

Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd [2009] NSWCA 354

A recent case that explores the specificity required to demonstrate a breach of confidence, necessary to obtain an injunction.

Waste Recycling and Processing Pty Ltd (WRP) sought an injunction to restrain the Sydney legal firm, Holman Webb and a partner of that firm Mr Dermot Maxwell from acting as legal representatives for their opponents Worth Recycling Pty Ltd.

The injunction was sought on the basis that Mr Maxwell and Holman Webb had previously acted for other parties in proceedings against WRP in respect of essentially the same cause of action. Those proceedings were resolved at mediation and a settlement deed was executed which placed confidentiality and non-disclosure obligations on the parties in respect of information acquired in the course of the mediation. WRP argued there was a threatened breach of these obligations by Holman Webb and Mr Maxwell by having conduct of the proceedings on behalf of Worth Recycling Pty Ltd.

At first instance, WRP was successful and injunctions were issued in respect of both Holman Webb and Mr Maxwell restraining them from acting for Worth Recycling Pty Ltd in those proceedings.

On appeal, the New South Wales Court of Appeal reconsidered the following issues:

1. Did Mr Maxwell owe an obligation of confidence to WRP, and if so, what was the content of that obligation?
2. Was there a threat of that obligation being breached, sufficient to justify an injunction?
3. Was the authority to grant the injunction within the inherent jurisdiction of the court?

Obligations of Confidence

Worth Recycling submitted that the primary judge had failed to identify the source or nature of the obligations of confidence owed by Mr Maxwell or the persons to whom they were owed. It was accepted by all parties that Mr Maxwell was not contractually bound by the settlement deed.

Rather, in the absence of a fiduciary duty between Mr Maxwell and WRP, an obligation of confidence would only arise if the four conditions consolidated in *Smith Kline & French Laboratories (Aust) Limited and others v Secretary, Department of Community Services and Health (1990) 22 FCR 73 at 87* were satisfied. These conditions require the plaintiff to:

1. Identify with specificity and not merely in global terms, that which is said to be the information in question;
2. Show that the information has the necessary quality of confidentiality;
3. Establish the information was received by the defendant in such circumstances as to import an obligation of confidence; and
4. Establish that there is actual or threatened misuse of that information without the consent of the plaintiff.

The court was satisfied that the confidential information could be specifically identified and its necessary quality of confidence could be derived both from the terms of the mediation agreement and the circumstances of the mediation. It was also evident that Mr Maxwell received the information in circumstances which imported an obligation of confidence. He was aware his client had promised WRP that he would not use confidential information except in accordance with the mediation agreement and Mr Maxwell participated in the mediation in that knowledge.

With respect to a threatened misuse of the information, Worth Recycling submitted that the primary judge erred by finding that because there were similar factual elements in the earlier proceedings, the burden shifted to Worth Recycling to show there was no danger of misuse of the information. Worth Recycling also put forth evidence that it and Mr Maxwell agreed



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that Mr Maxwell would not do anything that might breach the obligations of confidence.

The court confirmed that the onus of establishing a threatened misuse of information lies on the party seeking the injunction. However, despite the primary judge's mistaken view as to a shift in that onus, the court was satisfied that there was a real and sensible possibility of misuse of confidential information sufficient to justify an injunction. A misuse of the information would almost have been inevitable if Mr Maxwell had engaged in any settlement negotiations on behalf of Worth Recycling, and any attempt to segregate such negotiations from the rest of the proceedings would have been both difficult and impractical.

It was also held that while the court has inherent jurisdiction to grant injunctions, it is unlikely to be properly exercised in cases of misuse of confidential information where an injunction would not be granted on the *Smith Kline & French* principles discussed above.

Conclusion

It appears that *Smith Kline & French* is still the applicable test for importing obligations of confidence, in the absence of any contractual or fiduciary relationship.

Accordingly, a party seeking to establish a breach or threatened breach of obligations of confidence must:

1. specifically identify the confidential information;
2. prove it has the necessary quality of confidentiality;
3. establish why the circumstances in which the information was received imported obligations of confidence; and
4. point to an actual or threatened misuse of that information.

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