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Joseph P. Hennessee

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(3) Exceptions

In order to insure a complete review of the trial court's action on motions under G. S. 1-220, the following request and exceptions should be considered: (1) a request that the trial judge find facts, with an exception if the request is refused, 122 (2) exceptions to individual findings of fact, 122 and (3) exceptions to conclusions of the judge as to surprise or excusable neglect and meritorious defense. 124 Also, the question of what is presented for review by the following exceptions should be recognized. A “broadside” exception presents for review only the question of whether or not the facts found by the judge support his judgment. 125 A general exception to the findings of fact on which the judgment of the trial court rests, i.e. “a shot at the covey,” will not be considered on appeal. 126 An exception to the judgment below presents only two questions: Whether the facts found support the judgment and whether errors of law appear on the face of the record. 127

JOHN R. MONTGOMERY, JR.

Trusts—Constructive Trust—Recovery of Proceeds of Wrongful Disclosure of Confidential Information

Defendant, a geologist, was employed full time by the plaintiff to secure and classify geological data for use in locating and acquiring oil properties. The information was highly confidential. Upon discovery that defendant had been divulging parts of this information to confederates, who through its use were able to secure valuable oil interests for themselves and for defendant, an action was begun to impress a constructive trust on the interests thus secured. It was held that defendant had breached his fiduciary duty to his employer in divulging this information, and it was decreed that defendant and his confederates held the interests and profits therefrom as constructive trustees for the plaintiff. 1

Defined broadly, a constructive trust is a remedial device used to compel one who holds property wrongfully acquired or retained to

123 Radeker v. Royal Pines Park, Inc., 207 N. C. 209, 176 S. E. 285 (1934); Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950). (Exceptions must be to individual findings of fact, as a general exception to findings will not be considered on appeal.) See cases cited supra notes 121-124.

1 Hunter v. Shell Oil Company, 198 F. 2d 485 (5th Cir. 1952); accord, Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937), approved in 25 VA. L. Rev. 848 (1939); Ohio Oil Company v. Sharpe, 135 F. 2d 303 (5th Cir. 1943) reversing 45 F. Supp. 969 (D. C. Okla. 1942), approved in 41 Mich. L. Rev. 747 (1943).
transfer it to the one who is entitled to it.\textsuperscript{2} It no longer obtains of
doubt that this remedy will be used against one who has acquired
property through violation of his fiduciary obligation not to divulge
confidential information belonging to his employer,\textsuperscript{3} and to third parties
who have received and used this information with notice.\textsuperscript{4} Another, and
perhaps more widely used device of equity to prevent revelation and use
of confidential information, is the injunction.\textsuperscript{5} Basically the same
rules apply to both, the difference being whereas the constructive trust
is restitutional, the injunction is preventive. It is not unusual to see
the two used in conjunction.\textsuperscript{6} The injunction, as so used, is not a recent
innovation. It was used as early as 1820 when Lord Eldon enjoined the
use of secret veterinary formulae by a third party, where the secret had
been acquired by an employee.\textsuperscript{7}

The rule that one in a fiduciary capacity is disabled from revealing
the secrets belonging to his employer is deceptively simple. In applying
the rule, however, three main problems of construction arise, namely:
(1) What information is secret and confidential; (2) When is an em-
ployee in a confidential or fiduciary capacity; and (3) What is the dura-
tion of the disability? Due to the wide diversity of employer-employee
relationships, and the myriad types of information with which they are
concerned, it is impossible to give an answer that is more than a wide
generalization. It is suggested that whether or not information is

\textsuperscript{2}Engelstein v. Mintz, 345 Ill. 48, 177 N. E. 746 (1931); 3 Bogert, Trusts
AND TRUSTEES, § 471 (1946).
\textsuperscript{3}Harrison v. Craver, 188 Mo. 590, 87 S. W. 962 (1905) ("Assuming the
fiduciary relation it is an elementary law not needing citation of authority that an
employee . . . may not seize benefits with both hands, coming and going.").
\textsuperscript{4}Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (2th Cir. 1937), RESTATEMENT,
RESTITUTION, § 201 (1939).
\textsuperscript{5}Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12 (1889); 2 Story, EQUITY
JURISPRUDENCE, § 1283 (1918) ("Courts of equity will restrain a party from
making disclosures of secrets communicated to him in the course of a confidential
employment; and it matters not, . . . whether the secret be a secret of trade, or
secret to title, or any other secret of the party important to his interests.").

After its disclosure equity will enjoin its use by third parties. Stewart v.
Hook, 118 Ga. 445, 45 S. E. 369 (1903); Elaterite Paint and Mfg. Company v.
S. E. Frost Company, 105 Minn. 239, 117 N. W. 338 (1906); Vulcan Detinning
1909).

\textsuperscript{6}Consolidated Boiler Company v. Bogue Elec. Co., 141 N. J. Eq. 550, 58
A. 2d 759 (Ch. 1948); Vulcan Detinning Company v. American Can Company,
75 N. J. Eq. 542, 73 Atl. 603 (Err. & App. 1909).
\textsuperscript{7}Yovatt v. Winyard, 1 J. & W. 394, 37 Eng. Rep. 425 (1820). In an earlier
case, Newberry v. James, 2 Mer. 446, 35 Eng. Rep. 1011 (1817), Lord Eldon
refused to grant an injunction, saying: "If the art and method were a secret, the
court could not without having it disclosed ascertain whether it had been in-
fringed." This has been handled in the American courts by taking the evidence
in the presence of the parties only, and sealing it for later use for determining if
the decree of the court has been violated. Taylor Iron Company v. Nichols, 73
N. J. Eq. 684, 69 Atl. 186 (Err. & App. 1908). Such disclosure does not act as
1903).
secret is a fact which must be proven. It is not necessary, however, that the information be an absolute secret. Ordinarily the term "confidential information" is understood to mean a secret process or formula, tool, compound or mechanism known only to its owner and those of his employees in whom it is necessary to confide for its profitable utilization, in contradistinction to "mere privacy" with which a business is usually cloaked. Once it is accepted that it is a wise public policy to protect such secrets, it does no violence to the idea to extend the protection to other types of information which are peculiar to, and essential to the owner's business. Authorities disagree as to whether this protection should be extended so as to include customer lists. It has been held that where physical lists are used, they are included, but where the knowledge is in the employee's memory, it is not, and cannot be the property of the employer, and is excluded. Illustrative, but not limiting of the generalized types of information which have been held to be confidential are geological data, customer lists, office methods and techniques, credit ratings, future stock trading plans, production methods and manufacturing processes, business opportunities, chemical formulae, insurance debits and expiration dates, and a code system showing cost and selling prices of merchandise. The mere fact that the owner considers it to be secret is not controlling, and though it be in fact secret, it must have a relationship to the activity of the em-

12 Garst v. Scott, 114 Kan. 676, 220 Pac. 277 (1923). (If the list is obtained by mere observation it is not secret.). Fulton Grand Laundry v. Johnson, 140 Mo. 359, 117 Atl. 753 (1922).
13 See note 1 supra.
18 State v. Kirkwood, 357 Mo. 325, 208 S. W. 2d 257 (1948); Irving Iron Works v. Kerlow Steel Flooring Co., 103 N. J. Eq. 240, 143 Atl. 145 (Ch. 1928).
19 Volk Company v. Fleschner Bros., 60 N. Y. S. 2d 244 (Sup. Ct. 1945).
22 Simmons Hardware Company v. Waibel, 1 S. D. 488, 47 N. W. 814 (1891).
ployer.\textsuperscript{22} A fortiori, information which is of a nature known generally to the trade, or which is readily obtainable elsewhere is not confidential.

While a mere employee is not usually thought to be in a fiduciary relation to his employer, if he comes into possession of secrets relating to his employer's business, he occupies a position of trust analogous in most respects to that of a fiduciary and is governed accordingly.\textsuperscript{24} This rule has been applied to a secretary who learned his employer's future stock trading plans;\textsuperscript{25} to a book-keeper privy to the company's loan procedures;\textsuperscript{26} to a store manager in possession of customer credit ratings;\textsuperscript{27} industrial chemists in possession of secret formulae;\textsuperscript{28} an engineer supervising production methods;\textsuperscript{29} to route salesmen in possession of customer lists.\textsuperscript{30} It has also been applied to insurance agents,\textsuperscript{31} and to a tannery employee who knew his employer's secret process for making leather.\textsuperscript{32} In an interesting early case it was applied to a student who was enjoined from publishing his professor's lectures for outside sale.\textsuperscript{33}

The duty not to divulge confidential information is said to be contractual. Courts differ as to whether the contract must be express\textsuperscript{34} or may be implied from the nature of the employment.\textsuperscript{35} The basis for the protection is said to be the employer's property right therein,\textsuperscript{36} and in some cases, as in customer lists, it is spoken of as "good-will" belonging to the business.\textsuperscript{37} This duty is said to exist after the termina-

\textsuperscript{22} Young v. Bradley, 142 F. 2d 658 (6th Cir. 1944).
\textsuperscript{26} Friedman v. Stewart Credit Corp., 26 N. Y. S. 2d 529 (Sup. Ct. 1939) (injunction).
\textsuperscript{28} See note 20 supra.
\textsuperscript{29} State v. Kirkwood, 357 Mo. 325, 208 S. W. 2d 257 (1948); Irving Iron Works v. Kerlow Steel Flooring Co., 103 N. J. Eq. 240, 143 Atl. 145 (Ch. 1928) (constructive trust).
\textsuperscript{30} See note 14 supra.
\textsuperscript{31} Morrison v. Woodbury, 105 Kan. 617, 185 Pac. 735 (1919) (injunction).
\textsuperscript{32} Du Pont Powder Company v. Masland, 244 U. S. 100 (1917) ("The word 'property' as applied to trade secrets is an unanalysed expression of certain secondary consequences of the primary fact that the law makes some elementary requirements of good faith.").

tion of the employment as well as during its continuance.\footnote{Wooley's Laundry v. Silva, 304 Mass. 383, 23 N. E. 2d 899 (1939); State v. Kirkwood, 357 Mo. 325, 208 S. W. 2d 257 (1948).} If held otherwise the employer would be at the mercy of an unscrupulous employee, who on receipt of a given trade secret could decamp with impunity. While authorities are generally silent as to how long this duty continues after the termination of the employment, it is reasonable to assume that the duty will be said to exist as long as revelation or use of such information has the power to harm the owner.\footnote{It has been held, however, that it is not necessary that the owner should have suffered any actual loss. Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937).}

In the principal case it was urged, unsuccessfully, that defendant's loyalty was relaxed as to information of areas in which the plaintiff was no longer interested. The court intimated that such defense might be made if it could be proven that such areas of interest had been abandoned. It has been held, however, that the employee may not be the judge of what his employer may or may not be interested,\footnote{Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937).} and a constructive trust has been decreed as to property of a type only occasionally purchased by the plaintiff, where there was no showing that he would have in fact purchased the property.\footnote{Whitten v. Wright, 206 Minn. 423, 289 N. W. 509 (1940).}

The extension of the rule\footnote{See notes 3 through 6 supra.} to the more mundane kind of employees and to the less technical types of information is a salutary example of the development of the conscience of business.\footnote{But see, Simpson, Equity, Annual Survey of American Law, 839 (1946). ("In view of the ease with which any business practice can be labeled 'confidential,' and of the fact that enforcement of covenants not to compete by employees is justified only where the interest of the former employer materially outweighs both the public interest in free competition and in the dissemination of useful knowledge, and the employee's interest in being able to learn and apply his skill to his own advantage, all these decisions (as to confidential information) seem dubious. Certainly the tendency which they manifest cannot be extended if freedom of individual enterprise is to be preserved. A fictional extension of the 'trade secret' concept should not be allowed to become the tool of monopoly.").} 

Joseph P. Hennessey

Venue—Waiver Under Non-Resident Motorist Statutes

B of Texas was injured by the allegedly negligent operation of an automobile by A of New York in the State of Vermont. Service was made on the Commissioner of Motor Vehicles in accordance with the provisions of the Vermont non-resident motorist statute,\footnote{VT. REV. STAT. § 428 (1947), as amended VT. Public Acts, 1951, § 209.} and suit commenced in the federal district court sitting in Vermont. The court denied defendant's motion to dismiss for failure to satisfy the federal