

Case note on confidentiality over the internet: EPP v Levy

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Overview

In the recent case of EPP v Levy (EPP), the NSW Supreme Court had occasion to consider whether information that is available on the internet loses the quality of confidentiality and falls into the public domain.

EPP involved an application by the plaintiff for an interlocutory injunction to prevent the defendant from breaching contractual provisions of a confidentiality deed which prohibited the disclosure and use of confidential information for purposes other than the business of the plaintiff. Barrett J granted injunctions in respect of some, but not all, of the claims. Significantly, this judgment considers that information placed on a website which is accessible to anyone with access to the internet is in the public domain. However, the judgment does not consider the more difficult issues of whether material transmitted via email, an ISP or stored on a secure website accessible only to parties with passwords, is in the public domain.

Facts

EPP was the proprietor of a business which acted as an introductory intermediary between potential buyers and sellers. The focus of the business was to introduce small businesses that were in need of goods and services to suppliers on terms that were more favourable to the buyer than could be obtained elsewhere. Buyers who entered this arrangement were regarded as members and thus obtained privileged access to suppliers. In this arrangement there were two types of suppliers. First there were National Suppliers, such as Telstra and St George. Secondly, members could also become suppliers of goods and services, under the Member to Member Segment. This allowed members to supply

discounted goods and services to other members. A benefit of the member to member segment was that members were given an online presence at the EPP site, with details of the business and product included on the site.

The plaintiff sold memberships through agents. Each agent was assigned a specific geographic region and was remunerated for each member introduced. The defendants became agents in July 1999, and were assigned to an area on the central coast of NSW. At that time the agents entered a confidentiality deed and an agent's contract which governed the conditions of the agency.

The confidentiality deed sought to restrict the disclosure and use of confidential information. It provided that unless information which related to the business of the plaintiff was made publicly available then that information was not to be disclosed or used for purposes other than the promotion of the plaintiff's business and interests.

In October 2000, the defendants' agency agreement was terminated. It had become apparent that during the course of the agency and following termination that the defendants had, in their personal capacity, approached certain suppliers and members to undertake arrangements similar to that of the plaintiff.

The plaintiff alleged that the approaches made by the defendants were in breach of the confidentiality deeds, specifically the provisions that restricted the use of confidential information. Accordingly, the plaintiff sought to restrain the defendants' conduct by obtaining interim injunctions pending final judgment.

Issues

The principal issue in the case was whether the defendants had breached their contractual obligations by using information that they had acquired in the course of the agency. The plaintiff did not argue that in addition to the contractual breaches there were breaches of equitable obligations to maintain confidence. The effect of this was that Barrett J did not consider the inherent quality of the information concerned. Rather all that was required was that the information bore a connection with the plaintiff so as to bring it within the contractual description.

The defendants' case was that most, if not all, of the material that the plaintiff regarded as confidential was in the public domain and thus was not within the contractual restraint on use. Hence it was for the Court to determine whether the material used by the defendants in approaching members and suppliers of the plaintiff was confidential as defined by the deed.

Decision

Barrett J identified three categories of material which the case concerned: membership information; supplier information; and methodology information. His Honour assessed each category of information to determine whether or not it had fallen into the public domain.

In considering the membership information, Barrett J emphasised that around 20 per cent of members had their names and contact details listed on EPP's website. This inclusion was a benefit of their membership in the member to member segment. However, the remaining 80 per cent were not listed on the website. In reaching his decision his Honour held:

"I regard everything which is accessible through resort to the internet (sic) as being in the public domain. It is true that someone can obtain that information only if they have access to a computer which has a modem which connects to an internet service provider who, for a fee, provides a connection to the internet. But those barriers are, in my view, no more challenging or significant in today's Australia complete with internet cafes, than those involved in access to a newspaper or television content, both of which should ... be seen as involving the public domain ..."

Barrett J concluded that with respect to the membership information of the 20 per cent of members who were listed on the website that information was within the public domain exception to the confidentiality deed because it was widely available. In reaching this conclusion, Barrett J noted that this particular information was available through a website "available throughout the world to anyone with internet access". His Honour has not ruled out the possibility that information available on a website but "secured" through a password or other security system may still not be in the public domain.

With respect to the other information that was not available on the internet

site, such as the names of the remaining 80 per cent of members and specific membership renewal dates, Barrett J held that this remained as confidential information and was protected from unauthorised use and disclosure by the confidentiality deed. Accordingly, this warranted the granting of an interim injunction.

In regards to the material about suppliers, his Honour held that although the identities, businesses and products of the businesses were widely known, more specific information such as the officer in the supplier organisation who deals with such buyer arrangements was not publicly known. Thus there was a serious question to be tried and an injunction with respect to this information, on the balance of convenience, was justified.

Finally, Barrett J held that the business methods and concept knowledge that the defendants had acquired through training and throughout the course of the agency was confidential information as prescribed by the confidentiality deed. Again, as this raised a serious question to be tried at the final determination, an interim injunction was reasonable in the circumstances.

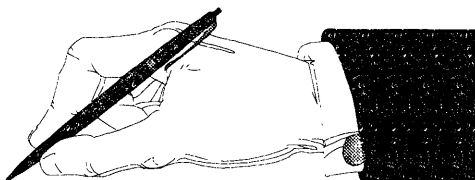
As a procedural matter prior to granting an interlocutory injunction,

the Court has to assess whether such an order would, on the balance of convenience, cause undue hardship to the defendant. In this case, Barrett J held that an interim injunction in respect of the use of the confidential material would not cause undue hardship as it would not prevent the defendants' from developing their business. Secondly, the Court considered whether the plaintiff had sufficient financial resources to be able to provide an adequate undertaking as to damages. Barrett J considered that based on the strength of cashflow and future earnings, the plaintiff would be likely to meet an undertaking.

Conclusion

This case is significant because Barrett J directly addressed the issue of the internet and the public domain exception to obligations of confidence, although it should be noted that this case did not concern more general equitable obligations of confidentiality. His Honour strongly asserts that once information is made accessible on any website generally available, it loses the quality of confidentiality. In reaching this conclusion, Barrett J compared this use of the internet to other mediums for the dissemination of information, such as television and newspapers.

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