dance Studio UK”), has been ordered to be wound up compulsorily on December 9, 1992 and has not been represented whereas the other, Danceclub Ltd (“Danceclub”), is still in existence and was represented by Mr Neish of Counsel who also appeared for the three natural defendants. Mr de Maudsley appeared in person but he had been represented by solicitors and counsel at earlier stages than the hearing of the action and there are professionally drawn pleadings on either side although Mr de Maudsley obtained leave to re-amend his at a late stage before the evidence was taken.

The action hinges primarily upon what transpired at a supper party at Mr Palumbo's flat on November 1, 1989 when he provided a meal for Mr de Maudsley and Miss Lisa Smalley with whom Mr Palumbo was at that stage having an intimate relationship which did not last long into the New Year of 1990. Miss Smalley was at the time residing in the same flat as Mr de Maudsley but not on the basis of any such intimate relationship. Put very shortly, Mr de Maudsley's case is that during that supper party he revealed to Mr Palumbo his idea for a night club of a novel

nature and that Mr Palumbo was so impressed by its possibilities that he offered to Mr de Maudsley to fund it or arrange for its financing and that this offer was accepted. This agreement was, it is claimed, elaborated over the following weeks, notably so as to include Mr Waterhouse and Mr Berkmann as participants in the project for the proposed nightclub on terms that the four of them. Mr de Maudsley, Mr Palumbo, Mr Waterhouse and Mr Berkmann would through the medium of a company to be acquired share the profits of the intended business in equal shares. Over a year and three-quarters later in September 1991 a nightclub Ministry of Sound (“Ministry of Sound”) was opened by Dance Studio Ltd UK of which Mr Palumbo owned half the issued shares and in which none of Mr de Maudsley, Mr Waterhouse or Mr Berkmann was a shareholder but Mr Waterhouse and Mr Berkmann were involved in different capacities whereas Mr de Maudsley had no beneficial involvement of any significance.

Mr de Maudsley's case is pleaded on two bases. First it is claimed that there was a contract created at the supper party on November 1, 1989 and expanded over the following weeks notably so as to include Mr Waterhouse and Mr Berkmann for the development of the nightclub project and the sharing of its profits and that the natural defendants are in breach of that contract. Secondly, it is claimed that all the defendants other than Danceclub are guilty of breach of confidence in having opened and operated through Dance Studios UK the nightclub Ministry of Sound which it is said incorporated all of Mr de Maudsley's ideas which he communicated to Mr Palumbo at the supper party on November 1, 1989 without Mr de Maudsley's licence, and that the disclosure of those ideas without Mr de Maudsley's licence constitutes an actionable breach of confidence. *\*451* Danceclub's involvement is that it took over the nightclub Ministry of Sound on the liquidation of Dance Studio UK and continues to run it and it is claimed that this involves a further breach of confidence in that the transfer to it of a business incorporating Mr de Maudsley's idea was effected without Mr de Maudsley's licence.

The law with regard to the claim in breach of contract needs no examination beyond observing that what is needed is an agreement with a sufficient degree of certainty to be capable of enforcement entered into by persons intending to create a legal relationship. I say at once that in my view, for reasons which will appear hereafter, the plaintiff's claims under this head fail on the facts and indeed are hopelessly bad.

The situation regarding breach of confidence is less clear, both as regards the facts and the law. So far as the law on the subject is concerned, although the broad general principles have now been established at the highest level, there are still important issues which remain to be definitively settled. For a statement of the broad general principles I take from the speech of Lord Goff in *A-G v. Guardian Newspapers (No. 2)* [1990] 1 A.C. 109 at p. 281 the following

I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in

circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

Lord Goff went on to acknowledge that in the vast majority of cases the duty of confidence will arise from a transaction or relationship between the parties, often a contract, in which event the duty may arise by reason of either an express or implied term of that contract, but that it was well settled that a duty of confidence might arise in equity independently of contract or relationship between the parties.

So much for the broad principle. When the authorities in which the principle has been applied are examined there are various categories which are discernible. Some are clearly far distant from the case before me, such as private confidences in domestic matters such as *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302, and employer and employee cases of which there are very numerous examples. Nearer to the case before me are those dealing with the boundaries of copyright where breach of confidence has mitigated the well-established principle in copyright law that there is no copyright in ideas or information. For example, a series of cases, of which *Gilbert v. Star Newspaper Co. Ltd* (1894) 11 T.L.R. 4 is one, has established that the courts will protect the plot and dramatic ideas in plays which remain unpublished in written form so that no breach of copyright is threatened but the material has come to the defendant in circumstances giving rise to a duty of confidence. Another related class of case concerns the duty of confidence which arises when a prospective inventor submits his ideas to a person in a commercial context with a view to its exploitation by that person. Thus in *Seager v. Copydex Limited* [1967] 1 W.L.R. 923 the plaintiff, an inventor, who had **\*452** patented a form of carpet grip, negotiated with the defendants for its manufacture by them but no contract resulted from those negotiations. During the negotiations the plaintiff revealed another form of grip which he had thought of but was not the subject of patent protection. The defendants were held liable in damages for breach of confidence in having subconsciously copied the unpatented grip which had been revealed to them in confidence.

There was no issue in *Seager v. Copydex*, *supra*, on the question whether the relevant information was given to the defendants in confidence. The issue that was debated was whether the defendants had produced their carpet grip as the result of their own ideas or, as the Court of Appeal held, by unconscious adoption of the plaintiff's idea conveyed to them in confidence. It is illustrative of circumstances where a duty of confidence will arise. Another decision bearing some resemblance on the facts to *Seager v. Copydex*, *supra*, was *Coco v. A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41 where the plaintiff failed to obtain an interlocutory injunction restraining breach of confidence. This was before the House of Lords decision in *American Cyanamid Co. v. Ethicon Ltd* [1975] A.C. 396, so the approach to the question of the availability of an interlocutory injunction is no longer of significance, but the principles stated by Megarry J. regarding the necessary elements for



an action for breach of confidence are highly significant and have often been adopted and applied since, notably in a Canadian decision *L.A.C. Minerals Ltd v. International Corona Resources Ltd* (1989) 61 D.L.R. (4th) 14 ([1990] F.S.R. 441 ). He said at p. 47:

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 [ *Saltman Engineering Co. Ltd v. Campbell Engineering* (1948) 65 R.P.C. 203 ] on p. 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.

With regard to the first element he said this also on p. 47:

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 . . . whether it is described as originality or novelty or ingenuity or otherwise, I think there must be some product of the human brain which suffices to confer a confidential nature upon the information:

The latter passage contains a second echo of what Lord Greene M.R. said in the *Saltman* case at p. 215 when he said: \*453

It is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind which is the result of work done by the maker upon materials which may be available for the use of anybody: but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

The principle involved has also been applied in the world of theatre and entertainment in circumstances where there is no tangible finished product in the sense of a detailed written script. Mr de Maudsley relied upon two authorities concerning ideas for a television programme. The first was *Talbot v. General Television Corporation Pty. Ltd [1981] R.P.C. 1*. In this case the plaintiff had prepared a written submission, to be used in negotiations with television networks, which set out in some detail an idea for a television series consisting of programmes illustrating the lives of real millionaires (in Australian dollars) and examining how they had achieved this and their lifestyles. The submission included the following:

Each “case study” will provide viewers with in depth background about how the million dollars was made and how it is being spent. It's a show for “financial voyeurs” and there's a little of that in all of us.

There were also details included of two different ways in which the programs ( *sic* ) could be constructed. The plaintiff handed this submission to the officers of one of the group of companies known as the Channel 9 network of which the defendant company was another, at a meeting where the possibility of the Channel 9 network screening such programmes was debated. The plaintiff later supplied a pilot script for one proposed episode. No agreement ensued between the plaintiff and Channel 9 network but some time later the defendant proposed to screen programmes about the lives of several millionaires and the publicity material included, after naming the persons concerned, “Could you be a millionaire too? Some of Australia's biggest money makers spell out their recipes for success in a special series starting on 'A Current Affair'.”

The plaintiff sought and obtained an interlocutory injunction but the programme was nevertheless screened. On a further motion for an interlocutory injunction restraining breach of confidence, the parties agreed to treat the motion as the trial of the action. Harris J., at first instance in the



Supreme Court of Victoria, set out the three elements listed above by Megarry J. in the *Coco* case. Having set out the arguments of counsel on either side, which included a submission on behalf of the defendant that there is no property in an idea, he dealt with the question whether the idea or concept of the plaintiff was sufficiently developed to constitute confidential information. In relation to that he said at page 9:

Without deciding that it is always necessary for a plaintiff to go that far, I am satisfied that where a concept or idea has been developed to the stage where the plaintiff had developed his concept, it is capable of being the subject of a confidential communication. The plaintiff had developed his concept so that it could be seen to be a concept which had at least some attractiveness as a television programme and to be something which was capable of being realised as an actuality.

**\*454**

He also held that the plaintiff's concept, although dealing with a familiar phenomenon, could not be treated as public knowledge and therefore not confidential, saying at page 9:

I am satisfied that what was called the “commercial twist” or the particular slant, of the plaintiff's concept (or idea) does give it a quality which takes it out of the realm of public knowledge.

The distinctive feature which he identified was the giving by the successful men themselves during the programme their recipes for success to the viewers. This had not been done before in Australia. Moreover the plaintiff had not communicated his concept to anyone outside his own organisation except an officer of the Channel 9 network and it had been conceded on behalf of the defendant that the oral formulation of the plaintiff's concept and later the pilot script had been given in circumstances which implied confidence. This material led him to the conclusion that confidential information had been communicated in circumstances importing a duty of confidence and having found, as he went on to do, that this duty had been broken, he granted the injunction sought and directed an inquiry as to damages. There was a largely unsuccessful appeal but the decision of the Full Court on that appeal is not reported although a later unsuccessful appeal against the decision on quantum of damages was reported. This latter is however of no assistance upon questions which

I have to answer. The decision of Harris J. underlines the relevance of the extent to which a creative idea has been developed so as to constitute something capable of being realised as an actuality.

This aspect was taken up by Hirst J. in the second of the two cases relied upon by Mr de Maudsley. *Fraser v. Thames Television Ltd* [1984] Q.B. 44. In that case three women plaintiffs, who formed a rock group, ("the group"), together with their composer and manager developed what was found to be a well-formed idea for a television series based on their experiences focusing both on their individual lives (they were all actresses), and on their collective character. One of the group, with the consent of the other two, communicated this idea for a television series in confidence to a defendant scriptwriter. The scriptwriter approached the prospective Head of Drama for Thames Television and negotiations ensued for a possible television series based on the plaintiffs' idea. It was common ground that the group wanted to appear as themselves if the series was commissioned by Thames Television and an option agreement was reached between Thames Television and the plaintiffs which provided for Thames Television to be entitled to have time to decide whether or not to commission the series during which period the group agreed that they would not feature in any competing television comedy or drama as a group. The plaintiffs also agreed that if they decided not themselves to proceed with the series they would permit Thames Television to make the series with other actresses. Thames Television paid £500 for the rights provided by this option agreement. The scriptwriters prepared scripts and the option agreement was extended in consideration of another payment but eventually when Thames Television \*455 decided to proceed one of the group was unavailable and after unsuccessful negotiations Thames Television produced a series with other actresses incorporating episodes based on the lives and experiences of the group and other aspects of the plaintiffs' original idea. The unavailability of the member of the group, as opposed to their declining to proceed with the series, was not an event provided for in the option agreement between the plaintiffs and Thames Television. In those circumstances Hirst J. held that the plaintiffs' idea as well as their services as actresses did form part of the agreement entered into by Thames Television and that there was an implied agreement by Thames Television not to employ other actresses than the group. He found that the plaintiffs' claim in contract succeeded. He went on, however, to deal with the claim in breach of confidence which is what is directly relevant for my purposes. It was argued for the defendants that the law should not protect by remedies for breach of confidence literary or dramatic ideas unless they were fully developed in the form of a synopsis or treatment and embodied in some permanent form. Hirst J. rejected this saying at p. 65:

I accept that to be capable of protection the idea must be sufficiently developed. so that it would be seen to be a concept that has at least some attractiveness for a television programme and which is capable of being realised as an actuality: see *per* Harris J. in *Talbot v. General Television Corporation Pty. Ltd* [1981] R.P.C. 1, 9, lines 20–22. But I do not think this requirement necessitates in every case a full synopsis. In some cases the nature of the idea may require extensive development of this kind in order to meet the criteria. But in others the criteria may be met by a short

unelaborated statement of an idea. In *Talbot's* case itself I do not think the detailed submission, quoted at p. 5, added very much of substance to the idea which is set out in one sentence starting at line 10 on p. 5. Unquestionably, of course, the idea must have some significant element of originality not already in the realm of public knowledge. The originality may consist in a significant twist or slant to a well known concept ( *Talbot's* case). This is, I think, by analogy, consistent with the statements in *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd (1948) 65 R.P.C. 203* and *Coco v. A.N. Clark (Engineers) Ltd [1969] R.P.C. 41* , that novelty in the industrial field can be derived from the application of human ingenuity to well known concepts.

To the best of my recollection, every witness in the theatre or television business on both sides agreed that if he or she received an idea from another it would be wrong to make use of it without the consent of the communicator. They of course were expressing their views in the context of a moral usage in their profession rather than of a strict legal obligation. However, the authorities, and in particular *Saltman's* case ( *per* Somervell L.J.) and *Thomas Marshall (Exports) Ltd v. Guinle [1979] Ch. 227* , strongly support Mr Strauss's argument that the existence of such a usage is a factor of considerable force in deciding whether a legal obligation exists. I think the law as laid down in the authorities I have cited clearly establishes that the obligation which the witnesses saw as moral is also legal in character.

This of course does not mean that every stray mention of an idea by one person to another is protected. To succeed in his claim the plaintiff must establish not only that the occasion of communication was confidential, but also that the content of the idea was clearly identifiable, original, of potential commercial attractiveness and capable of being realised in actuality. With these limitations. I consider there is no basis for Mr Harman's fears that authors' freedom to develop ideas will be unduly stultified. \*456

The following points emerge from this decision. First, it is not essential in order to constitute confidential information for the material to be in writing or other permanent form. Secondly, it is essential for the material to have at least some attractiveness to an end user and be capable of being realised “as an actuality”, by which I understand to be meant as a finished product in the relevant medium. The requirement for it to have some attractiveness does not with all due respect seem to me to advance matters very much if only because if that element is missing it is hardly likely to be appropriated. It is the other element of being capable of being realised as a finished product which

is significant for my purposes. This seems to me to be an element which can be traced back to Lord Greene M.R.'s reference in the *Saltman* case to the maker of the product, in that case a document, having used his brain and produced a result which can only be produced by somebody who goes through the same process. That connotes a mental process and a product of the mental process which can properly be described as a result. There is a significant difference between that concept and an aspiration the flavour of which can be captured in the phrase “Wouldn't it be great if . . .”

Before the status of confidential information can be achieved by a concept or an idea it is necessary to have gone far beyond identifying a desirable goal. A considerable degree of particularity in a definite product needs to be shown to be the result of the mental process in question. That does not of course exclude simplicity. There is ample authority for that. See for example *Cranleigh Precision Engineering Ltd v. Bryant* [1965] 1 W.L.R. 1293 at 1308 and 1310. Vagueness and simplicity are not the same.

The third and last observation to be made regarding *Fraser's* case is that the existence of a trade or industry practice to treat the type of information in issue as confidential played a significant part in Hirst J.'s decision that the plaintiffs' idea constituted confidential information.

Mr Neish summarised the requirements for a literary, creative or entertainment industry idea to achieve the status of confidential information as follows. Basing himself on what Hirst J. said in *Fraser v. Thames Television* , above, he said that the idea must

- (1) contain some significant element of originality
- (2) be clearly identifiable (as an idea of the confider)
- (3) be of potential commercial attractiveness
- (4) be sufficiently well developed to be capable of actual realisation.

Subject to what I have said above I accept that formulation.

The only other point of law in relation to breach of confidence which needs mention is the test to be applied to determine whether the communication of the confidential information was or was not made in circumstances which imposed a duty of confidence. There are relatively few cases in the field of inventors showing their inventions and authors imparting confidential information where there has been a live issue whether or not the circumstances in which the information was passed on imposed a duty of confidence. It was conceded in the *Saltman Engineering, Seager v. Copydex* , and *Talbot v. General Television Corporation Pty.* cases and Megarry J. felt no difficulty about the issue in *Coco v. A.N. Clark (Engineers)* at p. 50. He \*457 resorted to the officious bystander to whom he found the parties in that case would have said that there obviously was a term of their

agreement that the information was being passed in confidence. I was also referred to Megarry V.-C.'s decision in *Thomas Marshall (Exports) Ltd v. Guinle* [1979] Ch. 227 where he identified four elements which may be of assistance in the context of an industrial or trade setting, in identifying confidential information or trade secrets which the court will protect. He said at p. 248:

First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, *i.e.* that it is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usages and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection.

It is clear that usages and practices of the particular industry or trade concerned were influential with Hirst J. in *Fraser v. Thames Television* and indeed that the parties' understanding of moral obligations may be of assistance in identifying where legal obligations exist, a point also made by Hirst J. in *Fraser v. Thames Television* in the passage at p. 66 quoted above. Mr Neish's submissions involved the proposition that, before a finding could be made that the circumstances in which information was imparted imposed a duty of confidence, it would need to be established that this was the common intention of the parties. I say this because of his submission that looking at the matter (whether there was communication in confidence) from the defendants' point of view the evidence was overwhelmingly that the defendants did not themselves believe that they were being told anything unique or confidential. Whether this is factually so, is a question to which I must return, but while I accept that the absence of such belief is quite capable of being significant I do not accept that it follows that a person who forms no belief on the question is thereby absolved from being found to have received information in confidence. The test in my view is objective—the question is were the circumstances such as to import a duty of confidence and, if so, the obligation is not to be avoided simply by not addressing the problem. On the other hand I accept that a factor, and it may be an important factor, is whether the parties did in fact regard themselves as under an obligation to preserve confidence, just as is a proven trade or industry usage in that regard but I do not accept that the test is exclusively subjective as to the parties' intentions.

I turn therefore to find the facts.

...

**The judge then set out the facts at length and then continued.**

The idea upon which Mr de Maudsley's claim to breach of confidence was \*458 based was pleaded on his behalf to have five features, which, as the statement of claim was originally drafted, were alleged to be individually original, but by amendment were only claimed to be original as a combination. Those features were as follows:

- (a) the club would operate all night long, but unlike existing all-night dance clubs, would so operate legally;
- (b) it would be big and the decor for the debut would be novel and would be of “high tech industrial” warehouse style;
- (c) the club would incorporate separate areas for dancing, for resting and socialising and a “V.I.P. lounge”;
- (d) the separate enclosed dance area within the club would be of an acoustic design ensuring excellent sound quality, light and atmosphere with no leakage of its elements beyond this environment;
- (e) top disc jockeys from the United Kingdom and around the world would appear at the club.

In relation to those features my conclusions regarding the three elements quoted above from Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd* required to establish a breach of confidence are as follows. The elements it will be recalled are:

- (i) the information must have the necessary quality of confidence;
- (ii) the information must have been imparted in circumstances importing an obligation of confidence;
- (iii) there must have been an authorised use of that information.

In my view this action fails on all three elements. As regards the second element, communication in circumstances importing an obligation of confidence, on the facts regarding the supper party on November 1, 1989, as I have found them, there are two insuperable objections. The first is that the occasion was a social and not a business one. Nothing was said, even on Mr de Maudsley's evidence, to take the occasion out of the social, and put it into a business sphere. Secondly, again even on Mr de Maudsley's evidence, he deliberately refrained from mentioning confidentiality. As he himself said, this was “because I did not want to blow the deal there and then”. That involves his



appreciation that there was at least a risk of Mr Palumbo not agreeing to do what Mr de Maudsley wanted him to do, produce or procure money in large quantities, if the information was stated to be confidential. It is quite impossible to infer an obligation of confidence in such circumstances. Also on this aspect, there was no evidence of any trade or professional practice. The nearest that the evidence came to this was Mr Berkmann's evidence that he would not have expected Mr Palumbo and Mr Waterhouse to go off and do the project with others after the initial meeting in November 1989.

Turning to the other two elements my finding as regards the five features relied upon by Mr de Maudsley are as follows.

- (a) The all night long legal operation was novel. Such evidence as there was of other legal all night clubs was either very old, dating back to \*459 the 1960s, or very specialised, namely a club limited to night club staff after other night clubs had closed. But I do not accept that so general and vague an idea is sufficiently elaborated to constitute confidential information.
- (b) Size is far too vague to qualify and indeed lacks novelty. The individual high-tech decor is also in my judgment too vague to qualify although it might well have qualified on novelty alone.
- (c) Separate areas for dancing, resting and socialising including a V.I.P. lounge fail both on grounds of novelty, for the concept was not novel, and of vagueness, but primarily on the former ground.
- (d) Separate enclosed acoustically designed dancing area fails because that was not what Mr de Maudsley had worked out by November 1, 1989. The acoustic enclosed area was the product of the later meeting with Mr Andrews and his partner. Mr de Maudsley's original idea was that there should be privacy for the dancers, without any technical acoustic element for he had no acoustic knowledge or experience. As such that idea of Mr de Maudsley was in my view too vague to constitute confidential information.
- (e) The idea of having high quality disc jockeys of far flung provenance is far too vague to constitute confidential information. The point hardly needs elaboration.

The claim to originality in relation to the combination of the five features must also fail, partly because quite significant parts of the claimed five features were not in fact part of Mr de Maudsley's idea and partly because a combination of features which were not individually novel does not automatically become novel by being added together.

So far as the use of Mr de Maudsley's idea is concerned, I am satisfied that the extent to which it was used, namely an all-night legal club with separate dancing area from the other areas, such as the V.I.P. lounge and bars, would not be sufficient to constitute unauthorised use for the purposes of breach of confidence because the club Ministry of Sound was as it opened, a substantially different club principally in that it was primarily based on Paradise Garage rather than Mr de Maudsley's idea. There were very important features which formed no part of Mr de Maudsley's idea, notably

lack of alcohol and limitation to over 21-year-olds and the American sound system and some features of Mr de Maudsley's idea, notably industrial high-tech decor, were not present in Ministry of Sound.

For all these reasons this action fails but the fact remains that Mr de Maudsley was in my view rather shabbily treated in that he was encouraged to think that he would be part of the enterprise but was only told that this would not be so, long after Mr Palumbo and Mr Waterhouse had decided, almost certainly justifiably because of Mr de Maudsley's rather difficult character and limited abilities, that he would not be included in their project. It is the fact that it was Mr de Maudsley who sowed the original seed in Mr Palumbo's mind and he has in the event got very little indeed out of it. It would have been preferable for him to have been told a great deal earlier and *\*460* more clearly that he was being dropped, as dropped he was. However that is not a matter which supports either of his two claims to breach of contract or breach of confidence. It does go some way to explain his being disgruntled.

The action will be dismissed.

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