

The logo features a stylized, dashed line graphic that resembles a series of connected arches or a wave, positioned to the left of the company name.

Wigley & Company

BARRISTERS *and* SOLICITORS

**CONFIDENTIAL INFORMATION BREACHES NOW  
EASIER TO PROVE**

**June 2006**

In our February 2005 online article, *Confidential Information Breaches Can be Difficult to Prove*,<sup>1</sup> we set out some of the risks and solutions around protection of confidential information, and greater difficulties caused by a Court of Appeal decision. The Privy Council has now reversed the Court of Appeal.

- 1 **Introduction:** The observations in our earlier paper, on risks and solutions in respect of confidential information, continue to apply. This Privy Council decision<sup>2</sup> confirms that protection of confidential information is a little easier.
- 2 **What's changed?** The facts in *Norbrook v Bomac* are set out in more detail in our earlier article. In essence, the Court of Appeal held that Bomac had not breached its contractual undertaking to “*maintain in confidence and not use*” confidential information (namely a chemical formulation). The Court of Appeal said that, as the confidential information had just subconsciously gelled in the mind of the relevant person at Bomac (and he did not think that it was confidential information when that happened), that did not constitute a breach.
- 3 The Privy Council quickly despatched this conclusion by noting that, in any event, the confidential information had been used and that was the end of the matter. Part of the reasoning of the Court of Appeal revolved around whether Bomac had made “*improper use of that information*”, when Privy Council found the issue is simply whether it was used, improperly or not.
- 4 **Evidential Issues:** The Privy Council went further and confirmed that existing evidential rules applied. Where the legal burden of proof lies on a party, if that party adduces evidence from which, in the absence of any adequate explanation or answer, an inference of breach may properly be drawn, an evidential or provisional burden falls on the other side. This is just common sense, said the Privy Council. The principle is generally applicable, but the Privy Council said it applied in a confidential information case as follows:<sup>3</sup>

Thus if A entrusts B in confidence with secret proprietary information not publicly available, and B is precluded by contract from using that information for its own purposes, and the relationship between them ends, and B puts on the market a product which would not ordinarily be made without using A's secret information, a claim by A for breach of contract is likely to succeed unless B shows that it obtained the information from another legitimate source, or as a result of independent research, or in some other manner not involving misuse of A's information.

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<sup>1</sup> <http://www.wigleylaw.com/Articles/LatestArticles/ConfidentialInformationBreachesCanBeDifficultToPr1/>

<sup>2</sup> *Norbrook v Bomac* [2006] UKPC 25 (PC) Lord Bingham.

<sup>3</sup> *Norbrook v Bomac* [2006] UKPC 25, para 31 (PC) Lord Bingham .

- 5 **Conclusion:** There will still often be difficulties with proving breaches of confidential information but the Privy Council decision makes this easier. The risks and solutions that we outlined in our earlier paper continue to apply in other respects.

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While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society).

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