

(As published in UPOV Gazette No. 94, December 2002)

NEW ZEALAND

**COURT DECISION ON BREACH OF CONFIDENCE -  
DISCLOSURE OF A CONFIDENTIAL PROPAGATING TECHNIQUE**

**“PVR Poacher sues Gamekeeper - and Wins<sup>\*</sup>”**

A nursery in New Plymouth, New Zealand, has won an action in breach of confidence against the New Zealand police [*Stepping Stones Nursery Limited v Attorney General (for New Zealand Police)*]. The case has a most unusual set of facts.

Evidence gathered by the police in a criminal investigation was used in a civil action by a plant variety right holder. The Judge found that the police had committed a breach of confidence by providing the information to the holder, not justified by any public interest. However, although the Judge did decide the nursery was entitled to some damages, these were limited to detriment caused only by actions of the police. It was a victory, but a Pyrrhic one.

The action arose as a result of a complaint to the police by another nursery, Duncan and Davies Nurseries (DD), alleging that Stepping Stones Nursery (SS) had stolen budwood of DD's maple tree variety, Red Dragon. The variety was protected by a plant variety right. The police found no evidence of theft, but did find 1,700 Red Dragon plants in various stages of propagation. The police told DD of the existence of these plants and provided information of how they were propagated.

DD sued SS for plant variety right infringement. That action was eventually settled when SS took a licence from DD. SS then turned their attention to the police. Shortly before the end of the limitation period for doing so they sued the police for breach of confidence in releasing to DD the information gathered in the criminal investigation.

The Court had no difficulty in concluding that, in the circumstances of the police investigation, the information was confidential. The question the Court went on to consider was whether or not there was any public interest overriding the duty of the police not to disclose commercially sensitive information of a competitor to DD. The Judge concluded that there was no such public interest and therefore a breach of confidence had occurred.

Stepping Stones Nursery had claimed damages under five headings:

1. Defending a plant variety right infringement proceeding
2. Loss of chance to successfully apply for a compulsory licence
3. Loss of sales from contracted growers who had turned around and sold plants to a subsidiary of DD

---

\* The review of this case is reproduced with the kind permission of A.J.Park, Intellectual Property Lawyers and Consultants, New Zealand. The article was previously published in A.J.Park's "IP Newz", issue no. 29, November 2002 and in the January 2002 issue of the "New Zealand Plant Variety Rights Journal".

4. Loss of a commercial advantage by disclosure of SS's secret propagating techniques to DD, and
5. General exemplary damages.

The Judge had disposed of the first three grounds. Whatever detriment SS had suffered was not a result of the actions of the police, but because SS had propagated 1,700 plants in breach of DD's plant variety right. The police disclosure did not cause the detriment, it only gave DD the opportunity to enforce its rights.

SS did succeed on the fourth ground of special damages claimed. It was because of the police disclosure that a confidential propagating technique developed by SS was put into the hands of DD.

On the fifth point the Judge held that SS was entitled to nominal general damages. He also stated that SS was entitled to exemplary damages, which would be determined once a decision of the Privy Council allowing an appeal from the New Zealand Court of Appeal on exemplary damages had been published. If the parties cannot agree on the quantum of these damages there may be an epilogue to this decision.

In the end, justice was done. The plaintiff nursery did not receive the quantum of damages they were seeking because they had been the main authors of their own fate. The police were given the message that, while they are defenders of public rights, they are not always defenders of private rights.

It would be interesting to speculate upon a situation where the police had simply said to DD that they had found no evidence of any crime. Would DD have succeeded if they had gone to court to seek discovery of the police report, allowing them to pursue the infringement action?