

ROYAL COURT

92.

Hearing Dates:
2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 11th, 12th November, 1992; and
8th, 9th, 10th, 11th June, 1993.

Judgment reserved: 11th June, 1993.
Reserved Judgment delivered: 16th July, 1993

Before P.R. Le Cras, Esq., Lieutenant Bailiff, and
Jurats Vint and Hamon.

Between: Roger Sydney Benest Plaintiff
And: Peter Langlois Defendant

Advocate A. P. Begg for the Plaintiff.
Advocate D. J. Petit for the Defendant.

JUDGMENT

THE LIEUTENANT BAILIFF: The Plaintiff, Mr. R. Benest, is an inventor, and brings this action on the grounds that the Defendant, is in breach of a duty not to use confidential information provided to him by the Plaintiff.

The Plaintiff gave evidence that after leaving school and having a variety of jobs, he had returned to the Island in 1975 to farm and had very shortly thereafter been declared "en desastre". He had still not paid off all his creditors, but had now given up farming and was working full time as an inventor.

In about 1980, Module planting for calabrese was beginning to take over from the previous method of bare root planting.

The machine used for bare root planting was a Teagle. It was agreed by witnesses called on both sides that the Teagle was not suitable for modular transplanting.

By 1982 the Plaintiff had come to the same conclusion. He therefore purchased a Michigan speedling planter. Although different in concept to a Teagle and, we were told, satisfactory

for use in California it had, in the view of the Plaintiff, (and confirmed by, amongst others, Mr. K. Huelin, a grower) a number of defects which rendered it unsuitable for use in the Island. We do not think it necessary to enumerate these. Evidence was tendered that these machines were not in common use and that it was thought that there was only one other such machine in the Island, although the witnesses we heard were not sure when it had first appeared.

A derivation of this machine, described to us as the "Italian" machine, was also, it would seem, unsatisfactory for this purpose.

As a result, Mr. Benest considered the problem and came to the conclusion that what was required was a machine with a function between that of a seed drill and a transplanter (such as the Teagle).

In consequence, he embarked on a 5 year project, putting in both time and money to search for a solution.

Between, for example, January and August, 1985, he estimated that he spent perhaps a quarter of his time crawling around behind his machine in research and development, the remainder being devoted to producing perhaps one and a half million module plants for sale.

This evidence was confirmed by Mr. K. Huelin who stated that the Plaintiff was well aware that the Michigan was not effective as he (the Plaintiff) would be called out (by the witness) to discuss the problems arising from its use. In, he thought mid-1984 to mid-1985, the Plaintiff started to produce his own machine and indeed produced a prototype which although not perfect, was a big improvement. The Plaintiff spent well in excess of one year working on it extensively.

Although not himself an engineer, Mr. Huelin knew of no similar United Kingdom machine at the time. The Plaintiff, he said, spent more hours developing the machine than running his farm or nursery. He added that he thought the turbine drive in particular was a totally new concept. He saw drawings and we will return to these in due course.

His evidence as to the Plaintiff's constant attention to the development of his prototype was, we may say, echoed by Mr. N. Arthur, another grower, when he continued the development of his machine which he offered to Mr. Arthur as part of his service. Mr. Arthur said that there were modifications to the machine every day. He too described the Plaintiff as having in more than one instance a unique approach, or as having a new concept by reference to anything he had ever seen.

To return to the Plaintiff's evidence, at the start of the 1985 season, the indexing part of the machine was being developed, and by September of that year he had drawings for an ongoing machine not mounted on a seed drill but correcting the deficiencies found on the seed drill chassis. He rectified the deficiencies of the Michigan machine very slowly as he went along, one by one. In cross-examination he emphasised the importance of the Michigan. It had been the state of the art and he had found out the problems by using it. The prototype he had was derived from the Michigan, with the faults ironed out. It had taken him from trying to operate the Michigan in its first year to the time he went to see Mr. Langlois, in late 1985, to remedy these defects.

As the Autumn wore on he approached his neighbour, Mr. K. Huelin, for funds. Mr. Huelin confirmed that he had indeed made an agreement, since terminated, to fund the construction of the new machine.

From September to December, the Plaintiff was fine tuning his machine. By August of that year he had produced drawings and in November was in touch with patent agents.

As part of his continuing efforts to produce a satisfactory machine, the Plaintiff had purchased a Becker seed drill which he was using as a chassis.

He claimed thus to have arrived at his machine via a series of intermediate machines, and had produced at least one novel solution which was the indexing system. We do not think it necessary to set out in full the technical details, which were rehearsed extensively before us, other than to say that it was turbine or rotor operated with a continuous drive. There were, of course, solutions to other problems involved in the construction and setting up of the machine and we will come to these in due course.

At all events, the machine was now in such a state that the Plaintiff and Mr. Huelin decided to try to put it together and shew it at the British Growers Look Ahead Show at Harrogate on the 19th January, 1986. As the Plaintiff was very busy, and anyway did not have all the equipment, Mr. Huelin suggested that he should see Mr. Peter Langlois, the Defendant, who had done repairs for him and with whose standard of work he was satisfied.

Unfortunately, Mr. Langlois has died since the institution of the proceedings and consequently the Court has had to proceed without the benefit of his evidence.

However certain things became clear. Mr. Huelin described him as an excellent fabricating engineer of the highest quality,

though expensive, this perhaps on account of putting too much evidence on quality.

Mr. Langlois had, he said, converted scarifiers, ploughs and trailers for him. There had been no detailed drawings and he would give verbal quotations.

He would, had he decided to use something he had seen, have known what he was doing: but he would have thought it out of character for him to steal someone's invention. He would not, he said have recommended Mr. Langlois, had he not believed him to run his business in an impeccable manner.

He was asked towards the end of his cross-examination whether he believed Mr. Langlois was capable of producing machines purely on drawings. He believed that he could have, adding that he was capable of making anything.

He added however that when he had dealt with Mr. Langlois he would, basically, explain what he was trying to achieve. Mr. Langlois would then advise him from an engineering point of view how it could be achieved. Mr. Huelin added that he (Mr. Huelin) had quite firm ideas as to what he wanted from a piece of machinery.

Mr. Arthur, (a grower) a witness also called by the Plaintiff gave evidence that he had heard no ill of Mr. Langlois, but had heard good reports of him on account of his engineering ability.

Mr. B. de Gruchy, a grower at St. Ouen, called by the Defendant, and a neighbour and client of Mr. Langlois described him as experienced in engineering, even for big machines. He could do anything the Island needed. He had great knowledge, and if the witness had gone to him with a problem he would try to solve it and further the cause. In his case, he said, he had found him brilliant. He was, he said, a business friend and they never entertained each other.

Further evidence as to Mr. Langlois' abilities, character and experience was given by several witnesses.

His widow, Mrs. Jean Langlois, told the Court that he was always drawing on pieces of paper. All the time farmers would come with their problems and discuss things. She confirmed Mr. Huelin's remarks that sometimes her late husband's jobs cost more and remarked that he had said that this was because they were properly done. She had never heard of any litigation in his business. She had, she said, thrown many of his drawings away. It became clear, though, that she was not involved directly in the engineering side of his affairs. She knew nothing in detail about the case. Her husband was adamant he had done nothing wrong. He had built a machine which was different. He was without guile and

wondered what all the fuss was about. He was as nice out as he was at home.

His first wife Mrs. Rosemary Langlois, who was married to the deceased for some 25 years, described him as being extremely capable in design and manufacture. He was always very interested in coping with problems with machinery and in trying to overcome them. It was his hobby as well as his job and she had known him get up at night to spend an hour or so drawing. In her view he was capable of his own solutions, honest and not the sort of person who would have used someone else's idea. (That he was always drawing on pieces of paper was confirmed by his widow).

Whilst he was working for at least one of the firms in Australia, she also worked there for some time and it was from this knowledge that she formed her view of her husband's capabilities. It became clear to us from her evidence that he had come into contact whether directly or indirectly with a patent application, and with the development of new inventions, not least an ejector bucket.

He kept many of his drawings, often rolled up in a tube. She was sure he could read a blue print. She had moved away in 1984 and did not recall anything relating to a design of a speedling planting machine. It is clear though that at that time the marriage was breaking up and the parties were ceasing to communicate.

Finally she confirmed that Mr. B. de Gruchy was both a neighbour and a customer.

Mr. de Gruchy told the Court that he had started to grow calabrese in 1980, grew it again in 1981 and got a contract from a large supermarket chain in 1982. This contract had helped him fix the date in his mind.

Like Mr. Huelin and Mr. Arthur he had found the Teagle unsuitable for speedling planting, which was hardly surprising as it had been designed for quite a different purpose viz, bare root planting.

In December, 1982/January, 1983, he had consulted Mr. Langlois and together they had tried various modifications suggested by the latter.

We do not need to deal with all of these, but amongst other modifications Mr. Langlois had put a drum in front of the machine, on which he put cleats to make the wheel grip.

As a further modification Mr. Langlois had thought that an arm could be put on the front drum to work a rotating cup. Mr. Langlois had drawn a diagram of how it would work: it was more

which were required for it to be built into a production prototype.

The Plaintiff averred that he had produced his drawings prior to seeing Mr. Langlois (at the latter's workshop) as, of course, he required the drawings to work from. He produced his diary for the 8th December shewing a plan scribbled in it.

At the meeting on the 4th the Plaintiff stated that he had explained the philosophy of the machine. Mr. Langlois, he said, had no understanding as he had never seen a Michigan before (though we note from Mr. Arthur's evidence that this may not necessarily have been so as there was at least one other such machine in the Island, and maybe more, though he did not specify a date). Mr. Langlois had, the Plaintiff said, a genuine interest to see the machine. He asked why particular functions were necessary and the Plaintiff stated why he had made modifications from the Michigan. He was emphatic that he had to explain the difficulties as they were not apparent.

The first meeting, according to the Plaintiff, lasted some two hours. Mr. Langlois picked things up very quickly. He was, he said, a good agricultural engineer. At this meeting it was agreed that the best way forward was for the Plaintiff to take his seed drill machine to Mr. Langlois' workshop, with his sketch drawings. On the 9th December, according to Mr. Benest, the machine went to Mr. Langlois' workshop. Again, according to the Plaintiff, Mr. Huelin took it there.

As we say this date was not agreed by the Defendant. There is no doubt however that the machine did go there at some point in December, 1985. Mr. Langlois had, he thought, made some sketches in his office to understand and describe the interpretations of what he wanted: it was, he said, a sort of detailed analysis of what the Plaintiff had been trying to do.

When the machine went to Mr. Langlois' workshop he discussed it with his wife, Mrs. Jean Langlois. Mrs. Langlois told the Court that when the Plaintiff came to him, her husband was intrigued by the approach. When questioned by the Court as to what she meant by "intrigued" she replied that her husband thought the Plaintiff's machine was Heath Robinson with a lot of working parts and not as good as his. He did not, she said, think much of the Plaintiff's ideas. She added that although he did not talk much he had given her the impression that he had been working on Mr. de Gruchy's planter for months. She had the impression that the planting idea he was working on was not a new idea.

The precise order of the events which happened next is not precisely clear. This is hardly surprising after a lapse of seven years.

This, then, was the position when Mr. Benest got in touch with Mr. Langlois.

There is some dispute as to the dates, but the parties agree that Mr. Benest and Mr. Langlois did indeed meet and discuss the Plaintiff's project in December, 1985.

This evidence, apart from the dates, is corroborated by Mr. K. Huelin, who had seen Mr. Langlois he said, trying a prototype machine in Mr. de Gruchy's field but in September, 1985. At that time the T bar and A frame was the standard type. He thought, he said, that the planting machine he had seen Mr. Langlois working on in September that year did not have a future. It had, he thought, skids, like skis rather than press wheels.

In his evidence the Plaintiff stated that Mr. Langlois was working on Mr. de Gruchy's Teagle when he went to see him. There is no dispute that this was in December, 1985, although as we say there is dispute as to the precise date in the month, the Defendant's pleadings placing it later than claimed by the Plaintiff.

According to the Plaintiff, he called to see Mr. Langlois on the 3rd December, 1985. He had never met him before. He went to Mr. Langlois' workshop, and considered that Mr. Langlois' knowledge of modules was not extensive as he was then working on Mr. de Gruchy's Teagle, adding some tray racks and opening up the Coulter. Mr. de Gruchy had, he told the Plaintiff, asked him to make some modifications.

In cross-examination the Plaintiff reiterated that the late Mr. Langlois was working on alterations to a Teagle; indeed he shewed him what he was doing which was to put three or four slats on one side and to open up the Coulter.

Asked whose ideas were the more advanced, the Plaintiff replied that his were, as all Mr. Langlois was doing was to modify a Teagle.

When asked whether he had enquired of Mr. Langlois how he proposed to drive his transplanter, he remarked that there was no drive on a Teagle but only a kicker.

This followed his evidence in chief where the Plaintiff claimed that Mr. de Gruchy's machine had been there on the 3rd December, and that it was not then possible to slide the units through the A frame.

The following morning Mr. Langlois came to the Plaintiff's farm where he viewed the Becker seed drill which the Plaintiff was using as a chassis. This was the machine which had been developed through the 1985 season and which basically contained the elements

like a dish with a little flap which opened and divided into five compartments in the dish, which were there to put the plants in.

When the machine worked there was a clang and a clatter and hopefully the modules would fall out of the machine into holes.

On being shewn a photograph of the machine which Mr. Langlois subsequently developed he identified the drum on the machine as the dish to which he was referring.

It is common ground that Mr. Langlois' machine does make such a noise as Mr. de Gruchy described, and that it is a discontinuous drive system, as against the continuous drive system developed by Mr. Benest. It is also common ground that these two systems afford an example of reverse engineering.

We may perhaps add at this point that we found, as a preliminary point to help Counsel, that Mr. Langlois did have a prototype of some sort with a discontinuous drive indexing system in being in December, 1983; and in any event before he and Mr. Benest first met in December, 1985.

Although Mr. de Gruchy is clearly not an engineer or inventor of the same calibre as Mr. Langlois, he was nonetheless prepared to accept that there was a difference between the 1983 machine and that developed later. In particular, he could recall no kicker to the Coulter in the earlier machine.

Both he and Mr. Langlois were clearly very busy men, and there was, we think, some confusion in his mind as to what trials were done and in which year.

However, he was quite clear on certain matters. First, at some point Mr. Langlois had asked him if he wished to buy a model of the machine on which he had been working but he had refused. It had too many working parts and was too noisy and he found planting by hand with intensive labour more cost effective. Second, the machine would on his evidence, have appeared to have stood in the workshop or on a neighbouring car park for quite some time. At some time he thought Mr. Langlois might have painted it, possibly in 1984, but could recall no further trials on it, or any further work being done thereafter.

In fairness we should add that when Mr. Langlois' machine went on show in April, 1986, he did not examine it.

Finally he stated that he recalled seeing Mr. Benest with Mr. Langlois in the workshop at a date which could have been December, 1985, when they had a small green type of machine. He did not know what they were discussing.

It would seem, however, that there was some difficulty over payment. Mr. Huelin was prepared, he said, to put a certain amount of money in and required a firm quotation. Mr. Langlois refused to quote and gave him no reasons for so refusing. He believed he could have done so and another engineer had done so. When the quotation was not forthcoming he told Mr. Langlois that he would come and collect the machine and did so.

An allegation by the Defendant (in the particulars) to the effect that Mr. Huelin had said he was not financing the transplanter, had already put in £500 and that he would claim the machine himself, and further commenting that the Plaintiff was likely to go "en désastre" was emphatically denied by Mr. Huelin.

It seems clear that at about this time Mr. Huelin telephoned the Plaintiff who stated that, as a result of the telephone call, he had called on Mr. Langlois and found him working on another machine, and that it appeared that he seemed to have lost interest in his (the Plaintiff's) machine.

He was, he said, working on something attached to the Plaintiff's design of an A frame. The Plaintiff had, he said, remonstrated with Mr. Langlois, but the latter had not seemed too bothered. It was definitely not on his (the Plaintiff's) machine that Mr. Langlois was working. When the Plaintiff said he, Mr. Langlois, was using his ideas, the latter had stated that they were in common use. What was happening should not have been happening so he went to see his lawyer. We will return to this directly.

A few days later Mr. Huelin came and took the machine away.

Mr. Benest did indeed call on his solicitors where he saw Mr. N. Journeaux, not yet an advocate but already an English solicitor. By Mr. Journeaux's note this was on the 20th December. When he went to see Mr. Journeaux, Mr. Benest had mentioned that his ideas for his T bar and A frame were unique. Mr. Journeaux made an appointment and went to see Mr. Langlois on the 23rd December. To his surprise Mr. Langlois let him in. He noted that the machine on which Mr. Langlois was working had a T bar and an A frame like that of his clients. Mr. Langlois had failed to persuade him that there were others like it, nor could he indicate where he could see one of his, or anyone else's manufacture. Mr. Langlois, he said, was working on a machine which bore an alarming resemblance to that of his client.

We accept that Mr. Journeaux, like Mr. de Gruchy, is not an engineer; but his evidence is to some extent confirmed by Mr. Huelin who stated that when he went up to get Mr. Benest's machine, the A frame, as designed by the Plaintiff, was on Mr. Langlois' machine, whereas he had not noticed this on the machine

- which was a Teagle in basic concept - on which Mr. Langlois had been working when he took Mr. Benest's machine to St. Ouen.

There is, of course, no evidence that what Mr. Huelin first saw was in fact Mr. Langlois' prototype and indeed it was probable it was not: however, we do note Mr. Journeaux's comment that Mr. Langlois stated that he had been working on a similar machine for Mr. de Gruchy and that the base frame (which Mr. Journeaux saw) had been built in the last 10 - 12 days.

The result of Mr. Journeaux's enquiries was that he wrote to Mr. Langlois on the 7th January, 1986. Although referring in particular to the T bar and A frame the letter clearly put him on notice that he (Mr. Journeaux) considered him (Mr. Langlois) to be in breach of his duty of confidentiality.

Mr. Benest's machine came, temporarily at least, to a standstill. That of Mr. Langlois, by contrast, made rapid strides.

By the 30th January, 1986, Dr. Kisch, a consulting engineer, was writing to Mr. Langlois to say that he (Mr. Langlois) had shewn him a "typical planting machine" with several possible patentable improvements.

Dr. Kisch recommended that he go to Mr. D. Bernard of TSL for advice as to its development. Mr. Bernard confirmed that he had seen Mr. Langlois on the 1st March, 1986, when the latter had signed an agreement with him, or to be more exact, his company.

He had asked Mr. Langlois during 1986 how long he had been working on the machine, to which Mr. Langlois answered that it was the previous winter and that the first prototype was built in February, 1986.

Mr. Bernard was also quite specific that, certainly when he first saw Mr. Langlois the latter had not mentioned the letter of the 7th January, 1986, written to him by Mr. Journeaux's firm.

We may say that we were not surprised when he said he would much rather have known about it.

Matters now went on apace. Mr. Bernard, who has much experience in these affairs, having for a long time been associated with Mr. R. Hickman and his "workmate", applied for a patent for the discontinuous driving mechanism; and Mr. Langlois continued with the making ready of his machine.

He succeeded so well that he had his machine ready for the Agricultural Show at the end of April, 1986. He was, on the evidence of his widow, wildly excited, as he had reason to be, for he won a prize there. Mr. Benest's machine was still in pieces.

Subsequently he sold, it is thought, three of his machines. One was sold to the States Farm and we heard evidence from Mr. D. Van de Vliet, the Manager. The machine had not worked very well and was not a success. More interestingly, from the point of view of the litigation, Mr. Langlois, after its purchase, had spent a lot of time sorting it out and making modifications.

The Plaintiff called Mr. P.B. Archer, a Chartered Patent Agent and European Patent Attorney. He has a number of years experience in this field.

Mr. Benest was a valued client and he had a high opinion of his abilities as an inventor.

He was at pains to stress the time which is likely to be spent perfecting the tolerances and dimensions of a new machine. He added that he had, he thought, been introduced to Mr. Benest by the firm that was marketing his (Mr. Benest's) machine, which thus appears to have been a markedly more successful machine than that produced by Mr. Langlois.

It was clear that he had approached his evidence on the basis that it was his client's machine in the first place. However, he stated that he had known of no instance where he had found the Plaintiff to plagiarise an invention: his approach was in his experience, radical and different.

He further added that, in his experience, it was highly unlikely that two such machines (i.e. the Benest and Langlois machines) would have been developed in such close proximity in distance and time unless information had been exchanged. Given that, it would be difficult to say from the machines themselves which one had preceded the other.

However, despite his approach, his evidence was nonetheless of considerable assistance to the Court, not least, in the light of his extensive experience.

Any information which the Plaintiff gave to Mr. Langlois would, in his view, remain confidential even if Mr. Langlois were already working on a transplanter. In such a case he should take the TSL approach and cover himself with an agreement, or should refuse to listen to the Plaintiff. Even if he first mentioned that he was working on such a machine and then received the information he would still, again in his view, be at risk.

The Michigan machine, he said, represented an important point of comparison. It was a big advance on any previous machine; despite its disadvantages it worked - though not to the satisfaction of the Plaintiff in Jersey - and it was the starting

point (again on the information he had received) for the Plaintiff.

What was however (in these circumstances) a starting point for the Plaintiff was an unacceptable design option for Mr. Langlois.

Given these parameters, he was of the view that it was possible to deduce the manufacturer of the Langlois machine which was significantly different from the Michigan.

In his view it was a risky decision for Mr. Langlois to take: as we say, indeed it was a risky decision to design any module planter at all after having received information from the Plaintiff. In his experience, a firm like Massey Ferguson would refuse to receive any information in confidence and would insist that the applicant file his patent application, the danger being that it would restrict the firms freedom of action in that particular area, where they may, in fact, already have been working.

In his view, in a confidential information case, the similarities between machines were more important than the differences. The former suggests that information has been used, whilst, in his view, the latter suggests nothing as they may result from e.g. personal preferences, availability of materials or background.

He stated that there were a series of overlapping similarities between the Benest and the Langlois machines. In his view, and in order of importance, these were:-

1. The indexing system.

In both the Benest and the Langlois machines there is a single rotor defining chamber to receive the modules as against four on the Michigan. The main difference between the Benest and Langlois machines is that the latter, with a discontinuous drive, feeds the modules inwardly to a central tube whilst the latter, with a continuous drive, lets them move outwards.

In assessing his evidence on this particular point we, of course, bear in mind our finding that Mr. Langlois had already some form of discontinuous drive system in being.

He ventured an opinion that Mr. Langlois had chosen to avoid the Plaintiff's patent rights and got into difficulty with the drive: and Mr. Langlois had had to work around the idea to adopt an intermittent drive. There were superficial differences in shape: that of Mr. Langlois was conical and rotating whilst that of the Plaintiff was cylindrical and stationary.

The differences were, in his opinion, sufficient to enable a patent to be granted. On this point though, we are, as we say, firmly of the belief that Mr. Langlois had already dealt with this problem and a form of discontinuous drive system had been made up by him for quite some time.

2. The slope of the indexing head, which on both the Benest and Langlois machine was such that it faced the operator, whilst on the Michigan and Italian machines the pots were horizontal.

3. The radial feed, which on the Benest machine sweeps the module around in the drum whence they pass outwards in a radial direction into the chute which is close to the operator, whereas on the Langlois machine there is a difference in that the modules rotate radially inwards and not outwards.

Mr. Archer stated that both these systems were quite different from the Michigan machine in which the modules drop axially i.e. straight down, approximately parallel to the axis of rotation.

4. The operators weight is, in both the Benest and the Langlois machine, taken on the frame; whereas with the Michigan it is taken on the row unit directly.

Thus, on the Michigan, where one operator is heavier than the other, that operator will plant modules deeper than the other. The same defect, he added, applied to the Italian machine.

He could not categorically say that he had never previously seen such an arrangement to compensate for the differing weights of the operators.

5. The attachment of the row units to the frame, where the feature was the double beam, permitted row units to be positioned at any chosen location along the length of the beams. This gave great versatility, and with heavy equipment in the field greater ease of placement and safety. Both the Benest and the Langlois machines are virtually identical, whereas the Michigan and Italian machines are at a disadvantage because the headstock is in the way of certain placings.

In cross-examination he refused to accept that the principle had been present in the Michigan machine. It was, he asserted, a quite different solution.

6. The additional roller was in front of the Coulter, which has a certain levelling effect on the row, to take into account the fact that the modules are rather small.

Again the Benest and Langlois machines are similar and both differ from the Michigan and Italian machines.

In cross-examination he stated that he had never seen it in a transplanting machine, though it might be used, he surmised, in a seeding machine. Again, we bear in mind Mr. de Gruchy's evidence that Mr. Langlois had considered this problem and indeed would appear to have approached it in this or a similar fashion, although not, it would seem, with great success.

7. There was a stacking rack for holding the trays of modules in the Benest and Langlois machines whilst the Michigan and "Italian" machines had a carousel.

In his view, given the work done by Mr. Benest and his experiments over the years, and the machines which he had considered, especially the Michigan and its problems, would have made it unlikely that Mr. Langlois would have got to where he did without information from the Plaintiff.

As he saw his client's case, he had given a package of information to Mr. Langlois which the latter had used as a springboard. In his view it was almost impossible to avoid using confidential information even subconsciously. It was for this reason that firms like Massey Ferguson refused to receive any information in confidence.

It was put to him that Mr. Langlois' design shewed no conceptual or detailed resemblance whatsoever to the design which Mr. Benest shewed to and discussed with Mr. Langlois. He refused to accept this; indeed it was in his view plainly wrong having regard to the similarities which he had already detailed.

In his view the publication of the Langlois machine as a result of the breach of confidentiality could have potentially serious results for Mr. Benest with regard to his patent applications.

As we say, the defence called Mr. D. Bernard, a Chartered Engineer by profession but now totally involved in the business of identifying and protecting inventions and in licensing them. He has many years experience in this field.

Like Mr. Archer, he had an involvement as his Company TSL had made an agreement with Mr. Langlois by which he hoped to profit if the machine were successful.

Like Mr. Archer though, we found him to be a fair minded and helpful witness: and we would like to say at this point that we were grateful to both of them for their assistance.

The seven points of similarity discussed by Mr. Archer were put to him on the basis that the purport of Mr. Archer's evidence was that the similarities shew the use of confidential information by Mr. Langlois. His reply to this was absolutely not: in his

view it was a load of nonsense and unsustainable. As to Mr. Archer's statement that Mr. Langlois would not have got there without input from Mr. Benest, he replied that there was not a shred of evidence to support such an extraordinary statement. The Benest machine had, he thought, no inventive relationship with the Langlois machine.

In his view, Mr. Benest had not put together a machine which was a different concept.

However, he was quite frank in admitting that his expertise on transplanters was extremely limited. He knew nothing about a Teagle; or, at best, was not very familiar with it. He had seen a Michigan machine but had not seen it working. He had, he thought, seen the Benest machine at the Howard Davis Farm and had seen the plans and specifications but had not, we understood, seen it working, nor had he seen the Langlois machine in operation, having arrived too late to see it properly when being demonstrated at the Howard Davis Farm.

He added that in this case he was sadly disappointed in the market which was unfamiliar to him. He had suffered from liking the technology involved in a neat and attractive engineering idea.

We formed the view that he had little comprehension of the ideas relating to or the reasons for which module planting - a recent innovation on the evidence before us - had come into use nor the problems of putting together a machine which could overcome the various difficulties attending module planting, as against, for instance, seeds or bare roots.

He was asked his view as to the confidentiality of information. Very properly, as it seemed to us, he regarded it as a duty of trust and honesty with a necessity to disclose a conflict of interest. We should, perhaps, say here that it is obvious that he, again very properly, takes great care with this.

In his view, in order to maintain a claim of confidentiality the feature must be novel, unobvious and incorporated into the machine in which the copying takes place. He could see nothing on the Langlois machine which met those requirements.

However he agreed that the line dividing confidential information from that in the public domain was not always as clear as it might be; and that in say, a juxtaposition of the whole of the prior art then it could be different as it might form a new concept. In the case of the "workmate", regarding which we understand there was considerable litigation, we understood him to reply that one item which was not in the public domain was the ability to angle the side whilst keeping the vertical alignment in a controllable fashion: but it was the bringing together of many different parts, or the concept, which was different so that, as

he put it, the value of the whole greatly exceeded the sum of the parts. There had been, he added, a five year gestation period.

This, then, is a brief resumé of the facts which were put before us.

Counsel were in general agreed on the law.

Because this case is an unusual one in this Court and because several of the Judgments may not be readily available in the Island, we have thought it proper to set them out in some detail.

Counsel laid a number of cases and references before us.

In our view, a convenient place to start, as so often, is with the statement in Halsbury.

Counsel referred us to the passage in 4 Halsbury 16 at para. 1455:

"Breach of confidence. A person who has confidential information belonging to another may be restrained by injunction from using it without the owner's consent, but the court will act only at the instance of the party to whom the duty of confidence is owed. It has been said that, in restraining an employee from making use of or communicating confidential information which he has gained in the course of his employment, the court rests its jurisdiction upon the ground of implied contract and breach of trust or confidence, but it is now clear that, with regard to such information, the person who possesses it is under an obligation binding his conscience and existing quite apart from contract, the law on the protection of confidential information depending on the broad principle of equity that he who has received information in confidence must not take unfair advantage of it".

And para. 1456:

"Conflict of duty and interest. A court of equity imposes special liabilities and duties upon persons who stand in a fiduciary relationship to others, and it is a principle of equity that no person having duties of a fiduciary nature to discharge should be allowed to place himself in a situation where he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interest of those whom he is bound to protect. The principle extends not only to the relationship between trustee and beneficiary, but to all kinds of fiduciary relationships where a real conflict of duty and interest occurs; it is not dependent on fraud or absence of good faith".

He then went on to refer us to a series of passages in Cornish & ca.

At p.266, the author suggests that the subject matter occupies the same moral terrain as breach of trust, whilst at p.267 the author writes:-

"In the period after the Judicature Acts, there were some attempts (typical of their period) to confine the equitable wrong to cases in which the original disclosee agreed by contract, express or implied, to respect confidence; with the apparent consequence that an indirect recipient, not being privy to the contract, would be liable only if he deliberately or recklessly induced breach of that contract. Contract and tort would thus subsume the whole field between them.

More recently, contrast has ceased to be treated as the universal touchstone of liability (though its role in determining what obligations of confidence exist may still be crucial). Starting with Saltman v. Campbell, the courts have recognised a wider equitable jurisdiction, based, it is said, "not so much on property or on contract, but rather on good faith", and this approach is now reasonably well entrenched among the judiciary".

At p.284 comparing infringements to patent or copyright, the author writes:-

"The notion of breach of confidence is by comparison loosely defined. It may consist in any disclosure or use which contravenes the limited purpose for which the information was revealed. If the question is one of misuse, it appears not to matter that the use will not disclose the information to further recipients. Not all the information taken has to be used or disclosed before breach occurs, though doubtless the deployment of insubstantial amounts might be disregarded. The information used must come from that disclosed in confidence and not from some other source. This may raise similar difficulties of proof to those arising in copyright; and, as there, courts may want to infer derivation of the idea from the similarity of end products".

With that general background, we turn now to an examination of the cases cited by Counsel.

First, Saltman Engineering Co. Ltd. -v- Campbell Engineering Co. Ltd. [1948] RPC 203; [1963] 3 All E.R. 413. The headnote reads:-

"The re-amended statement of claim in this action alleged, inter alia, that the first Plaintiffs, or alternatively the

second Plaintiffs, were the owners of the copyright in certain drawings of tools for the manufacture of leather punches; that such drawings were delivered to the Defendants by R a Director of the third Plaintiffs on their behalf, such third Plaintiffs acting as agents, or alternatively as sub-contractors, for the first Plaintiffs; that R acting as aforesaid instructed the Defendants to manufacture such tools and the Defendants accepted such order; that subsequently R acting as aforesaid, instructed the Defendants to manufacture 5,000 leather punches at an agreed price; that it was an implied condition of the delivery of the said drawings and of the said contract that the Defendants should not use such drawings except for the construction of such tools and such punches, and that the Defendants should return the said drawings, tools and punches to the third Plaintiffs who would have transmitted them to the first Plaintiffs.

It was further alleged that, in breach of the said contract and of their obligations of confidence, the Defendants had detained and converted the said drawings to their own use, and that in infringement of the aforesaid copyright they had reproduced and used the same for their own purposes by constructing tools therefrom for the manufacture of punches, and had constructed and sold for their own account large numbers of such punches".

The case went to the Court of Appeal and the headnote as to its findings reads, *inter alia* (at p.205):-

"Held by the Court of Appeal (i) That there was in fact a contract with the Defendants for the construction of the tools, such contract being made by R on behalf of the third Plaintiffs as agents for the first Plaintiffs.

(ii) That it was an implied term of the contract that the drawings entrusted to the Defendants for the purposes of such contract should be treated as confidential.

(iii) That, apart from any question of contract, an obligation of confidence was placed on the Defendants by the delivery of the drawings, since they knew that such drawings were the property of the first Plaintiffs, and had been placed in the Defendants' hands for a limited purpose, viz., the manufacture of tools for the use of the first Plaintiffs.

(iv) That a document may be confidential if it is the result of work done by its maker, even if the matters on which he worked were matters of public knowledge.

(v) That the Defendants had broken the obligation of confidence by using the drawings for purposes other than those for which they were confided to them".

Counsel then went on to refer the Court to certain passages at p.213:-

"The Defendants knew that those drawings had been placed in their possession for a limited purpose, namely, the purpose only of making certain tools in accordance with them, the tools being tools required for the purpose of manufacturing leather punches".

"I need not go into the law, which I think is correctly stated in a formula which Mr. Heald himself accepted. I will read it: "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights"."

There are several cases, of course, which deal with that (Morrison v. Moat is one of the better known of them) and I need not examine them further. The principle is established and is not disputed; and it is perfectly clear that that obligation, based on confidence, existed and bound the conscience of the Defendants down to the 22nd November, 1945".

He then proceeded to refer the Court to a further passage at p.215:-

"I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, 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.

What the Defendants did in this case was to dispense in certain material respects with the necessity of going through the process which had been gone through in compiling these drawings, and thereby to save themselves a great deal of labour and calculation and careful draughtsmanship. No doubt, if they had taken the finished article, namely, the leather punch, which they might have bought in a shop, and given it to an expert draughtsman, that draughtsman could have produced the necessary drawings for the manufacture of

machine tools required for making that particular finished article. In at any rate a very material respect they saved themselves that trouble by obtaining the necessary information either from the original drawings or from the tools made in accordance with them. That, in my opinion, was a breach of confidence".

Not surprisingly, Counsel for the Plaintiff placed a good deal of weight on these passages.

He then brought to our notice a number of cases through which he proposed to trace the principles above enunciated.

The next case was Terrapin Ltd. -v- Builders' Supply Co. (Hayes) Ltd. [1967] RPC 375. The headnote reads:-

"The defendants manufactured prefabricated portable buildings to the design of the plaintiffs. At the inception of their co-operation, the plaintiffs had communicated to the defendants their design together with full manufacturing details, specifications, technical information and know-how, solely for the purposes of their joint venture. Before the termination of the contract between the parties, the plaintiffs disclosed to the defendants in confidence a modification of their building. After the determination of the contract, the defendants offered for sale in competition with the plaintiffs a prefabricated building incorporating many of the features of the plaintiffs' original design, as well as the modification. On the plaintiffs' motion for an interlocutory injunction to restrain the defendants from misusing confidential information, the defendants argued that the obligation of confidence was discharged by the plaintiffs' having sold buildings and published brochures which disclosed all the features of the buildings. The defendants' works manager also denied having employed any confidential information in evolving his design on behalf of the defendants.

Held, (1) that as the works manager knew every stage of the production of the plaintiffs' original design, his mind must have been saturated with every detail of its design, features, and methods of construction, which information was derived either directly or indirectly from the original confidential communication made by the plaintiffs. When embarking on a new design for the defendants he could not have avoided starting his dive into the future from the spring-board of confidential information acquired by the defendants (p.390).

(2) That aside from the misuse of general manufacturing information, the defendants had committed a further breach of

their duty of confidence by the incorporation of the modification (p.391).

(3) That with reference to the plaintiffs' publication of the details of their buildings by sales thereof and the distribution of brochures, they were not in the circumstances of the case equivalent to the whole of the information which had been given to the defendants. A member of the public without the aid of confidential information would probably have had to construct a prototype, and certainly to have conducted tests. Therefore the defendants as possessors of the confidential information still had a long start over any member of the public, and an interlocutory injunction was granted (p.391).

Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203 applied".

It is sufficient, we think, to cite the passage at p.380:-

"It is to be noted that the single leap which placed the Swiftplan building unit in a position far ahead of the Mark 24 building unit was the flat ceiling, which became possible by reason of the development of advanced stressed skin technique, being precisely the improvement which the plaintiffs' managing director had communicated to Mr. Moere, and which (as I shall show later) Mr. Moere was actively exploiting in his own workshop in June or July, 1958. I am asked to believe that all these things are mere coincidences and that the Swiftplan was the precious and only child of the brain of Mr. Chambers. I shall come back to that later".

And further passages from p.p. 388, 389, 390:-

"How then, did the prototype embodying all the basic features of the Mark 24, with the flat ceiling improvement, come into existence? It is admitted that the drawings and specifications for the Mark 24 were put into the possession of the first defendants for the sole purpose of enabling them to manufacture that type of building for the plaintiffs, and I have already accepted Major Bolt's allegation that at the time technical information and know-how was also disclosed solely for that purpose. All this was, therefore, confidential information within the principles enunciated in the case of *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203*, a decision of the Court of Appeal, Lord Greene being the Master of the Rolls.

I think this is a convenient moment to read the passages from his judgment in that case which I propose to accept, and I think there is no real opposition to this course, as the passages of prime authority in connection with a case of this

character. At page 213 the Master of the Rolls said this: "I need not go into the law, which I think is correctly stated in a formula which Mr. Heald himself accepted." It is to be noted that it is not suggested that Mr. Heald invented that formula. I suspect that Lord Greene invented it himself. However that may be, he propounded it. He said: "I will read it: 'If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights'." In passing, I may say that the precise origin of a plaintiff's rights in this class of case is by no means clear, but I hope I may be excused from embarking upon a legal dissertation on the hearing of an interlocutory application.

Then again he says (because I will read all the material passages at once) at page 215: "I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, 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." I think those are the two passages.

It cannot be considered in isolation. It was not an idea for making something completely unheard of; it was an idea for making a better unit than the Mark 24 and it was an idea which was to be added to the whole stock of ideas and information which were already in the possession of the first defendants under condition of confidence. Moreover, the disclosures were made at a time when both parties contemplated the possibility, I think I would add the probability, that the agreement would be extended, so that it would not have expired when in fact it did, that is to say, the agreement under which the first defendants were, amongst other things, manufacturing Mark 24 units and at that time seemed likely to continue to do so for an indefinite future. I absolutely believe Major Bolt when he says that when he made the communications - and there were, as I say, more than one - about this flat ceiling, he did contemplate that the plaintiffs would not wish to manufacture the then proposed now model, which ultimately became Mark 36, exclusively themselves, and that the defendants would also manufacture

the new model. In those circumstances, I hold that those disclosures were also disclosures made in confidence.

.....his mind must have been saturated with every detail of its design, features and methods of construction; and if his mind was so saturated from observing the work in progress on the manufacture of Mark 24 buildings, obviously that information was either directly or indirectly derived from the original confidential communications made by the plaintiffs to the first defendants. Moreover, upon what were Mr. Chambers' first efforts now directed? - to improve the floor of the Mark 24; not to make some new building unit. If, therefore, his mind was not already saturated with the Mark 24, his efforts to improve it must assuredly have completed that process. There is no better way of really understanding something than to try and improve it, and if you produce a different result, it is absurd to say that you made no use of the thing which you set out to improve.

When, therefore, Mr. Chambers was instructed on behalf of the first defendants to design a new building unit - and I may say I have no doubt at all that in June or July, 1958, Mr. Moere was taking precautionary steps in anticipation of a breakdown of the negotiations for an extension of the contract - intended, as I am quite certain it was, to compete in the open market with the Mark 24 as about to be improved, he could not have avoided starting his dive into the future from the springboard of the confidential information acquired by the first defendants and by Mr. Chambers as their servant.

It is said that the undoubted divergences in structural detail indicate that Mr. Chambers did not do this, but I reject that submission on two grounds. First of all, the general principles were used if the detail was not, and, secondly information is nonetheless used if it serves as a starting point for a new design, because in the end the design wholly or partially discards the information from which it was originally built up".

And at p.p. 391, 392:-

"As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public. The brochures are certainly not equivalent to the publication of the plans, specifications, other technical information and know-how. The dismantling of a unit might enable a person to proceed without plans or specifications,

or other technical information, but not, I think, without some of the know-how, and certainly not without taking the trouble to dismantle. I think it is broadly true to say that a member of the public to whom the confidential information had not been imparted would still have to prepare plans and specifications. He would probably have to construct a prototype, and he would certainly have to conduct tests. Therefore, the possessor of the confidential information still has a long start over any member of the public. The design may be as important as the features. It is, in my view, inherent in the principle upon which the Saltman case rests that the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start; or, in other words, to preclude the tactics which the first defendants and the third defendants and the managing director of both of those companies employed in this case".

These principles have been considered in a line of cases. In Ackroyds (London) Ltd. -v- Islington Plastics Ltd. [1962] RPC 97 (a case which involved the manufacture of swizzle sticks, neither the stick nor its design being covered by patent or registered design). Havers J. having referred to the cases cited above, went on to say at p.p. 103, 104:-

"The only other passage to which I think I need refer is in the judgment of Lord Evershed, where he said: "It may broadly be stated, as a result of the decision of this Court in Saltman Engineering Co. v. Campbell Engineering Co. (1948) 65 R.P.C. 203, that if information be given by one trader to another in circumstances which make that information confidential, then the second trader is disentitled to make us of the confidential information for purposes of trade by way of competition with the first trader".

The first question I have to consider, therefore, is, Was information given by the plaintiffs to the defendants in circumstances which made that information confidential? The plaintiff's tool was entrusted to the defendants for the manufacture of swizzle sticks for the plaintiffs for reward and for no other purpose. In those circumstances, it seems to me that in equity there was an obligation on the defendants to use the tool solely for the purposes of the plaintiffs, and not to use it for the purposes of the defendants or for any other purpose. Similarly, all information directly or indirectly obtained by the defendants from the plaintiffs from the operation of the tool, or from the swizzle sticks themselves, or, in my view, obtained by the defendants in circumstances which made that information confidential.

It was contended by the defendants that there is nothing confidential about a swizzle stick which had been on the market for three years. It is true that the plaintiffs had supplied sticks of this type since 1945 to Duncan Walleet for use on P. & O. ships to be given away to the ship's passengers. The plaintiffs had also supplied some swizzle sticks to other lines, the Netherlands Line, the Royal Ocean Lines, and small quantities to Cunard Lines, and a few to large hotels or London distributors. But they had never distributed them retail. Before delivery to the ships, the bulk of them, or certainly those for the P. & O., remained in Duncan Walleet's stores until they were issued to the ship. These swizzle sticks were never on the market generally so that the public could buy them at almost any shop in the country.

Mr. Eastham relied on that passage in Lord Green's judgment in the Saltman case, when he said: "No doubt, if they had taken the finished article, namely the leather punch, which they might have bought in a shop, and given it to an expert draughtsman, that draughtsman could have produced the necessary drawings for the manufacture of machine tools required for making that particular finished article". In Terrapin's case, as I have already indicated, Roxburgh, J., objected to this argument and it was not argued in the Court of Appeal. No doubt a time may come when information is generally available for the public. But the mere publication of an article by manufacturing it and placing it upon the market, whether by means of work done in it or calculation or measurement which would enable information to be gained, is not necessarily sufficient to make such information available to the public. The question in each case is: Is such information available to the public? It is not, in my view, if work would have to be done upon it to make it available".

In Peter Pan Manufacturing -v- Corsets Silhouette Limited [1964] 1 WLR 96 where a sample of a new design of brassiere was given in confidence and the defendants manufactured and sold two designs in part based on the design shewn to them, the Plaintiff obtained an injunction.

Pennycuick J. dealt with law in a short passage at p.p. 102, 103:-

"I turn now to the law which, for the determining of this action on the facts which I have found, may be shortly stated. There exists a well-established principle which is stated in the following terms by Lord Evershed M.R. in Terrapin Ltd. v. Builders Supply Co. (Hayes) Ltd.: "It may broadly be stated, as a result of the decision of this court in Saltman Engineering Co. Ltd. v. Campbell Engineering Co.

Ltd. that if information be given by one trader to another in circumstances which make that information confidential, then the second trader is disentitled to make use of the confidential information for purposes of trade by way of competition with the first trader."

The principle goes back at least as far as Morison v. Moat, and was applied by the Court of Appeal in the Saltman case mentioned by Lord Evershed M.R. For a recent application of this principle see the judgment of Havers J. in Ackroyds (London) Ltd. v. Islington Plastics Ltd".

In Cranleigh Engineering -v- Bryant [1965] 1 WLR 1293 an action concerning above ground swimming pools, the headnote reads at p.290:-

"Held: (i) the knowledge what was the right type of clamping strip to use for the swimming pools, how to define to a plastics manufacturer what was required for this purpose and what manufacturer would readily supply the strip were trade secrets of the plaintiffs, and similarly, the method and purpose, and particular size and shape, of the interfit of the vertical steel panels, were trade secrets of the plaintiffs; the information concerning the special features of the plaintiff's swimming pools was confidential information acquired in confidence by B. as managing director".

Here the defence was put that neither of the particular features - that is the clamping strip and the interfit of the panels was confidential because of their simplicity. Roxburgh J. dealt with this point at p.295:-

"The essence of the defendants' case was that neither of these particular features of the plaintiffs' pool was susceptible of being the subject of confidence because of their very simplicity. It was said that anybody could buy a plastic strip and use it for clamping, and any competent engineer or sheet metal worker could without difficulty construct the interfit. It was said that the plastic strip manufacturer might have his secrets of manufacture of the plastic strip, but those secrets were not the secrets of the swimming pool manufacturer, and once the latter had received from the plastics manufacturer a plastic strip suitable for clamping the liner to the top of the vertical plates, there could, in the nature of things, be no secrecy attaching to the user of the clamping strip as such. Particular reliance was placed, on behalf of the defendants, on certain answers given by a plastics manufacturer, a Mr. Stokes, whom they called as a witness.

The plaintiffs' reply to this argument was, as regards the clamping strip, that their secret lay in knowing what the right product was to achieve the purpose, from whom to order it, and how to define to the plastics manufacturer precisely what they required. They relied in particular on certain answers given by Mr. Stokes that he had never supplied clamping strips of the kind in question, and if asked to supply such a strip or extension for a swimming pool, he would advise his customer to have a test strip and put it on a pool out of doors and see how it reacted in various weathers and in high temperatures. In other words, the right type of clamping strip is not something which a plastics manufacturer, however experienced, would be able to produce without experiment and trial and error...."

In my judgment the plaintiffs are correct in their contentions on this issue. I think that the knowledge that this particular clamping strip was the right type of clamping strip to use for this particular purpose, coupled with the knowledge of how to define to a plastics manufacturer what was required for this particular purpose and what plastics manufacturer could readily supply this particular form of strip, is and was a trade secret of the plaintiffs. I take the same view in relation to the interfit of the plates, which it is worth noting that Bryant and the defendant company in their leaflet have described as "unique". Accordingly, it follows that if Bryant acquired this knowledge in confidence as the plaintiffs' managing director, he is not entitled to make use of it in breach of his obligation of confidence to the plaintiffs".

Further on the same page, the learned Judge followed the Judgments in both Terrapin and Ackroyds.

Later in the Judgment (at p.300) he expressly follows the principles enunciated by Lord Greene, M.R., in Saltman which we have set out above. He then went on to deal, and cite a passage in the Terrapin case (at 301), the relevant part of which we have cited above.

Counsel next referred the Court to Seager -v Copydex Ltd. [1967] RPC 349 C.A.

The findings of the headnote sufficiently set out the facts at p.349:-

"Held, (1) that although coincidence might have a long arm, it was not infinitely expandable, and there was an irresistible inference from the uncontroverted fact that the plaintiff had raised the topic of the new stair carpet fixing device at the meeting in March 1962, from the defendants' adoption of both the strong teeth and the name INVISIGRIP,

and from the self-apparent volubility of the plaintiff, that the defendants had failed to stop him from telling them of his idea for a stair carpet fixing device.

(2) That this information was communicated to them in confidence.

(3) That the defendants, although not intending to plagiarize, had taken and used this information, and therefore were liable to the plaintiff in damages".

In the course of his Judgment, Denning L.J. having stated that he had no doubt that the Defendants believed that it was their own idea and having at p.367 referred briefly to the observations of Lord Greene M.R. and Roxburgh J. cited above, went on to say at p.368:-

"The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent. The principle is clear enough when the whole of the information is private. The difficulty arises when the information is in part public and in part private. As, for instance, in this case. A good deal of the information which Mr. Seager gave to Copydex Ltd. was available to the public, such as the patent specification in the Patent Office, or the KLENT grip, which he sold to anyone who asked. If that was the only information he gave them, he could not complain. It was further knowledge. But there was a good deal of other information he gave them which was private, such as the difficulties which had to be overcome in making a satisfactory grip; the necessity for a strong, sharp tooth; the alternative forms of tooth; and the like. When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it; or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it. It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him in saving him time and trouble.

Conclusion

Applying these principles, I think that Mr. Seager should succeed. On the facts which I have stated, he told Copydex Ltd. a lot about the making of a satisfactory carpet grip

which was not in the public domain. They would not have got going so quickly except for what they had learned in their discussions with him. They got to know in particular that it was possible to make an alternative grip in the form of a "V-tang", provided the tooth was sharp enough and strong enough, and they were told about the special shape which would produce this result. The judge thought that the information was not significant. But I think it was. It was the springboard which enabled them to go on to devise the INVISIGRIP and to apply for a patent for it. They were quite innocent of any intention to take advantage of him. They thought that, as long as they did not infringe his patent, they were exempt. In this they were in error. They were not aware of the law as to confidential information. They were not at liberty to make use of any confidential information he gave them without paying for it.

I would allow the appeal and give judgment for Mr. Seager for damages to be assessed".

Counsel found some difficulty with the remark that when the information is mixed being partly private and partly public that the Defendant should use only the material which is in the public domain and that he should go to the public source to get it.

In this case, Counsel argued that this was not possible, as to use the phrase, the Defendant was impregnated with the idea so that even if he had gone to the public source, he would have known where to go and would thus have got a start over others by using the information received in confidence.

Insofar as this statement may appear to disagree with the remarks of Lord Greene M.R. it does not however, in this regard appear to have been followed either by Salmon L.J. or by Winn L.J.

Salmon L.J. stated at p.369:-

"It is common ground that any information given by the plaintiff at that meeting was given in confidence. Accordingly, if any such information was given to the defendants and used by them directly or indirectly without the plaintiff's consent, the defendants would be guilty of an infringement of the plaintiff's rights: the Saltman case (1948) 65 R.P.C. 203. The law does not allow the use of such information even as a springboard for activities detrimental to the plaintiff: Terrapin case, [1960] R.P.C. 128, Cranleigh Engineering Co. v. Bryant, [1964] 3 A.E.R. 289 [1966] R.P.C. 81".

and having reviewed the facts stated at p.371:-

"Nevertheless, the germ of the idea and the broad principle of the domed V-shaped prong was, I am certain, implanted in their minds by the plaintiff at the confidential interview of 13th March 1962, and afterwards subconsciously reproduced and used, if only as a springboard, to forestall the plaintiff with INVISIGRIP. This is no reflection upon their honesty, but it does infringe the plaintiff's rights. I would accordingly allow the appeal".

Winn L.J. clearly did not think it necessary to deal with the authorities. However, he does deal with the absorption of ideas at the end of his Judgment where he says at p.374:-

"Unconscious plagiarism of ideas is no less common, I venture to think, than the phenomenon of multiple contemporaneous invention, of which counsel for the respondents spoke. To my own mind it appears that the proper conclusion to be drawn from all the material before the court, not by any means primarily from the direct evidence, is that the appellant did explain his INVISIGRIP idea to Mr. Boon and Mr. Preston; that they absorbed what he told them; and were able to recall enough from their memories to indicate to Mr. Sudbury and Mr. Furl what they wanted them to produce. In doing so, they did not, I think, realise that they were infringing a duty of confidence: I think that they did infringe it. In so holding I do not imply any condemnation of Mr. Boon or Mr. Preston as dishonest men. Mr. Preston made a most revealing statement when he said: "...action for breach of confidence. I did not know such a thing existed ... the only problem was that we might infringe his patent"."

Counsel then cited Coco -v- A.N. Clark [1969] R.P.C. 41 where Megarry J. dealt with a motion for an interlocutory injunction. This action concerned a moped engine, and Megarry J. found, as the headnote at p.41 sets out:-

Held, (1) that of the three elements essential to a cause of action for breach of confidence, namely (a) that the information was of a confidential nature, (b) that it was communicated in circumstances importing an obligation of confidence and (c) that there was an unauthorised use of the information, only the second condition was satisfied by the plaintiff....."

"(3) That the plaintiff had not established a strong prima facie case that the information was confidential in nature, or a prima facie case of infringement, as the evidence adduced by him had failed to reveal that the similarities between the two engines were achieved by the use of the information, or that his engine had original qualities which would amount to confidential information".

As might be expected, the learned Judge followed both Saltman and Seager -v- Copydex.

In this case (at p.46) the learned Judge stated that:-

"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."*

(See 1 Rolle's Abridgment 374). 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?

At p.47 he made a lucid analysis of the authorities:-

"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; Ferrapin Ltd. v. Builder's 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. Mr. Mowbray demurs to the concept that some degree of originality is requisite. But 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: and, expressed in those terms, I think that Mr. Mowbray accepts the concept.

The difficulty comes, as Lord Denning, M.R. pointed out in the *Seager* case on page 931, when the information used is partly public and partly private; for then the recipient must somehow segregate the two and, although free to use the former, must take no advantage of the communication of the latter. To this subject I must in due course return. I must also return to a further point, namely, that where confidential information is communicated in circumstances of confidence the obligation thus created endures, perhaps in a modified form, even after all the information has been published or is ascertainable by the public; for the recipient must not use the communication as a spring-board (see the *Seager* case, pages 931 and 933). I should add that, as shown by *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293; [1966] R.P.C. 81, the mere simplicity of an idea does not prevent it being confidential (see pages 1309 and 1310). Indeed, the simpler an idea, the more likely it is to need protection.

The second requirement is that the information must have been communicated in circumstances importing an obligation of confidence".

He found, it would seem, some difficulty with the concept enunciated by Denning L.J. as to the use of material which is partly in the public domain, but despite his doubts, he accepts,

as we read it, the principle that ... "he is under a duty not to use the confidential information as a spring-board or as giving him a start" (at p.49).

However, despite the difficulties which this statement caused the learned Judge, we have to bear in mind here the very short time scale involved from the moment when Mr. Benest met Mr. Langlois.

In Industrial Furnaces -v- Reaves [1970] R.P.C. 605, one of the unknown features was the overall heat transfer coefficient of an apparatus for heating air.

In the course of his Judgment Graham J. stated at p.617:

"On the above facts, I hold that the information of a suitable K factor for heaters of this type was not readily available at the date in question and whether it was obtained from the plaintiffs' tests, as I find to be the fact, or from calculations, measurements and deductions made by the defendant on the plaintiffs' behalf as their director and employee from the Gibbons leaflet, it is in either case a matter to which the attribute of confidence can be and is properly attached.

This feature does not, in my judgment, affect the principles to be applied to confidential information. The information in question here was obtained as a result of considerable labour and expense, and was used and was valuable; and the fact that it was obtained by a method which in theory ought not to be relied upon does not affect the matter. The material here to which confidence is sought to be attached is therefore, in my judgment, no different in quality from the material to which confidence was attached by the court in the Terrapin case [1960] R.P.C. 128 and in Saltman Engineering Company Limited v. Campbell Engineering Company Limited (1948) 65 R.P.C. 203".

This case is not quite on all fours with the present one as it concerns the misuse of confidential information by a servant: but the principle of the attribution of confidence would appear to us to remain the same.

Counsel then referred the Court to a series of cases decided in Australia and New Zealand.

The first was Interfirm Comparison (Australia) Pty. Ltd. -v- Law Society of New South Wales (1975) 2 NSW LR 104, which concerned the preparation of a legal survey which if not original was more than a mere compilation of matters in the public domain. The learned Judge having referred to the statements of Lord Greene

in *Saltman* and to Megarry J. in *Coco v. Clark* went on to say at p.117E:-

"In my opinion, having regard to the amount of skill, judgment and labour involved in the preparation of the proposal and the 1972 questionnaire, and to the limited purpose of the negotiation between the plaintiff and the defendant in furtherance of which the material was supplied, both documents were confidential, in the sense that they could be used by the Law Society only for the purpose for which they had been given to it, that is to say, for the purpose of considering and deciding whether it would engage the services of the plaintiff for its own survey and interfirm comparison: they could not, without the plaintiff's assent, be used for other unrelated purposes, for example, for the purpose of publishing a book of precedents or writing an article in the Law Society's Journal.

It was argued for the defendant that much, if not all, of the material in the proposal and the questionnaire was already well-known, and should, on this ground, be denied the protection of confidentiality.

Although it is true, as I have pointed out in relation to copyright, that much of the material in the proposal and questionnaire was generally known, the particular expression and arrangement of this material found in the proposal and questionnaire was new; it was not generally known.

Then it is argued for the defendant that disclosure to any member of the public will destroy the claim to confidentiality, and that the plaintiff itself had destroyed any confidentiality in the 1972 questionnaire by the manner in which it had distributed it. In this regard counsel for the defendant relied upon patent cases dealing with disclosure which would cause an invention to be regarded as part of public knowledge in that field of the law: *R. v. Patents Appeal Tribunal*; *Ex parte Lovens Kemiske Fabriks Handelsaktieselskab*; *Fomento Industrial S.A. Biro Swan Ltd. v. Mentmore Manufacturing Co. Ltd.*

Counsel for the defendant also relied upon the remarks of Lord Greene M.R. in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* and the decision of the House of Lords in *O. Mustad & Son v. Dosen* as indicating the same strict rule should be applied in cases of breach of confidence.

It appears to me that decisions relating to patents are not helpful in dealing with questions of confidentiality. The Patents Act 1952-1969 (Cth.) itself, by its provisions, raises some points of difference. But apart from that, in the case of an invention the State offers to the inventor a

monopoly in return for disclosure in his specification of his invention. If an inventor has already disclosed his invention, even to one member of the public, it may be held as a matter of principle that he has no consideration to offer in return for the grant of monopoly: see *Humpherson v. Syer*. The law relating to confidentiality of communications appears to me to be based upon different principles - the long-standing equitable principles relating to fair-dealing with the work of another. It is closer to the law relating to copyright in unpublished works than to the law of patents. The authorities indicate that even though secrecy may be imperfect in relation to communication which is given in confidence, that communication may still be protected by the principles of confidentiality. The matter was discussed by Sir J.L. Knight-Bruce V.-C. in *Prince Albert v. Strange*. The learned Vice-Chancellor said: "Nor is this right to prevent 'innocent' writings from being published without the consent of the proprietor, the author, confined to those instances where he has kept them in a state of entire privacy and secrecy before the invasion complained of. The right is not lost by partial and limited communications not made with a view to general publication, as is shown by several cases, that of Lord Clarendon's History, and others".

The case of Lord Clarendon's "History of the Reign of Charles the Second, from the Restoration to the year 1667" was Duke of Queensberry v. Shebbeare. Another supporting case to which his Lordship refers is that relating to the publication of the play "Love a la Mode" which had been performed but not published in written form: *Macklin v. Richardson*. See also *Abernethy v. Hutchinson*, discussed in *Lamb v. Evans*. More recent authority is to the same effect: see *Exchange Telegraph Co. Ltd. v. Central News Ltd*; *Ackroyds (London) Ltd. v. Islington Plastics Ltd*. See also *Amedee Turner on The Law on Trade Secrets (1962) pp. 17, 81, 82.*

I do not consider that Lord Greene's passing reference in the *Saltman* case to something which is "public property and public knowledge" runs counter to what I have said".

We note particularly his Lordship's remarks to the effect that actions relating to confidentiality of communications (at p.118D) were based on the long standing equitable principles relating to fair dealing with the work of another.

The second, *Deta Nominees Pty. Ltd. -v- Viscount Plastic Products Pty. Ltd.* (1979) VR 167 concerned plastic drawers. This was a case where the machinery was made up by the Defendants but the idea was protected. Once again the learned Judge, here Fullager J., stated that the Court had power to intervene on equitable principles.

The third was A.B. Consolidated Ltd. -v- Europe Strength Foods Co. Pty. Ltd., (1978) 2 NZLR 515, which concerned the wrapping of a health food bar which exposed the contents in an attractive manner. The process was a simple one, each step was known and the novelty lay in the process as a whole (v. headnote). It was put thus at p.519 l.28:

"At the hearing in the Supreme Court a diagram was produced for the assistance of the Court which demonstrates the individual steps in the process which had been developed by Europe and at the same time had been proved by that company to be commercially feasible. In its simplest form it may be described as a method of taking a mixture of a particular kind through a steam heated caramel cooker and then by a transfer pan to shallow wooden trays lined with plastic. There it was levelled and made firm with a roller after which it was left to condition and cool. Subsequently there was a further and independent process which involved cutting the material to an appropriate size. The individual stages of the general method of manufacture were known and used in the trade but for such a product, so the Judge found, those separate stages had not previously been put together by other manufacturers anywhere. That fact he regarded as of importance because the overall result could not otherwise be achieved and its significance was emphasised by the knowledge that Europe had gained of the economic viability of the whole operation despite the extent to which the mixture had to be handled and moved about at different times".

Once again the Court followed the English cases and found that the remedy was founded in equity (v. 520 l.41):

"However the obligations of confidence relied upon in the present case and referred to in Megarry J's analysis are founded in equity and arise quite independently of contract - or of tort. Mr. Holland was inclined to argue that there must be some sort of contractual nexus or at least a recognised relationship of a fiduciary kind before a remedy would be given for the misuse of confidential information. But it is made quite clear in two decisions of the Court of Appeal in England that this is not so. In Saltman Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 RPC 203, 211; [1963] 3 All ER 413, 414 Lord Greene M.R. stated expressly that:

"...the obligation to respect confidence is not limited to cases where the parties are in contractual relationship."

Then in Seager v. Copydex Ltd. [1967] RPC 349, 368; [1967] 2 All ER 415, 417 Lord Denning M.R. said:

"The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent."

That same equitable jurisdiction was exercised by Megarry J. in the Coco case. He remarked that in the case before him it was:

"...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" ([1969] RPC 41, 46).

And more than a century earlier the Vice-Chancellor (Sir G.J. Turner) had said in *Morison v. Moat* (1851) 9 Hare 241, 255; 68 ER 492, 498:

"The true question is whether, under the circumstances of this case, the Court ought to interpose by injunction, upon the ground of breach of faith or of contract.

"That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but, upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

The present case is concerned with what may be described as trade or industrial information said to have been provided in the course of discussions which were carried as far as they were because of the proposal for a joint venture or licensing arrangement that it was thought might become the subject of a concluded contract; but it is inappropriate as well as unnecessary to consider the obligations of ABC on the basis of some quasi-contractual implication. It is sufficient to consider the matter, as Lord Denning M.R. did in the *Copydex* case, on the basis of "the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it".

The kind of information which will be protected must have "the necessary quality of confidence about it" in the sense that it is not "something which is public property and public knowledge": *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 RPC 203, 215; [1963] 3 All ER 413, 415. Nevertheless, the mere fact that a concept is a simple one or that the individual or discrete parts of a wider process are publicly known or are used by a trade will not prevent the overall process itself or the concept as a whole from being protected. Nor is it necessary for the information to possess the character of novelty or invention that would be required in the case of a successful patent application. No doubt the comparative insignificance of some kinds of confidential material would be reflected in the Court's consideration of the remedy to be given, if any. That matter is the subject of the caveat of commonsense mentioned by Megarry J. in the *Coco* case: that equity would be unlikely to intervene "to protect trivial tittle-tattle" ([1969] RPC 41, 48). But protection is still available (as the authors of *Meagher, Gummow and Lehane, Equity* (1975) point out in para 4109) in the case of such a "mundane technique" as the construction of swimming-pools: see *Cranleigh Precision Engineering Ltd. v. Bryant* [1966] RPC 81; [1964] 3 All ER 289".

The learned Judges followed Lord Denning M.R. and considered the matter on the basis of the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. It is clear from this judgment that the learned Judges considered with Somers J. that the concept as a whole will be protected even if the individual parts are known. The making up of the wrapper involved thought processes, research and experiment adapted solely to making the particular product; and that process was not public knowledge (at v. p.522 l.1. 10, 50). It has thus the necessary requisites of ... confidentiality.

The fourth was Talbot -v- General Television Corporation Pty. Ltd. (1980) VR 224 and 250, where once again Harris J. followed Megarry J.'s definition of the three elements required.

This action concerned a television programme "To make a million". The Plaintiff claimed the concept was communicated in confidence and the real point was (at p.231 l.20) "had the idea or concept been sufficiently developed". Harris J. found that it had and that the programme's particular slant took it out of the realm of public knowledge, (p.231 l.40).

The learned Judge cited the Court of Appeal in Seager v. Copydex (supra) and we note that he cited the remarks of all three of their Lordships.

At p.238 l.50, Harris J. found in effect that "conversations may remain in subconscious minds". Counsel put it in this way that if the concept was found not to be self-evident and that should someone have the same idea soon afterwards then if there is no conscious use of the information, it shews at least a strong inference of such subconscious activity.

Next the Court considered Schering Chemicals Limited -v- Falkman Limited and Others [1981] 2 All ER 321 C.A.

The facts in this action are not on all fours, as the Plaintiffs sought to restrain a journalist from making a film, where the First Defendant had received information in confidence. However, it is nonetheless of assistance.

At p.328 J Lord Denning M.R. confirmed his view as expressed in Seager v. Copydex (supra). However, Shaw L.J. at p.337h stated:-

"McNeill J, to whose judgment I would pay respectful tribute, disposed of this argument summarily but incisively in these terms:

'I would grant the injunction against the second defendant on two grounds. First, on the grounds of breach of duty of confidence arising out of the trust the plaintiffs placed in him, in the course of his remunerated employment to advise them professionally...'

I agree with him. As I see the position, the communication in a commercial context of information which at the time is regarded by the giver and recognised by the recipient as confidential, and the nature of which has a material connection with the commercial interests of the party confiding that information, imposes on the recipient a fiduciary obligation to maintain that confidence thereafter unless the giver consents to relax it".

In his approach to the question of whether the information was all in the public domain, Shaw L.J. put it in this way at p.338f:-

"It is now said that all the information on which the programme of the projected documentary is based could have been derived from sources available to the public before the Schering course with Executive Television Training. It is asserted also that Mr. Elstein with the assistance of a colleague in Thames Television has assiduously explored and collated all those sources. The relevant facts and opinions are all to be found in what has been described as 'the public domain' or 'the public sector'. No principle of confidentiality can apply, so it is contended, to matters

which have become notorious. Whatever may have been the fiduciary duty on the part of Mr. Elstein not to disclose anything of a confidential nature that he had learned on the course, it had been entirely dissipated when the Primodos affair emerged into public view. What obligation of reticence can apply to what has long been an open secret? So the argument ran.

It is an argument which at best is cynical; some might regard it as specious. Even in the commercial field, ethics and good faith are not to be regarded as merely opportunist or expedient. In any case, though facts may be widely known, they are not ever present in the minds of the public. To extend the knowledge or to revive the recollection of matters which may be detrimental or prejudicial to the interests of some person or organisation is not to be condoned because the facts are already known to some and linger in the memories of others".

Templeman L.J. at p.345f put it in this way:-

"In my judgment, when Mr. Elstein agreed for reward to take part in the training course and received and absorbed information from Scherings, he became under a duty not to use that information and impliedly promised Scherings that he would not use that information for the very purpose which Scherings sought to avoid, namely bad publicity in the future including publicity which Scherings reasonably regarded as bad publicity. Scherings reasonably regard the film 'The Primodos Affair' as bad publicity based on information which they supplied to Mr. Elstein to enable him to advise Scherings. Mr. Elstein could have made a film based on Primodos if he had not taken part in the training programme, but 'The Primodos Affair' film only came into existence because Mr. Elstein received from Scherings information for one purpose and used that information for another purpose, for his own gain and to the detriment, as they reasonably believe, of Scherings".

Finally, we were referred to Union Carbide -v- Naturin [1987] RPC 538 C.A., which dealt with a method of manufacture of sausage skins. This, as with several others of the cases cited arose not on the trial of the action but as a preliminary point.

No particularly new point arises, we think, but it is to be observed that at p.544 their Lordships refer with approval to the three elements normally required if an action for breach of confidence is to succeed as set out by Megarry J. in Coco v. Clark (supra), and referred to the principle on which Harris J. relied in Talbot -v- General Television Corporation Pty. Ltd. (1980) VR 224 and 250 (at 546). We agree with Counsel that this was effectively a comment implying a general support of that finding.

In his pleadings, as we understood them, the Defendant admitted that Mr. Langlois owed Mr. Benest an obligation of confidence in respect of confidential information properly so described. However, for anything which was in the public domain, Mr. Langlois claimed not to be bound by any obligation of confidence.

We find the law as set out in the cases cited to us to be entirely consistent and to be based on the obligation of good faith. In our view, it goes further than the view propounded by Mr. Bernard in his evidence.

In his address, Counsel for the Plaintiff abandoned his claim for copyright and based himself solely on breach of confidence.

In his reply, Mr. Petit quite properly made the point that Mr. Benest's machine was produced after Mr. Langlois' machine and that, if that were true, Mr. Benest's machine would have no bearing on the case; and further that a quick glance at the machines could not shew a sufficient similarity to meet the proof required by the Plaintiff for a breach of confidential information.

He conceded, however, as we think he had to do on the evidence, that Mr. Langlois did stop work on his machine, and then restarted with Mr. Benest's arrival on the scene.

He conceded also, on his reading of the authorities and in our view again rightly, that he would have to say that the machine must have been in its final stage, or substantially so, when Mr. Benest arrived and that any additions were wholly Mr. Langlois' own and in no way arose from Mr. Benest's ideas.

We find the facts are wholly against him. There is ample evidence that Mr. Langlois did indeed work from the original Teagle, and did indeed invent some form of discontinuous drive system, but the machine was not a success and lay about for some two to three years. On the evidence before us, it would seem that the only previous machine from which Mr. Langlois worked (before meeting Mr. Benest) was a Teagle.

Against that, we have the evidence, supported by witnesses of the way in which Mr. Benest worked through his ideas and persevered over several years, moving from the Teagle to the Michigan and then basing himself on a Becker seed drill. By early December, 1985, he was ready to have his machine manufactured.

No sooner had he put this in train than Mr. Langlois, having heard his explanations, forthwith abandoned Mr. Benest's machine and produced his own. We accept Mr. Archer's evidence - despite the angle from which he approached it - as to the similarities -

and are left in no doubt but that Mr. Langlois, having heard at length from Mr. Benest as to his concept and the reasons for it, used this information to adapt and produce his own machine. This finding is confirmed in our view by Mr. Van de Vliet's evidence to the effect that the machine sold by Mr. Langlois required constant adjustment, very similar, it would seem, to the adjustments carried out before manufacture by Mr. Benest in conjunction with Mr. Arthur and Mr. Huelin.

We have no doubt but that the Plaintiff satisfies the three tests propounded by Megarry, J.

First, the information did have the necessary quality of confidence about it.

Second, it was imparted in circumstances importing an obligation of confidence.

Third, there has been an unauthorised use of that information to the detriment of the Plaintiff.

It is clear in our view that having been given information for one purpose, Mr. Langlois made use of it for another in circumstances where he should not have done so.

On the issue of liability, therefore, we find for the Plaintiff.

By agreement between the parties, the issue of the remedy sought by the Plaintiff has been left over.

Authorities

- 4 Halsbury 16: paras. 548-550 and 1454-1457.
- Cornish: "Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights" [1981] Chapter 8; Chapter 11.
- United Indigo Chemcial Co. Ltd. -v- Robinson [1931] 49 RPC 178.
- Saltman Engineering Co. Ltd. -v- Campbell Engineering Co. Ltd. [1948] RPC 203; [1963] 3 All ER 413.
- Ackroyds (London) Ltd. -v- Islington Plastics Ltd. [1962] RPC 97.
- Peter Pan Manufacturing -v- Corsets Silhouette Limited [1964] 1 WLR 96.
- Cranleigh Engineering -v- Bryant [1965] 1 WLR 1293.
- Printers and Finishers -v- Holloway [1965] RPC 239.
- Seager -v- Copydex Ltd. [1967] RPC 349.
- Terrapin Ltd. -v- Builders' Supply Co. (Hayes) Ltd. [1967] RPC 375.
- Coco -v- A.N. Clark [1969] RPC 41.
- Industrial Furnaces -v- Reaves [1970] RPC 605.
- Faccenda Chicken -v- Fowler [1987] Ch. 117 C.A.
- Union Carbide -v- Naturin [1987] RPC 538.
- Lamb -v- Evans [1893] 1 Ch. 218.
- Kirchner & Co. -v- Grubon [1909] 1 Ch. 413.
- British Celanese -v- Moncrieff [1948] Ch. 564; [1948] 2 All ER 44.
- Triplex Safety Glass Co. -v- Scolah [1938] Ch. 211; [1937] 4 All ER 693.
- Robb -v- Green [1895] 2 QB 315 C.A.
- Schering Chemicals Limited -v- Falkman Limited & Others [1981] 2 All ER 321 C.A.
- Baker -v- Gibbons [1972] 1 All ER 759; [1972] 1 WLR 693.

New Zealand Netherlands Society "Oranje" Incorporated -v- Kuys
[1973] 2 All ER 1222; [1973] 1 WLR 1126 PC.

Seager -v- Copydex (No.2) [1969] 2 All ER 718; [1969] 1 WLR
809 C.A.

Interfirm Comparison (Australia) Pty. Ltd. -v- Law Society of New
South Wales (1975) 2 NSW LR 104.

Talbot -v- General Television Corporation Pty. Ltd. (1980) VR 224
and 250.

Deta Nominees Pty. Ltd. -v- Viscount Plastic Products Pty. Ltd.
(1979) VR 167.

A.B. Consolidated Ltd. -v- Europe Strength Foods Co. Pty. Ltd.
(1978) 2 NZLR 515.

Clerk & Lindsell on Torts (16th Ed'n) Chapter 31: Breach of
Confidence.

McGregor on Damages (15th Ed'n) paras. 1707-1716: Infringement of
Rights in Immaterial Property.

Leather Cloth Company -v- Hirschfield LRI Eq. 299.

United Horseshoe & Nail Co. -v- Stewart (1888) App. Cas. 401.

Dawson & Mason Ltd. -v- Potter (1986) 2 All ER 418.