

CASENOTE: New Aim Pty Ltd v Leung [2023] FCAFC 67 (10 May 2023)

New Aim Pty Ltd (also ‘**Applicant**’) conducts a large, online retail business in Australia. It sources products from a range of suppliers in China. New Aim sought relief against its former employee, Mr Leung, and other parties. This casenote is the third instalment of casenotes I wrote in November 2021 (concerning the application), and June 2022 (concerning the trial at first instance). This casenote concerns the appeal.

The claims against Mr Leung concerned breaches of his employment contract, breaches by him of his equitable obligations not to use confidential information (*viz*, breach of confidence in equity), and of sections of the *Corporations Act* 2001 (Cth). Claims were made against the Mr Leung’s new employer related to these claims.

Two main issues were resolved by Justice McElwaine of the Federal Court of Australia against the Applicant’s interests at first instance. The first was in respect of confidential information, in which McElwaine J made findings that not all claimed confidential information was confidential. Also, his Honour made findings rejecting the Applicant’s expert evidence. Despite the significance of these latter findings (see below), this casenote concentrates on the former question and findings of confidentiality.

In the end effect, the Federal Court dismissed the Applicant’s application relating to the claims pendant on confidentiality; it found that the extent of confidential information was narrower than claimed during the trial. New Aim appealed against McElwaine J’s judgment.

Appeal

Justices Kenny, Moshinsky, Banks-Smith, Thawley and Cheeseman heard the appeal. The five-member Full Court (which is relatively unusual for an intermediate appeal) was convened because of the possible challenge¹ to Futuretronics, a previous, and unanimous Full Court decision which has been considered authoritative on the meaning of section 183 of the *Corporations Act*.²

Rationale

The Court on appeal examined the grounds of appeal, and the first instance conclusion that the identity of suppliers for New Aim’s business were confidential to the Applicant-appellant company: [18]. New Aim’s case was that confidentiality resided in the *identity and contact details of its suppliers*. In a similar way to Del Casale,³ in the NSW Court of Appeal, the Applicant sought to convince the first instance judge that because of the money, time and effort expended in identifying suppliers, this was both confidential and a valuable resource.

In this case, there existed WeChat contact details of the representatives of the 17 suppliers in circumstances where New Aim had identified those suppliers reliable sources of high-quality products that were suitable for the Australian market. At first instance, McElwaine J found that as the Applicant permitted Mr Leung to use his personal mobile phone for work related purposes without requesting Mr Leung transfer his WeChat contact details to any more formal

¹ Foreshadowed in the Appellant’s grounds of appeal.

² Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd (2009) 81 IPR, per Tamberlin, Finn and Sundberg JJ, in particular [44] and [46].

³ Del Casale & Ors v Artedomus (Aust) Pty Ltd [2007] NSWCA 172; 73 IPR 326; 165 IR 148.

database, such as their existing New Aim Purchasing System, the WeChat information did not possess the necessary quality of confidence.

New Aim alleged that trial judge did not distinguish between the WeChat contact details and the information (undoubtedly confidential) contained in the appellant's purchasing system. The appeal judges unanimously found that his Honour Justice McElwaine confused the confidentiality of each source of information. This was particularly so when examining his Honour's conclusions about the purchasing system of New Aim.

Their Honours found that the conclusions about the WeChat data (which included identity of suppliers, though many more than supplied products to New Aim) the first-instance judge to mistakenly restrict the definition of 'confidential information'. Accordingly, the first-instance findings relating to the three main claims (contract, equity and Corporations Act) which depended upon the judge's findings of confidentiality, were not sustainable. The appellant's claim was allowed, and the findings at first instance quashed and remitted.

Significance of the decision

The first instance decision in New Aim⁴ attracted attention because of the approach to the expert witness's evidence, which was rejected by the judge (in part due to the manner of its preparation) as well as not being in accordance with the prevailing Practice Note. This decision been remarked upon for the same reason.⁵

Despite this, I previously observed that the (sometimes *obiter*) approach of McElwaine J in relation to notions of confidentiality was novel.⁶ This decision is significant because of the care the Full Court took to indicate a more orthodox approach to the question of confidentiality. It stands as something of a benchmark when seeking either injunctive or final relief.

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19 June 2023

⁴ [2022] FCA 722.

⁵ For example: <https://www.mondaq.com/australia/disclosure-amp-electronic-discovery-amp-privilege/1322382/expert-evidence-new-aim-pty-ltd-v-leung-2023-fcafc-67>. No mention of the confidentiality rulings exist in this summary.

⁶ <https://www.timdonaghey.com.au/casenotes-and-articles/new-aim-pty-ltd-v-leung-2022-fca-722-23-june-2022/>.