

Who owns “your” contact list?

Philip Henson, employment solicitor at the Kingston upon Thames office of Howell-Jones rhw, writes:

Almost every employee will have a list of address or contacts, whether they are personal or business related, on their work computer system. But who actually owns the information once it has been inputted into the computer system of the employer?

This question would not normally crop up in everyday discussions in the work place, however, if an employee leaves, or is about to leave, especially in acrimonious circumstances, then the question becomes more relevant.

This briefing note considers a recent High Court decision which sets out how the facts could be relevant to both employers and employees.

Recent decision

A recent High Court decision ¹ has confirmed that where a list of contacts was contained on an employee’s email program (Outlook) and backed up by the employer, it belonged to the employer and could not be removed or copied by employees for use outside their employment, or after they left.

The facts

Pennwell Publishing (UK) Limited (“Pennwell”) is a company whose central business is organising conferences and exhibitions, especially in the petroleum and power industry.

Pennwell became concerned that certain employees were involved in setting up a competing company in October 2006. After the employees left it emerged that substantial quantities of confidential information had been removed. This information included lists of potential customers, suppliers and advertisers. Claims were brought

¹ Pennwell Publishing (UK) Ltd v (1) Nicholas Patrick Ornstien (2) Daniel Stanley Noyau (3) Junior Isles (4) Energy Business Group Ltd (2007) QBD

against the ex-employees and a newly formed company established by some of the ex-employees. The claims against the ex-employees, except for Mr Junior Isles, and the new company were compromised prior to trial.

This note concentrates on the proceedings against Mr Junior Isles who was a publisher and also editorial director, for Pennwell.

Mr Isles

When Mr Isles joined Pennwell he added the contact details of his existing contacts to the Outlook system maintained by Pennwell. It was backed up on the Pennwell server on a regular basis and accessed by Mr Isles by logging into Pennwell's system.

Company property

In reply to pre-action correspondence Mr Isles said, via his solicitors, that: "*He does not of course count his own journalistic contacts as the property of Pennwell*". He was subsequently ordered to return all items, including electronic storage devices containing information and that he would not delete any information until after a court hearing in October 2006.

Mr Isles confirmed in an affidavit that he had purchased a personal laptop computer before he left (as Pennwell had asked him to return his company laptop) and he had asked the personnel department to set up his new personal computer so that he could continue working until he left Pennwell at the end of August 2006. As a result a large amount of information was transferred to his personal computer.

Mr Isles subsequently made his computer available for forensic images to be taken and for information to be deleted. When examined it showed that part of a file was created at a different time as he had previously stated. Mr Isles changed solicitors at this stage.

Mr Isles then later claimed that he had a memory stick which was corrupted and disposed of, and other explanations of how he had created his own database.

Mr Isles tried to show that they had retained the contact information for a legitimate reason; he said that they needed the contacts for the purpose of maintaining key journalistic contacts. The Court held that the lists had been taken to ensure that the

departing employee had the widest possible list of contacts to be used by the new company, Energy Business Group Ltd. The judge also criticised Mr Isles for the answers which he had given prior to trial as being inadequate and partially inaccurate.

Human Rights

Mr Isles put forward an argument under Article 10 (freedom of expression) of the European Convention on Human Rights. He also argued that to hand over the contacts would breach specific section of the Press Complaints Commission Code of Practice which sets out that journalists have a moral obligation to protection confidential source information. The judge found that on the facts the Article 10 rights were not significantly engaged and that confidential sources would not be threatened.

What is confidential information?

As a general principle an employee cannot be restrained from using information obtained during employment and after that employment has come to an end unless it falls within the category of trade secrets, or a restricted category. The court has to carry out a balancing exercise to assess whether information is protected considering the nature of the employment and also the nature of the information itself. It is important to look at the employment contract to ascertain the references to confidential information.

The judge held that the contact details were not sufficiently confidential to amount to a trade secret and that if Mr Isles identified details of the contacts during his course of employment and selectively identified contacts that he might wish to use in the future, he could not have been prevented from using the information after the end of his employment. However the problem remained with the definition of what was company property, as defined in his employment contract.

The taking of a list of customers or contact by an employee and its use have long been considered to be a breach of an employee's duty of fidelity.

Conclusion

Pennwell were entitled to retain the database which Mr Isles delivered up to them and a permanent injunction against him preventing use of it, except for individual parts.

Lessons to be learnt – employers

Employers, especially those in the finance, sales and marketing industries, should ensure that their employment contracts are worded to include the following:

- Detailed clauses prohibiting employees having any other interest outside of the company,
- detailed restrictive covenant clauses,
- detailed clauses relating to the use of confidential information, and
- detailed clauses which stipulate that when an employee leaves they will hand over all company property, including copies of any contact lists and databases.

Company hand books should also be reviewed regularly and the content of the handbooks should be brought to the attention of all employees, and be easily available to view, such as on the intranet. The judge said that *“it is in my judgment highly desirable that employers devise and publish an email policy of the kind which in this case was devised by Pennwell”*.

Lessons to be learnt – employees

For the employee the judge considered that if the database was maintained as a separate spreadsheet by the employee then the ownership would rest in him. The judge held that it was reasonable to imply a term that in the absence of guidance (email policy) an employee be entitled to take copies of their personal information and, if the information is confidential to them (such as their doctor, banker or legal advisor) remove them from the employer’s system. The judge emphasised that most email systems have the option to create a personal address contact address book; this should be utilised.

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This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead it is intended to act as an introductory view of some of the legal considerations relevant to the subject in question.