

# The protection of TV formats, Part 2 - confidentiality

Ben Stevens

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## Subject

Media and entertainment

## Other related subjects

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## Keywords

Breach of confidence; Confidentiality; Confidentiality agreements; Format rights; Programmes; Television

## Cases cited

[Coco v AN Clark \(Engineers\) Ltd \[1968\] F.S.R. 415; \[1968\] 7 WLUK 2 \(Ch D\)](#)

[Fraser v Thames Television Ltd \[1984\] Q.B. 44; \[1982\] 10 WLUK 199 \(QBD\)](#)

[De Maudsley v Palumbo \[1996\] E.M.L.R. 460; \[1995\] 12 WLUK 175 \(Ch D\)](#)

[Wade v British Sky Broadcasting Ltd \[2014\] EWHC 634 \(Ch\); \[2014\] 3 WLUK 219 \(Ch D\)](#)

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**\*Ent. L.R. 59** Part 1 of this series of articles looked at the use of copyright to protect television formats. Whilst that is a potentially useful avenue, there are other options. All will depend on the precise circumstances but Pt 2 canvasses some of the potential arguments relating to confidentiality.

In the development stage, the law governing confidentiality could be applicable in circumstances where information relating to a proposed television format has been shared with somebody else, e.g. a potential producer or broadcaster, who has then gone on to exploit that information without consent. The reason this only applies during the development stage is that once information comes into the public domain—as a television format would once it has been produced and broadcast—it can no longer be confidential.

The classic test for whether there has been a breach of confidence comes from the case of *Coco v AN Clark (Engineers) Ltd*,<sup>1</sup> which sets out the three key elements:

1. the information must have the "necessary quality of confidence" about it, i.e. be of a confidential nature and not in the public domain;
2. the information must have been communicated in circumstances importing an obligation of confidence; and
3. there must have been an unauthorised use of the information to the detriment of the person who communicated the information.

Whilst breach of confidence is limited to the protection of ideas in the development phase, it is at least well settled that confidentiality can, in principle, attach to a proposed television format.

In the case of *Fraser v Thames Television Ltd*,<sup>2</sup> the idea for a proposed sitcom involving the members of a band called *Rock Bottom* was orally communicated by one of the claimants (with the consent of the other claimants) to one of the defendants. The defendants, who were all aware that the idea belonged to the claimants and had been communicated in confidence, went on to develop a television series based on their idea without their consent.

The judge accepted that:

"to be capable of protection the idea must be *sufficiently developed*, so that it would be seen to be a concept which has at least *some attractiveness* for a television programme and which is *capable of being realised* as an actuality." (emphasis added)

He went on to say that "I do not think that this requirement necessitates in every case a full synopsis" and, in some cases, "the criteria may be met by a short unelaborated statement of an idea". He also held that "the idea must have some *significant element of originality* not already in the realm of public knowledge" (emphasis added).

The judge, who had been assisted by an earlier Australian case<sup>3</sup> arising on very similar facts, summarised the requirements as being that a claimant "must establish not only that the occasion of communication was confidential, but also that the content of the idea was clearly *identifiable, original, of potential commercial attractiveness and capable of being realised in actuality*" (emphasis added).

In some respects, these requirements are not that dissimilar to the requirements for copyright to subsist. Originality is, of course, a key requirement and, as we saw in Pt 1 of this series, in relation to television formats it has been said that there must be "a number of clearly identified features" that "distinguish the show in question". However, there are two notable differences. The first is the recognition that the law of confidentiality can protect an idea. That basic principle was subject to the important requirements set out above, i.e. that the idea must be sufficiently identifiable etc. Nevertheless, it is the idea itself which is subject to protection.

Linked to the above was the conclusion that an idea expressed only orally could be protected, i.e. there is no need for the idea to be fixed in a permanent form. The judge concluded that "neither the originality nor the quality of an idea is in any way affected by the form in which it is expressed", although there is no doubt that the communication and content of an oral idea would be more difficult to prove than an idea expressed in writing. This contrasts sharply with the law of copyright which emphatically does not protect an idea, but protects the expression of an idea, and is concerned with the copying of material that has been recorded in permanent form.

These principles have been applied in subsequent cases, albeit some of them have not had much merit. It is not uncommon for arguments in copyright and breach *\*Ent. L.R. 60* of confidence to be made alongside each other. *Banner*,<sup>4</sup> discussed in Pt 1 of this series, was one such example. In that case, it was held that the claimant was estopped from bringing a claim in breach of confidence because of previous proceedings in Sweden. However, even if that had not been the case, the judge would have been inclined to accept that the claimant's format was "too vague and insufficiently developed to qualify for protection as confidential information under English law", demonstrating that these issues are always matters of degree.

The requirements set out in *Fraser* were discussed in *De Maudsley v Palumbo*.<sup>5</sup> This case did not concern a television format, but related to the idea for a nightclub which, it was alleged, had been disclosed to the defendant in confidence who had then acted in breach of confidence by using the idea in the course of opening what became the *Ministry of Sound* nightclub.

The findings are, however, of wider application as the judge accepted that for a:

"... literary, creative or entertainment industry idea to achieve the status of confidential information ... the idea must:

- (1) contain some significant element of originality
- (2) be clearly identifiable (as an idea of the confider)
- (3) be of potential commercial attractiveness
- (4) be sufficiently well developed to be capable of actual realisation."

This was, of course, based on the discussion in *Fraser* and shows that the principles set out there have started to take root in English law.

In the event, it was held that the claim failed to satisfy all of the requirements for a breach of confidence claim to succeed. The idea was not imparted in circumstances importing an obligation of confidence as the relevant discussion took place on a social rather than business occasion and the claimant deliberately refrained from mentioning confidentiality because he was concerned that the defendant would not agree to discuss it on that basis. Most notably, the judge did not accept that the idea upon which the claim was based was original. The idea was alleged to consist of five separate features that, in combination, were original. The separate components of the idea were variously held to be too general, vague, insufficiently elaborated and not novel.

The claim to originality in relation to a combination of features also failed:

"... partly because quite significant parts of the claimed five features were not in fact part of [the claimant's] idea and partly because a combination of features which were not individually novel does not automatically become novel by being added together."

The idea could not, therefore, be protected as confidential information.

Fast forward almost 20 years and the High Court decision in *Wade v British Sky Broadcasting Ltd*<sup>6</sup> and its appeal, reported in 2016,<sup>7</sup> provides the next significant case on confidentiality in a proposed television format. In this case, the claimants had pitched an idea for a music-based TV talent show called *The Real Deal* to Sky and had sent them a PowerPoint slide deck as part of this. Sky went on to broadcast a similar show called *Must Be The Music*, which the claimants alleged misused their confidential information.

In the High Court, discussing the underlying principles, Birss J (now Birss LJ) referred to the *De Maudsley* case and commented as follows:

54. "... the person whose idea it was had to have used their brain and produced a result which could only be produced by someone going through the same process. The antithesis of the idea being expressed by Knox J [in *De Maudsley*] and Lord Greene [in *Saltman Engineering v Campbell*<sup>8</sup>] would be a mere aspiration of the kind expressed by the phrase 'Wouldn't it be great if ...'. Or in other words one needs to go beyond simply identifying a desirable goal.

55. These are all attempts to address the problem of vagueness. *It is clear that ideas which are too vague are not protected* but one needs to be careful not to take the words Knox J used out of context. In the passage relied on the learned judge said that the element has to be capable of being realised as a finished product. That could mean that a pitch document for a television programme could never be protected by the law of confidence simply because all the details had not been worked out. I do not agree with that (nor do I believe it is what Knox J meant).

56. The evidence before me distinguished between a pitch document like the deck and a detailed treatment, the latter being a fully worked out explanation of a television programme. *The law will not only protect a treatment. A worked out and detailed pitch which includes concrete ideas for a television programme is capable of being protected by the law of confidence as long as the other aspects of the law are satisfied. The \*Ent. L.R. 61 fact that it is not as detailed as a full treatment does not mean it is not protectable.* On the other hand if it is too vague and unoriginal or both, it will not contain anything with the necessary quality of confidence to be protected." (emphasis added)

The judge went on to hold that the slide deck "as a whole" had the necessary quality of confidence to be protected as confidential information. This was because it contained a proposal which had been "worked out [in] some detail" and was "capable of being used as a firm basis on which to take a project forwards". It was not "merely a set of vague aspirations". However, this did not assist the claimants because, whilst Sky "were not free to publish the deck", what was alleged to have taken place was that "some of the ideas set out in the deck" had been taken and used in making *Must Be The Music*. The judge, therefore, had to identify what ideas set out in the slide deck were being relied on by the claimants and whether they could be protected.

After identifying those ideas, the judge concluded that:

76. "There are no other individual ideas in the deck which on their own have the necessary quality of confidence but that does not mean the claimants have no rights. A line exists somewhere between the full detail of the deck as a whole, which I have accepted as being protectable, and the individual ideas taken alone, none of which I have accepted. The question is where that line is to be drawn.

77. The claimants' case is really that the combination of the emphasis on singer-songwriters and chart eligible downloads in a music talent show has the necessary quality of confidence to be protectable."

Adopting a generous approach towards the claimants, who acted in person at the trial, the judge identified a combination of four key ideas that "one might say that the claimants should then rely on". He doubted whether the combination actually reflected the content of the slide deck and thought there was a danger of the combination having been cherry picked with hindsight. The judge did not, however, reach a decision on whether the particular combination he had identified had the necessary quality of confidence. This was because he found that, as a matter of fact, *Must Be The Music* was created entirely independently of *The Real Deal* and there was, therefore, no question of the claimant's confidential information being misused. Whilst this was good news for the defendant, disappointingly for neutral observers it meant that the most interesting question was ducked.

The case went to the Court of Appeal where Briggs LJ held that it was:

"... just as unnecessary for me, as it was for the judge, to deal with the perhaps quite difficult question whether any particular combination of the factors relied upon by the claimants as enjoying the necessary quality of confidence satisfied that condition."

This is unfortunate because as Briggs LJ noted:

"The law is less clear about the analysis which is called for when (a) no single feature of the claimants' format alleged to have been misused by copying has, on its own, the necessary quality of confidence about it; (b) the claimants' format is as a whole of confidential quality but is not copied, lock stock and barrel, by the defendant; but (c) a combination of features of the claimants' format is copied by the defendant which are alleged to have the necessary quality of confidence about them, in the aggregate, but where the two formats, viewed as a whole, have important differences between them."

In reality, given the way in which television formats develop over time, it is perhaps more likely that disputes in relation to the use (or misuse) of a proposed television format will arise in circumstances where only some ideas or features have been used, rather than an entire proposal being copied "lock stock and barrel". An insight into judicial thinking on these issues would, therefore, have been valuable. Nevertheless, it is clear that proposals can be protected as confidential information without them having to amount to detailed treatments.

Part 1 of this series referred to agreeing that the contents of any meetings discussing a proposed television format should be treated as confidential where possible. This does not have to be documented as such an obligation can be implied depending on the circumstances, i.e. where the information was communicated in circumstances importing an obligation of confidence as discussed above. However, if an express obligation of confidentiality can be agreed, including by way of a very simple non-disclosure agreement, this could provide a useful additional means of protecting the information discussed in a meeting. Such an obligation may be resisted at the outset but, if the relationship is at a more advanced stage, it may be possible to incorporate confidentiality obligations as part of an option or development agreement.

Practically speaking, this may be difficult in circumstances where proposed television formats are sent to production companies on an unsolicited basis (as has been the case in some of the reported cases). It would be prudent for any presentation/document to be marked as confidential and for any covering emails or letters to at least ask that the information contained within the format be treated confidentially. Although this is likely to be of little use legally given that an obligation *\*Ent. L.R. 62* of confidence cannot simply be imposed unilaterally<sup>9</sup> (whether such an obligation would arise depends on all the circumstances), it would at least alert the recipient to the fact that the sender regards the information as confidential. If, following a speculative submission, a meeting is then held to discuss the proposed format, confidentiality could be discussed further (including as part of the negotiation of option or development agreements mentioned above).

We must await further clarity on how the courts will apply the principles to cases where a particular combination of features of a television format are alleged to be novel, or where only some features set out in a proposal have been used. In the meantime, creatives must do what they can to ensure that their content is treated confidentially.

### Postscript

The author is grateful to Anna Frankum, partner at Penningtons Manches Cooper, for her input into this article.

**Ben Stevens**

*ASSOCIATE*

*PENNINGTONS MANCHES COOPER*

### Footnotes

- 1 *Coco v AN Clark (Engineers) Ltd* [1968] F.S.R. 415; [1969] R.P.C. 41.
- 2 *Fraser v Thames Television Ltd* [1984] Q.B. 44; [1983] 2 W.L.R. 917.
- 3 *Talbot v General Television Corp Pty Ltd* [1981] R.P.C. 1.
- 4 *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch); [2018] E.C.C. 4.
- 5 *De Maudsley v Palumbo* [1996] E.M.L.R. 460; [1996] F.S.R. 447.
- 6 *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch).
- 7 *Wade v British Sky Broadcasting Ltd* [2016] EWCA Civ 1214.
- 8 *Saltman Engineering Co v Campbell Engineering Co* (1948) 65 R.P.C. 203.
- 9 See, e.g. *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch); [2018] E.C.C. 4 at [77].