

# Insurance Brief

## A QUIET WORD IN YOUR EAR ABOUT CONFIDENTIALITY *Halliday & Nicholas Insurance Brokers Pty Ltd v Corsiatto & Anor* Court of Appeal (NSW) 29/08/01

Mr Corsiatto was a broker employed by Halliday & Nicholas Insurance Brokers (H&N). Prior to ceasing employment with H&N, he prepared a list of the clients for whom he was responsible. This information was confidential to his employer.

He left H&N and joined a rival broking firm - DHB. It was agreed with the directors of DHB that he would work as a sub-broker. DHB would retain 20% of the brokerage earned by Mr Corsiatto with the balance being to Mr Corsiatto's credit.

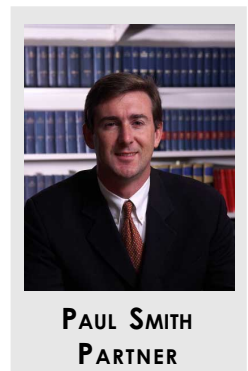
The day after leaving H&N, Mr Corsiatto sent circular letters to about half of the H&N clients for whom he had been responsible in a letter approved by DHB. He then contacted all of the former clients. All of this contact was based on the list he prepared prior to leaving and which he had taken with him. He succeeded in obtaining appointments from many of them. Unsurprisingly, H&N brought an action for a breach of fiduciary duty. What is of perhaps more interest is that H&N also sued DHB alleging, (amongst other things),

misuse of confidential information. Again unsurprisingly, both at trial and on appeal Mr Corsiatto was held to have breached his fiduciary duty owed to H&N. He was compelled to account for the profits made although he was given an allowance for the time, trouble and expertise involved. The position might have been different for him had he compiled the list from his own memory. However, the Court held that because he had obtained the confidential information whilst in the employ of H&N and then used the list to immediately contact certain clients the very next day after leaving his former employer, his task in obtaining those clients was made easier. Hence the finding of liability against him.

On appeal, H&N said that DHB was liable for the misuse of the information obtained by its agent Mr Corsiatto. DHB was not held responsible for the breach of fiduciary duty committed by him. However it knew that Mr Corsiatto intended to canvass former clients and the directors approved the letter he sent out.

The general principle was restated by the Court that, if it is proved that a party has used confidential information directly or indirectly obtained without the consent (express or implied) of another party, then they will be guilty of infringing that other party's rights.

Because of the agency relationship between Mr Corsiatto and DHB, it was held that DHB through its agent had misused the confidential information.



There was an interesting comment by one of the appeal judges that liability for misuse of confidential information is not confined to parties who owe a duty of confidence. It can extend to third parties who receive and use the information, perhaps even if they have no direct knowledge. The judge said that it did not matter that the directors were not personally aware of Mr Corsiatto's misuse of the information and that the Court had a wide power in equity to award compensation against third parties such as DHB. However it should be noted that the other appeal judges were not prepared to go so far and relied solely on the agency relationship which existed for finding liability against DHB.

The case is also instructive in that it provides a guideline as to how the Courts may assess the quantum of such a loss of profit claim.

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## NEW STRESSES FOR INSURERS IN THE EMPLOYMENT SECTOR

### *Sutherland v Hatton* Court of Appeal (UK) 05/02/02

There has been much publicity in the New Zealand press about the prospects of stress claims being included in the proposed amendment to the Health and Safety in Employment Act. Insurers providing cover for the fines and penalties that may be awarded under that Act will be aware that those fines will not be insurable under the new Act although that will not prevent insurers from offering legal defence costs cover. With the possibility of prosecutions for stress the market demand for such cover may well increase.

However stress claims in the employment context are already established in New Zealand law under the personal grievance regime established by the Employment Relations Act and its predecessors. Readers will be aware of the decisions in **Gilbert** and **Brickell** where a social worker and a police videographer established stress claims and were awarded damages covering loss of earnings effectively to the end of their working lives.

Fortune Manning has been involved recently in advising on a stress claim arising out of a professional services firm; billable hours and those types of stresses. This claim settled on confidential terms and so provides no precedent but does illustrate the proliferation of such cases. In the UK, with the less constrained personal injury regime, stress cases have been on the march. In a recent decision of the English Court of Appeal (**Sutherland v Hatton**) the Court provided some directions:

1. *The ordinary principles of employer's liability apply to stress claims.*
2. *The threshold question is whether stress to this particular employee was reasonably foreseeable and was an injury*

*to health attributable to stress at work (as distinct from other factors).*

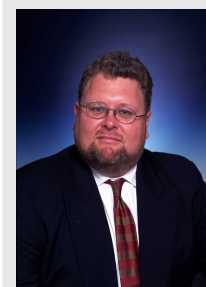
3. *Foreseeability depends upon what the employer knows (or ought reasonably to know) about the employee. Because of the nature of mental disorder, it is harder to foresee than physical injury. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.*
4. *The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others? Are others doing this job are suffering from stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic?*

5. *To trigger a duty to take steps, the indications of impending harm to health arising from stress must be plain.*
6. *The employer is only in breach of duty if he has failed to take steps bearing in mind the magnitude of the risk or harm occurring, the gravity of the harm*

*which may occur, the costs and practicability of preventing it, and the justifications for running the risk.*

7. *The size and scope of the employer's operation are relevant in deciding what is a reasonable response.*
8. *An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.*

Stress cases are still early in their genesis in New Zealand but the experience of overseas jurisdictions can be very helpful in deciding how to predict the approach of the New Zealand Courts.



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