itself, or where a foreign infringement is orchestrated from England? If so, section 12 would require the application of English law. But then the claim would fail automatically because English law regulates only infringements in England. It is inherent in the conflicts process that the applicable law may not always be one which recognises a plaintiff's claim. But there is something singular about applying the general rules for choice of law in tort to copyright infringements. The universally recognised principle of territoriality, limiting copyright protection to local infringements, ensures that only the law of the place of infringement *could* govern in such cases. For this reason Roch L.J. apparently assumed that only Dutch law could apply in *Pearce,* being that of the place of infringement, a solution canvassed by Lloyd J. at first instance. Identifying the law applicable to a tort normally involves a more subtle balancing of interests and connections, as it should have done in *Pearce.* But Roch L.J.'s approach echoes Ulmer's view that the applicable law should always be that which grants protection, the *lex protectionis* (*Intellectual Property Rights and the Conflict of Laws* (1976)). By answering one question, it seems, *Pearce* merely begs another: even if such claims are justiciable, which law governs the infringement of a foreign copyright?

Richard Fentiman

THE GREAT CANADIAN JUICE WAR

In the recent case of *Cadbury Schweppes Inc.* v. *FBI Foods Inc.* (1999) 167 D.L.R. (4th) 577, the Supreme Court of Canada considered the case of an action for breach of confidence involving "Clamato" juice (a mixture of clam broth and tomato juice). For the uninitiated, Clamato juice is mixed with vodka, oregano and Worcestershire sauce to become a "Bloody Caesar", a drink popular with Canadians but apparently few others.

C Ltd., the plaintiff (confider), disclosed confidential information respecting its product, Clamato juice, to CC Ltd. (the confidant), which agreed to manufacture and sell the drink in Canada. The information took the form of a list of some of the ingredients used in the recipe and detailed manufacturing specifications, but not the recipe itself. With the express consent of the confider, the confidant sub-contracted for the manufacture of the juice with F Ltd., the defendant (third party), and disclosed the confidential information to it. Whilst the confider and the third party were not directly linked by contract, the agreements between the confider and confidant and the confidant and the third party each contained a five-year non-

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competition clause in respect of tomato juice and clam broth products. After a 12-month notice of termination of contract was given by the confider to the confidant, the confidant misused the disclosed information to develop its own rival product ("Caesar Cocktail") during the termination period. The rival drink did not violate the non-competition covenant. After the notice period ended, the confidant immediately launched its rival product, which was again manufactured by the third party. Two years later, the confidant went bankrupt, and the third party-defendant purchased its assets, including Caesar Cocktail.

The plaintiff brought an action against the third party-defendant for compensatory damages and an injunction to restrain production. The damages were awarded but the injunction was refused. At first appeal, the plaintiff secured greater damages and a permanent injunction. In the Supreme Court of Canada, the quantum of damages was varied and the injunction discharged. With respect to injunctive relief, it was held that the balance of convenience did not favour such relief in the circumstances of the case, in that the plaintiff had actual knowledge of the breach almost immediately and thereafter unreasonably delayed both in bringing the claim and in conducting the litigation.

Unfortunately, in Binnie J.'s judgment in the Supreme Court and in the judgment of the court below, the scope of the third party's duty to the confidant and the nature of the breach are most unclear. It is uncertain whether Binnie J. held that a third party, knowingly in receipt of information disclosed or misused in breach of confidence, is liable to provide compensation for losses beyond those losses strictly attributable to its own breach of confidence.

With respect to the remedial issues, Binnie J.'s judgment proceeds from the "basket of remedies" approach accepted for some time in both Canada and New Zealand and takes the position that as the action for breach of confidence is *sui generis*, one must determine the "flavour of the breach" to determine the appropriate remedial response. Given that the confidant went bankrupt some two years later despite the successful launch of its rival product, one suspects that it is for this reason that the plaintiff sought a compensatory remedy rather than a restitutionary one.

Binnie J.'s judgment is noteworthy in a number of respects. First, he seems to have rejected the oft-made and oft-criticised proposition that confidential information may properly be regarded as a true form of property. The consequence of accepting the proposition would be to make a proprietary remedy available as of right, which in Binnie J.'s view would not always be appropriate. Recognising *property* as but a cluster of rights in relation to a thing, Binnie J.

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acknowledges that the absence of a proprietary characterisation merely necessitates a clearer articulation of the specific nature of the right or interest to be protected. English law still awaits a definitive position to be taken on this issue, the point having been left open by Lord Goff in the *Spycatcher* litigation: *Attorney-General* v. *Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 281.

Interestingly, Binnie J. characterises the plaintiff's loss as a lost market opportunity stemming from unfair competition. Whilst the plaintiff had contracted with the confidant in various respects, he held, it "did not bargain for the *unfair* competition of having their own know-how, imparted in confidence, used against them". Though the concept of unfair competition figures in the TRIPs Agreement, Article 39 (incorporating the provisions of the Paris Convention, Article 10*bis*), it has received a more sympathetic treatment in American trade secrets law than in the Commonwealth: see *MacDonald* v. *Vapour Canada Ltd.* (1976) 66 D.L.R. (3d) 1 (S.C.C.); *Moorgate Tobacco Co. Ltd.* v. *Philip Morris Ltd. (No. 2)* (1984) 156 C.L.R. 414 (Aust. H.C.). It is not clear whether Binnie J. intends to re-position Canadian law to look southward on this point. If this is indeed the case, it may have implications for the thorny problem of liability for acquisition of confidential information based on the illicit nature of the acquisition alone and without resting on abuse of an obligation of confidence.

Secondly, Binnie J. accepts that the private ordering of the equitable environment in contract between the confider and confidant may also circumscribe the duties incumbent upon a third party in knowing receipt of confidential information. This is a contentious point; should the law operate so as to limit the commercial environment which the parties bargained for? Again, the unfair competition point is interesting in this context.

Thirdly, with respect to quantifying the damages, Binnie J. adopts the approach of the American *Restatement (Third) of Unfair Competition* (1995), §45 comment (e), which is consistent in his view with *Dowson & Mason Ltd.* v. *Potter* [1986] 1 W.L.R. 1419, holding, *inter alia,* that general compensatory damages ought not to be used as a vehicle for an indirect award of exemplary damages based on the court's indignation respecting the breach.

DAVID FREEDMAN

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