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Leo Tsaknis

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Abstract
The duty of confidence is concerned with the obligations enforced in equity, which arise out of the special relationship between discloser and confidant. The duty is based on the broad principle of 'good faith', 'that he who has received information in good faith shall not take unfair advantage of it'. The doctrine does not depend upon the existence of a fiduciary relationship nor the existence of a contract beween the parties. It is essentially sui generis, though property, contract, bailment, trust, fiduciary relationship and unjust enrichment have all been claimed at one time or another as the basis of judicial intervention.

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THE JURISDICTIONAL BASIS, ELEMENTS, AND REMEDIES IN THE ACTION FOR BREACH OF CONFIDENCE -

UNCERTAINTY ABOUNDS

By
Leo Tsaknis
Principal General Counsel
Attorney-General's Department
Canberra

The interests protected and the jurisdictional basis of the action for breach of confidence

The duty of confidence is concerned with the obligations enforced in equity, which arise out of the special relationship between discloser and confidant. The duty is based on the broad principle of 'good faith',[1] 'that he who has received information in good faith shall not take unfair advantage of it'.[2] The doctrine does not depend upon the existence of a fiduciary relationship[3] nor the existence of a contract between the parties.[4] It is essentially *sui generis*, though property, contract, bailment. trust, fiduciary relationship and unjust enrichment have all been claimed at one time or another as the basis of judicial intervention.[5]

The origin of the jurisdiction is obscure, and equity judges of the experience of Sir Robert Megarry in England[6] and Sir Nigel Bowen, the former Chief Judge of the Federal Court of Australia have questioned the origins of the jurisdiction, though they have been satisfied as to its equitable existence.[7] One commentator has rationalised the conceptual confusion attending the attitude of the courts as to the jurisdictional source as a purely pragmatic one. The principal concern of the courts has been not to classify the breach of confidence into an existing conceptual category, but rather to use the existing categories to enforce the more fundamental notion of

1 *Fraser v Evans* [1969]1 All ER 8 at 22.
2 *Seager v Copydex Ltd* [1967] 1 WLR 923 at 931.
3 As to which see generally Hammond RG, 'Is Breach of Confidence Properly Analysed in Fiduciary Terms?' (1979) 25 McGill LJ 244.
4 *Saltman Engineering Co Ltd v Campbell Engineering Co* [1948] 65 RPC 203.
5 Ibid and see also Jones G, 'Restitution of Benefits Obtained in Breach of Another's Confidence' [1970] 86 LQR 463 at 464-5.
6 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.
7 *Interfirm Comparison v Law Society of New South Wales* [1975] 2 NSWLR 104.

confidence.[8] The duty of confidence is of respectable antiquity. The earliest case dates back to 1732 in which an injunction was granted to restrain an abuse of confidence in which the author of an unpublished work was held entitled to restrain its publication by persons to whom he had communicated the manuscript upon terms limiting its use, or by persons who had, in breach of trust, got possession of it.[9] However it is only since 1948 when Lord Greene MR in *Saltman Engineering Coy Ld, Ferotec Ld and Monarch Engineering Coy (Mitcham) Ld v Campbell Engineering Coy Ld*[10] embraced the notion of breach of confidence as being capable of application to situations otherwise than where a contract *strictu sensu* exists that the area of breach of confidence has borne fruit.

Whilst a right to confidential information is similar in many respects to a proprietary right and the courts have often referred to such information as being a species of property and have treated it as such,[11] it is now well settled that confidential information is very much *sui generis* and that the right to the protection from disclosure of confidential information may arise independently of any proprietary or contractual right. This was recognised as early as 1917 by Holmes J in *EI Du Pont de Nemours Powder Co v Masland:* [12]

> The word 'property' as applied to trademarks and trade secrets is an unanalysed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs.

A similar point was made by Lord Upjohn in *Phipps v Boardman:*[13]

> In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired. If it has been acquired in such circumstances that it would be a breach of confidence to disclose it to another then courts of equity will restrain the recipient from communicating it to another. In such cases such confidential information is often and for many years has been described as the property of the donor, the books of authority are full of such references; knowledge of secret processes, 'know-how', confidential information as to the prospects of a company or of someone's intention or the expected results of some

8 Gurry F, *Breach of Confidence*, Clarendon Press, Oxford (1984) at 26.

9 *Webb v Roci* (1732) cit 4 Burr 2303; 98 ER 201 cited in Hammond RG, 'The Origins of the Equitable Duty of Confidence' (1979) Anglo-American Law Review, which contains a summary of the historical development of the duty of confidence.

10 (1948) 65 RPC 203.

11 *Phipps v Boardman* [1967] 2 AC 46 per Lord Hodson at 107 and Lord Guest at 115; *In Re Keane* [1922] 2 Ch 475.

12 (1917) 255 US 100.

13 [1967] 2 AC 46 at 127-8.

> horse race based on stable or other confidential information. But in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship.

In Australia, the courts have similarly recognised that equity will grant relief against an actual or threatened use of confidential information, not involving any sort of breach of contract, fiduciary duty, copyright or trade mark in the absence of a proprietary right.[14] However, whilst recognising the essentially non-proprietary nature of confidential information, Australian courts have also recognised that the degree of protection afforded by equitable doctrines and remedies makes it appropriate to describe confidential information as having a proprietary character. This is not because property is the basis upon which the protection is given, but because of the effect of that protection.[15] This approach is consistent with the approach outlined previously that the principal concern of the courts is not to classify the breach of confidence into an existing conceptual category, but rather to use the existing categories to enforce the more fundamental notion of confidence.

At common law an employee is under a duty to serve his or her employer with good faith and fidelity. This duty encompasses the unauthorised use or disclosure of confidential information acquired in the course of employment and also extends to the use or disclosure of information which is not confidential if that disclosure would be 'destructive of the necessary confidence between employer and employee'.[16] The source of this duty has been variously described. Sometimes it has been said that the duty is an implied term in the contract of service, sometimes that it was an obligation arising out of the employee's position or status as such, and sometimes that the obligation arises because of the trust or confidence which an employee owes to his or her employer.[17]

The elements of the action for breach of confidence

Where a person receives information which has 'the necessary quality of confidence about it'[18] equity will restrain the recipient from making unauthorised use of the information and will hold the person accountable for any profits acquired by that use. For information to have 'the necessary quality of confidence about it', it must not be something which is public property and public knowledge.[19] In addition, the circumstances in which the information was imparted must be such that the confidant knew, or ought to

14 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* [No 2] (1984) 156 CLR 414 at 438 per Deane J.

15 *Smith Kline & French Laboratories v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 at 135-6.

16 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 per Dixon, McTiernan JJ at 81.

17 *Bent's Brewery Co Ltd v Hogan* [1945] 2 All ER 570.

18 *Saltman Engineering Co v Campbell Engineering Co* [1948] 65 RPC 205 at 215.

19 Ibid.

20

have known, that the information was imparted for a limited purpose and that its disclosure was limited to the purpose for which the information was given.[20]

It is not clear whether the confider must suffer any detriment as a result of the unauthorised disclosure, though the balance of authority suggests that the better view is that detriment is not required. In *Saltman Engineering Co Ltd v Campbell Engineering Co* Lord Greene MR described the duty of confidence in the following terms:[21]

> If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's right.

According to this approach the duty of confidence is a duty not to use the information without the confider's consent. However, in *Seager v Copydex Ltd* [22] Lord Denning MR inserted into Lord Greene MR's formulation the requirement of prejudice. Lord Denning MR expressed the obligation of confidence as a requirement that:[23]

> ...he who has received information shall not take unfair advantage of it. He must not use it to the prejudice of him who gave it without obtaining his consent.

According to this formulation it is not sufficient to establish a breach of confidence that the information was used without consent. Its use must be prejudicial to the person from whom it was obtained. One means suggested as to how to reconcile the two views is that the mere disclosure of information constitutes a 'prejudice' of the person who gave it.[24] In *Coco v AN Clark (Engineers),*[25] a case concerning the release of industrial information, Megarry J indicated his preparedness to confine the requirement of detriment to information of a commercial nature. He said:

> ...the essence of the duty seems more likely to be that of not using without paying, rather than of not using at all. It may be that in fields other than industry or commerce...the duty may exist in a more stringent form; but in the circumstances present in this case I think that the less stringent form is the more reasonable.[26]

Megarry J drew a clear distinction between confidential information of a commercial nature where detriment is required, and other types of information where detriment is not required, though ultimately he left the question open. Whether the plaintiff must show detriment was also left open

20 Above n 15.
21 [1948] 65 RPC 203 at 213.
22 [1967] 1 WLR 923.
23 Ibid at 931.
24 Finn P, *Fiduciary Obligations*, Law Book Co (1977) at 160.
25 [1969] RPC 41.
26 Ibid at 50.

by Bowen CJ in *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales*.[27] In *Fairfax*[28] Mason J was of the view that Megarry J considered detriment to be a necessary ingredient of the cause of action, though as Gummow J pointed out in *Smith Kline & French Laboratories v Secretary, Department of Community Services and Health*[29] Megarry J in fact left open the question of detriment, and he treated *Fairfax* as authority only for the proposition that detriment is required where a government seeks the assistance of equity to protect its secrets. With respect, it is submitted that the views of Gummow J are correct, that *Fairfax is* authority only for the proposition that where the government is a plaintiff it must establish detriment, though the detriment which the government must show is, as we shall see, very different from that which must be shown by other plaintiffs in an action for breach of confidence.

In *Moorgate Tobacco Co Ltd v Phillip Morris Ltd [No 2]*[30] the High Court observed that the basis of the equitable jurisdiction to protect obligations of confidence lies in an obligation of conscience arising from the circumstances in or through which the information, the subject of the obligation, was communicated or obtained.[31] Gummow J relied on these observations to hold that it is not necessary for a plaintiff to show detriment in an action for breach of confidence. Gummow J concluded that the 'obligation of conscience' is to respect the confidence, and not merely to refrain from causing detriment to the plaintiff. The plaintiff comes to equity to vindicate his or her right to observance of the obligation, not necessarily to recover a loss or to restrain the infliction of apprehended loss. Drawing an analogy with the duty owed to a beneficiary his Honour commented, 'when has equity said that the only breaches of trust to be restrained are those that would prove detrimental to beneficiaries?'[32] Such an approach is consistent with the observations of Professor Finn that equity traditionally acts *in personam* against a defendant by requiring an account of profits from an 'insider-trader' in the field of corporate responsibility where the profit causes no loss to the company.[33] The view of Gummow J is supported by other commentators.[34]

The matter was considered by the House of Lords in *Attorney-General v Guardian Newspapers Ltd (No 2)*[35] where a majority of their Lordships said that there was no requirement for a private plaintiff to show any material

27 [1975] 2 NSWLR 104 at 120.
28 (1980)147 CLR 39 at 50-51.
29 (1990) 95 ALR 87 at 126.
30 (1984) 156 CLR 414.
31 Ibid at 438.
32 (1990) 95 ALR 87 at 126.
33 Above n 24 at 160.
34 See eg Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies*, Butterworths, 2nd ed (1984) at 828. See also Birks P, 'A Lifelong Obligation of Confidence' [1989] 105 LQR 501 and above n 8 at 407-8 who both support the view that equity intervenes to uphold an obligation and not necessarily to recover a loss.
35 [1988] 3 All ER 545 at 638.

harm or loss beyond the unwanted disclosure.[36]

Disclosure in the public interest

A qualification which quickly became an important defence in an action for breach of confidence had its genesis in *Gartside* v *Outram*.[37] In that case the plaintiffs sought to prevent the defendant from disclosing information which the defendant had acquired while in their employ. It was held that they must answer interrogatories concerning allegedly dishonest dealings which were the subject-matter of the information. Wood VC said:

> The equity upon which the bill is founded is a perfectly plain and simple one, recognised by a number of authorities and most salutary to be enforced, by which any person standing in the confidential relation of a clerk or servant is prohibited, subject to certain exceptions, from disclosing any part of the transactions of which he thus acquires knowledge. But there are exceptions to this confidence, or perhaps, rather only nominally, and not really exceptions. The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist.[38]

In *Weld-Blundell v Stephens*[39] the defendant sought to invoke the principle in *Gartside v Outram* to excuse the publication of defamatory material. Shortly stated, the facts of that case were that a client had sued his accountant for breach of an implied duty to keep secret a letter of instructions containing a libel and which, following the careless conduct of the accountant, had subsequently come into the hands of the subjects of the libel. In *Weld-Blundell v Stephens, Gartside v Outram* was treated as a decision of the Court of Chancery not to exercise its jurisdiction in favour of a plaintiff who did not come to the Court 'with clean hands', and Warrington LJ declined to accept the existence of such a wide principle under which a confidential agent would be justified in disclosing a confidential document because it was libellous or contained evidence of a private wrong. He said:

> Such a principle, if it existed, would be of very widespread application. A man discloses to his confidential agent that he has committed a trespass to land or goods, and the agent might with impunity communicate this to the persons concerned with disastrous results to his employer. Indeed I can see no distinction in this respect between cases of contract and cases of tort. Unless there be such a distinction the disclosure by the agent of evidence of a breach of contract on his employer's part would be no breach of his duty to his employer. On the whole I

36 Ibid; Lord Keith at 640. Lord Goff inclined to the view that detriment was not necessary but left the matter open (at 659). Lord Brightman explessed his general agreement with both Lord Keith and Lord Goff. Lord Jauncey agreed with Lord Keith. Only Lord Griffiths would require detriment beyond tbe unwanted disclosure (at 650).

37 [1856] 26 LJ Ch 113.

38 Ibid at 114.

39 [1919] 1 KB 520.

> can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by his principal'.[40]

In *Initial Services Ltd v Putterill*,[41] in referring to a suggestion by Bankes LJ in *Weld-Blundell v Stephens* that the defence was restricted to information relating to the proposed or contemplated commission of a crime or civil wrong, Lord Denning MR said:[42]

> I do not think that it is so limited. [The defence] extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others...The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest.

The 'iniquity' rule reformulated by Lord Denning MR in *Initial Services v Putterill* was widened considerably by his Honour in *Fraser v Evans*:[43]

> I do not look upon the word 'iniquity' as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret.

The 'spring tide mark of public interest' as it was described by Rath J in *Castrol Australia v Emtech Associates*[44] came in *Woodward v Hutchins*[45] where the plaintiff sought to enjoin the ex-manager of a well known pop group, after having his services terminated, from disclosing details about the private lives and personal affairs of its members. In his judgment Lord Denning MR said:[46]

> If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth. That appears from *Initial Services Ltd v Putterill* [1968] 1 QB 396; *Fraser v Evans* [1969] 1 QB 349 and *D v National Society for the Prevention of Cruelty to Children* [1976] 3 WLR 124. In this case the balance comes down in favour of the truth being told, even if it should involve some breach of confidential information. As there should be 'truth in advertising' so there should be truth in publicity. The public should not be misled. So it seems to me that the breach of confidential information is not a ground for granting an injunction.

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40 Ibid at 535.
41 [1968] 1 QB 396.
42 Ibid at 405.
43 [1969] 1 QB 349 at 362.
44 (1980) 33 ALR 31 at 56.
45 [1977]1 WLR 760.
46 Ibid at 763-4.

The quoted passage extends 'iniquity' beyond serious crimes and misdeeds. It evinces how far the ground of 'just cause or excuse' can extend when the test of iniquity is departed from so that its scope rests solely in the subjective discretion of the judge.

The basis of the Court's decision in *Woodward v Hutchins* appeared to be that as the stars pursued a public image of respectability, if this was in fact untrue, it was in the public interest that this image should be corrected. The information disclosed in *Woodward v Hutchins* revealed no crime, fraud or serious wrongdoing or misdeed, nor did the Court suggest that the public interest found by it to be present could be accommodated in the existing categories. The Court created a further category justifying disclosure in the public interest, 'the public interest in knowing the truth'. The public interest in knowing the truth was subsequently relied upon by Lord Denning MR as justifying the disclosure of confidential information by the press where the public interest in making a matter known to the public at large outweighed the private interest in maintaining confidence.[47]

Woodward v Hutchins has been criticised on the basis that the Court imposed a standard of behaviour on the litigants before it, and decided the legal issues accordingly.[48] This is contrary to the accepted view that it is not for the court to pass judgment upon the personal integrity, good taste or self-respect of the litigants if that is not an issue in determining legal or equitable rights or liabilities.[49]

To date the Australian authorities have not adopted the wide view expressed in *Fraser v Evans* and *Woodward v Hutchins*. The approach of the Australian courts has been that the public interest exception extends only to disclosures which evidence a crime or serious wrongdoing, or matters injurious to public health. A case in point is *Castrol Australia v Emtech Associates*.[50] The facts of that case were that at the beginning of 1978 the plaintiff wished to develop a new lubricating oil. The first defendant (EmTech) carried out tests upon different oils submitted by the plaintiff. The second defendant was the chief executive of the first defendant. A report ('the EmTech report') was prepared and, as a result, the plaintiff prepared to market a new product. The plaintiff then consulted the Trade Practices Commission, the third defendant, for guidance in assessing whether proposed promotional material complied with the consumer protection provisions of the *Trade Practices Act 1974*. The fourth defendants were members of the Commission and the fifth and sixth defendants officers thereof.

In January 1980 the Commission indicated to the plaintiff that advertising

47 *Schering Chemicals v Falkman* [1981] 2 WLR 848 at 865.
48 Kearney J, *The Action for Breach of Confidence in Australia*, Legal Books, Sydney (1985) at 68.
49 *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 at 195-6 per Buckley J.
50 (1980) 33 ALR 31.

of the new product might breach sections 52 or 53 of the *Trade Practices Act*. In February 1980 the plaintiff withdrew the advertising campaign. In May 1980 the acting Chairman of the Commission served a notice upon the plaintiff under section 155 of the *Trade Practices Act* which interrogated about the EmTech report and required the plaintiff to divulge what the plaintiff claimed to be confidential information and trade secrets. The plaintiff then sought to continue *ex parte* injunctions restraining the first and second defendants from disclosing the EmTech report and restraining the third, fourth, fifth and sixth defendants from seeking to obtain, publish or disclose the same information.

Rath J expressly declined to follow the decision in *Woodward v Hutchins*, holding that in considering whether just cause for breaking confidence exists, the court 'must have regard to matters of a more weighty and precise kind than a public interest in the truth being told'.[51]

In granting the interlocutory injunctions Rath J held, following the decision of Ungoed-Thomas J in *Torrington Manufacturing Co v Smith & Sons (Eng) Ltd*,[52] that where information is provided on a confidential basis, its use and disclosure is to be limited to the purpose for which the information was given.[53] Two arguments were put forward by the Commission as justifying its use of the EmTech report. The first was that the Commission, as a statutory body charged with the administration of the *Trade Practices Act*, was entitled to make use of the information in its administration of the Act. The second was that as the EmTech report did not justify the claim of a 3.5% saving in petrol consumption, and as that report was the only basis advanced for the claim, it was in the public interest that the Commission should make use of the report for the purpose of investigating possible breaches of the Act.

As to the first argument, his Honour held that the performance by the Commission of its functions in its administration of the Act was consistent with the observance of the confidence placed in it in the present case.[54] As to the second point, Rath J concluded that the evidence did not show a breach by the plaintiff of the *Trade Practices Act* which would excuse the Commission from its obligation of confidence,[55] and that for Australian purposes the public interest defence has to date been more narrowly circumscribed than the English authorities and applies only to serious crimes or wrongdoing, or matters injurious to public health. This approach has been

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51 Ibid at 56.

52 [1966] RPC 285 at 306.

53 (1980) 33 ALR 31 at 47.

54 Ibid at 51. Above n 15 (decision affirmed on appeal by the Full Federal Court (1990) 99 ALR 679) the Federal Court held that a duty of confidentiality will not be imposed where its effect would be to restrict the discharge by a department or agency of its functions under legislation which it administers.

55 (1980) 33 ALR 31 at 52.

followed by other Australian authorities.[56] In *Smith Kline & French Laboratories v Secretary, Department of Community Services and Health*[57] Gummow J, a staunch judicial critic of the English approach said:

> [A]n examination of the recent English decisions shows that the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or override the obligation of confidence .... equitable principles are best developed by reference to what conscionable behaviour demands of the defendant not by 'balancing' and then overriding those demands by reference to matters of social or political opinion.[58]

The approach of Gummow J focuses on 'what conscionable behaviour demands'. However it is difficult to divorce the question of what conscionable behaviour demands from the public interest sought to be promoted by making the disclosure. Only by assessing the public interest sought to be promoted by the making of the disclosure can it be determined whether conscionable behaviour demands that the disclosure be made. According to the approach taken by the Australian authorities once a duty of confidence arises that duty must be respected, unless the plaintiff can show that the disclosure discloses a serious crime or wrongdoing. The English authorities permit the disclosure of less serious matters, developed on a case-by-case basis. The assumption that the public interest, except in the case of serious wrongdoing will always favour non-disclosure is questionable. Moreover, the question as to what constitutes a serious crime or wrongdoing remains largely unanswered. This question may turn out to be as unpredictable as the balancing exercise adopted by the English authorities.

The special position of government plaintiffs

It is clear from the Australian authorities[59] that, except where it would conflict or restrict the exercise by an agency of its statutory functions, information supplied to government by a third party will be protected from disclosure at the suit of a private litigant in accordance with the foregoing principles. That is, the provider of the information will be required to show as a condition of obtaining protection that the government knew, or ought to have known, of the limited purpose for which the information was provided.[60] In the case of personal information, the principal concern of equity is to protect the disclosure of material in a form which may reveal or lead to the identification of the person who supplies the information to

56 *Allied Mills Industries Pty Ltd v TPC* (1981) 34 ALR 105; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341; (1987)10 NSWLR 86 per Kirby P.

57 Ibid.

58 Ibid at 125.

59 See eg above n 15; *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31

60 Ibid at 132.

government, so that ordinarily the government will be able to make use of that information provided that it does not disclose the identity of the person concerned.[61]

Whilst it appears on the balance of the authorities that a private plaintiff is not required to show detriment to found his or her cause of action, it is clear that the government must show detriment. But what detriment does it need to show? In this regard it is illuminating to return to the judgment of Mason J in *Fairfax*:[62]

> The question then, when the executive government seeks the protection given by equity, is: What detriment does it need to show?
>
> The equitable principle has been fashioned to protect the personal, private and proprietary rights of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.
>
> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that the publication of material will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> The court will not prevent the publication of information which merely throws light on the past workings of government, even if it not be public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained.

A similar view was taken by the House of Lords in *Attorney-General v Guardian Newspapers Ltd (No 2)*[63] where all their Lordships agreed,

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61 Finn P, *Official Information: Integrity in Government Project, Interim Report* 1, ANU at 125-6.

62 (1980)147 CLR 39 at 51-2.

63 [1988] 3 All ER 545.

following *Attorney-General v Jonathon Cape*[64] and *Fairfax*, that in a governmental action to restrain unauthorised disclosure the plaintiff had to show that disclosure was likely to damage the public interest. In *Fairfax*, in determining whether disclosure was in the public interest, Mason J adopted a public interest test with respect to the disclosure of information in the possession of the government wider than that applied in Australia with respect to private plaintiffs, and at least as wide, and probably wider than that applied by the English courts in private actions in determining whether disclosure was justified in the public interest. The reference by Mason J to 'the public interest in keeping the community informed and in promoting discussion of public affairs' is hardly the stuff that serious crimes and misdeeds are made of.

In a private action a defendant seeking to rely on the public interest defence bears the onus of proof of substantiating the allegations made. So much is clear from the comments of Gibbs CJ in *A v Hayden*.[65]

> It is clear that a person who owes a duty to maintain confidentiality will not be allowed to escape from his obligations simply because he alleges that crimes have been committed and that it is in the public interest that he should disclose information relating to them. He bears the burden of establishing the facts upon which he relies to relieve him of the obligations. That seems clear on principle and I have seen no authority that suggests the contrary.

However, where it is the government that claims confidentiality, '[u]nless disclosure is likely to injure the public interest, it will not be protected'.[66] This formulation places the burden of proof on the government to satisfy the court that disclosure is likely to injure the public interest and for that reason must be restrained. Mason J did not explain what he meant by 'likely' in this context, however it would probably be construed narrowly. In other contexts the word 'likely' has been interpreted to mean 'having a real chance or possibility'.[67] English courts have held that something is 'likely' if it has a 'reasonable prospect' of happening,[68] or if it is 'on the cards'.[69]

In *Fairfax*, in describing what the government must show to restrain disclosure Mason J cited with approval the following passage in *Attorney General v Jonathon Cape Ltd*:[70]

> The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained,

64 [1976] QB 752.
65 (1984) 156 CLR 532 at 546.
66 *Fairfax* per Mason J at 52.
67 *State Pollution Control Commission v Blayney Abattoirs Pty Ltd* (1991) 72 LGRA 221 at 224.
68 *Dunning v Board of Governors of United Liverpool Hospitals* [1973] 2 All ER 454 at 460.
69 *R v Sheppard* [1981] AC 394 at 405.
70 [1976] QB 752.

> and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.[71]

The passage is significant for the heavy burden it places on a government seeking to prevent the unauthorised disclosure of information. The requirement that the government show that the public interest requires that publication be restrained stands in marked contrast to a private action, where once the plaintiff establishes that disclosure would constitute a breach of confidence, the onus is on the defendant to establish that disclosure is justified in the public interest. Of particular significance is the requirement that the government establish that there are 'no other facts of the public interest contradictory of and more compelling than that relied upon'. This requirement places the burden on government to satisfy the court of the absence of the existence of a fact. Moreover, that fact need not necessarily be one peculiarly within the knowledge of government. If the government can satisfy these requirements relief will be granted, but only to the extent that such relief is strictly necessary. The justification for the different approach in the case of government information was succinctly put by McHugh JA in *Attorney-General v Heinemann Publishers* in the following terms:[72]

> The doors of the Chancery are not closed to government or their agencies...But the relationship between the modern State and its citizens is so different in kind from that which exists between private citizens that rules worked out to govern the contractual, property, commercial and private confidences of citizens are not fully applicable where the plaintiff is a government or one of its agencies. Private citizens are entitled to protect or further their own interests, no matter how selfish they are in doing so. Consequently, the publication of confidential information which is detrimental to the public interest of a citizen is a legitimate concern of a Court of Equity. But governments act, or at all events are consistutionally [sic] required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest. Public and not private interest, therefore, must be the criterion by which equity determines whether it will protect information which a government or governmental body claims is confidential.

The comments of McHugh JA are directed at the relationship between government and the public. They are not directed at the relationship between government and its own officers.[73] In *Attorney-General v Guardian Newspapers (No 2)* Lord Keith, after commenting that the government has to show likely damage to the public interest before its information will be protected from disclosure said that:[74]

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71 Cited in *Fairfax* per Mason J at 52.

72 (1987) 75 ALR 353 at 454; decision affirmed on appeal by the High Court (1988) 78 ALR 449.

73 This distinction is adverted to by Professor Finn above n 61 at 133-4.

74 [1988] 3 All ER 545 at 640.

> In a question with a Crown servant...the general public interest in the preservation of confidentiality, and in encouraging other Crown servants to preserve it, may suffice.

Similarly, in *British Steel Corporation v Granada Television* the House of Lords recognised that there was:[75]

> a very strong public interest in preserving confidentiality within any organisation, in order that it can operate efficiently, and also be free from suspicion that it is harbouring disloyal employees. There is no difference in this respect between a public corporation...and an ordinary company...Unauthorised disclosure of confidential information about either is equally liable to damage efficiency and morale.

In *Fairfax* Mason J acknowledged that prejudice to the ordinary business of government could fall within the injury test.[76] The *Freedom Of Information Act* recognises there can be a public interest in 'preventing the disclosure of material having a substantial adverse effect on the proper and efficient conduct of the operations of an agency'.[77] Any argument by government on the need to protect the proper and efficient operations of an agency is likely to be narrowly construed given that the argument is applicable to the disclosure of all government information and its ready acceptance would render the special rules applicable to the disclosure of government information otiose. In this context it should be noted that the exemption in paragraph 40(1)(d) of the *Freedom Of Information Act* has been narrowly construed so as to be primarily concerned with the effect on disclosure on the way in which an agency conducts its operations, not with protecting from disclosure particular information contained in a document.[78]

The different kinds of government information

Although *Fairfax* and *Attorney-General v Heinemann Publishers* spoke in terms of 'when the executive government seeks the protection of equity', and 'where the government claims confidentiality' respectively, both cases concerned the disclosure of information generated by government itself rather than information provided in confidence to government by a third party. In *Fairfax* the disclosures concerned unpublished cables, memoranda, briefings and assessments relating to Australia's defence policy prepared by, and in the possession of, the Department of Defence. In *Heinemann* the disclosures concerned information pertaining to the activities of the British secret intelligence service, MI5. Accordingly, these cases should not be interpreted as determining conclusively that the need for the government to establish that the non-disclosure is justified in the public interest will apply in all cases simply because the government is the plaintiff. It would be

75 [1980] 3 WLR 774 at 852-3.
76 Above n 28 at 52.
77 *Freedom Of Information Act* s 40(1)(d).
78 *Re Brennan (No 2)* (1985) 8 ALD 10.

consistent with equitable principles to distinguish between the situation where the government is seeking to prevent the disclosure of information generated by government itself, and the situation where the government seeks the protection of equity to prevent the disclosure of information provided to it by a third party in confidence, and the predominant reason for the government bringing the action is to protect the interests of that third party. In the second class of case the position of government should be viewed as being analogous to that of a trustee of the information. In such cases it should make no difference that the government is plaintiff in the action. The action is to protect the private rights of the citizen. If the circumstances surrounding the original provision of the information to government or subsequent circumstances show that the citizen wishes the confidence to be maintained, the rules applicable had the action been brought by a private plaintiff should apply.

The Committee of Review of Commonwealth Criminal Law chaired by former High Court Chief Justice Sir Harry Gibbs recognised that there may be some difference between the rules applicable where the information in possession of the government has been supplied by citizens and those where the information has been generated for and about the government by its own officers and agencies. However, the Committee concluded that the decisions in *Heinetmann* and *Smith Kline & French Laboratories v Secretary, Department of Health* were more concerned to emphasise the special character of information in the possession of the government than to distinguish between different forms of that information.[79]

The distinction between the various kinds of government information is considered at some length by Professor Finn.[80] Finn develops a four-way system of classification for information in the public sector. The four categories are determined according to the interests which may be affected by the disclosure or use of the information.

The first category is referred to as 'public information'. As the term suggests, this comprises 'that stock of knowledge publicly available in the community for use by whomsoever wishes to utilise it'.[81] In terms of 'official information', examples of this would include the annual reports of Commonwealth agencies or the contents of a ministerial press release. As Finn points out, neither the government nor individual citizens have any legitimate interests which would normally be adversely affected by the disclosure of this information.[82]

The second category is 'third party information'. This is 'information

79 Review of Commonwealth Criminal Law Committee, *Review of Commonwealth Criminal Law, Final Report*, Sir Harry Gibbs Chairman, AGPS, Canberra (1991) at 258.

80 Above n 61 at 19-27.

81 Ibid at 19.

82 Ibid at 25.

supplied to government by third parties - individual citizens, groups, businesses and the like - about their private, personal and business affairs'. Professor Finn suggests that this information can be distinguished in terms of both its source and 'the direct interest that the information supplier can have in its use or disclosure.'[83] He also acknowledges that there 'will almost invariably be a governmental interest as well to be considered in the matter.' This interest will frequently coincide with that of the information supplier. According to Finn, the government is regularly given significant rights to use and disclose such information, often for reasons of public interest, and in so doing it is not dealing with information which is its own. In consequence third party information should be marked out for special consideration and protection.[84]

Information not included in Professor Finn's analysis, and which it is suggested would also fall within the category of third party information is information supplied by third parties concerning the private or confidential business affairs of other persons. This situation receives statutory recognition in Information Privacy Principle 3 of the *Privacy Act* 1988. Whilst the application of Information Privacy Principle 2 relates specifically to the collection of personal information from the individual concerned, the application of Information Privacy Principle 3 is expressed to apply to the solicitation of personal information generally. The basis of this distinction is that Commonwealth agencies should be sensitive to the interests of the person to whom the information relates, even where that person has not supplied the information to the agency.

The third category of information is 'governmental information'. This is 'information of and about government generated by the officers and agencies of government'.[85] This may, for example, include material relating to security, defence, or relations with other states. While government has a vital interest in this type of information, its own interests are not the sole ones of relevance. Because government is constitutionally obliged to act in the public interest, it is possible prejudice to the public interest which sets the limits to the protection government can claim for its own interests.[86] Although there would normally be no specific individual interests which would be adversely affected by the release of information falling within this class, there may still be a pressing public interest against its unauthorised disclosure.

The fourth category is 'proprietary information'. This is information which is acquired by the public sector in the course of performing what would otherwise be regarded as non-governmental activities, such as scientific research or business operations. This information differs little in its

83 Ibid at 19.
84 Ibid at 20-1.
85 Ibid at 21.
86 Ibid at 25-6.

character from like information produced in the private sector. It can properly be claimed to be 'owned' by government in the same way that a private sector enterprise would claim a like property in its information.[87] The interests which arise in relation to the use and disclosure of such information are analogous to the interests which a private body would have in the various species of intellectual property it holds, such as its trade secrets.

Having regard to these different categories of information, Professor Finn concludes that an officer should not disclose information acquired in office where the disclosure is likely to occasion unjustifiable prejudice to the interests of government, or to any third party who supplied that information to government.[88] Presumably the 'interests of government' means the interests of government having regard to the fact that it is constitutionally required to act in the public interest.

Persons having a proper interest to receive confidential information

A major qualification on the availability of the public interest defence is that the disclosure must be made to a person having a 'proper interest' to receive the information. In *British Steel Corporation v Granada Television*[89] Lord Wilberforce in discussing what is meant by a 'proper interest' commented:[90]

> But there is a wide difference between what is interesting to the public and what it is in the public interest to make known.

In similar vein, in *Initial Services v Putterill* Lord Denning MR said:[91]

> The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police, or a breach of the *Restrictive Trade Practices Act* to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.

In *Francome and Anor v Mirror Group Newspapers Ltd*[92] unidentified persons tapped telephone conversations made to and from the plaintiff's home. The eavesdroppers offered for sale to a national newspaper tapes of the telephone conversations which it was alleged revealed breaches of the rules of racing by the first plaintiff, a well-known jockey. The plaintiffs became aware of the existence of the tapes when two journalists employed by the newspaper approached the first plaintiff to confirm the authenticity of the tapes. Thereupon the plaintiffs issued a writ against the newspaper, its

87 Ibid at 19.
88 Ibid at 26.
89 [1981] AC 1096.
90 Ibid at 1168.
91 [1968] 1 QB 396 at 405-6.
92 [1984] 1 WLR 892.

editor and the two journalists claiming *inter alia*, damages for breach of confidence. On the plaintiffs' application for interlocutory relief, Park J ordered that the defendants be restrained until trial from publishing any article based on the contents of the tapes, that there be a speedy trial and that the defendants disclose the identity of the suppliers of the tapes.

The Court of Appeal, allowing the appeal, held that as a speedy trial had been ordered it was not necessary in the interests of justice to compel the defendants to disclose the identify of their source at the interlocutory stage of the proceedings, and that whilst the restraint on publication was necessary to preserve the rights of the parties until trial, its terms should be varied so that it would be open to the defendants to apply to the appropriate minister for permission to disclose the information to the police or Jockey Club. Lord Donaldson MR, after commenting that the media were peculiarly vulnerable to the error of confusing the public interest with their own interest said:[93]

> Usually these interests march hand in hand, but not always. In the instant case, pending a trial, it is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or to the Jockey Club. Any wider publication would only serve the interests of the *Daily Mirror*.

However, there may be circumstances where disclosure to the public at large by the media may be justified in the public interest. Such a case arose in *Lion Laboratories Ltd v Evans*.[94] In that case the plaintiffs manufactured and marketed an electronic instrument which had been authorised by the Home Office since April 1983 for use by the police for measuring intoxication by alcohol by testing the breath of motor vehicle drivers suspected of driving with an alcoholic concentration above the limit prescribed by paragraph 12 of Schedule 8 to the *Transport Act* 1981 (UK). The first and second defendants were employed by the plaintiffs as technicians working on the instrument. In January and February 1984 they left the plaintiffs' employment, taking with them, without authority, some confidential internal memoranda which cast doubt on the accuracy of the functioning of the instrument. Those documents were offered to the third and fourth defendants for publication in their newspaper, which had already published reports reflecting such doubts. The third and fourth defendants maintained that as the proper functioning of the instrument was of the utmost importance for drivers who were tested by the instrument and, on the basis of its readings, were charged, and possibly convicted, for drunken driving with the consequences which followed, it was important for the public to be informed of the instrument's doubtful functioning.

The plaintiffs issued a writ claiming an injunction and damages for breach of confidence and copyright. Leonard J granted an *ex parte* injunction restraining the third and fourth defendants from, *inter alia*, disclosing or

93 Ibid at 898.
94 [1984] 3 WLR 539.

making use, for any purpose, of any confidential information being the property of the plaintiffs and infringing the plaintiffs' copyright in the documents. Subsequently on the hearing *inter partes*, an interlocutory injunction on the same terms was granted and the first and second defendants were made parties to it.

On appeal the Court of Appeal, allowing the appeal, acknowledged that there was a conflict between two public interests, namely, the plaintiffs' right to protect their internal, confidential documents and their copyright in them and the public's entitlement to information which raised serious doubts about the reliability of an instrument which was providing the sole evidence on which members of the public had been or were being prosecuted. The Court held that in actions for breach of confidence, the defence of disclosure in the public interest where there was a just cause or excuse for breaking confidence did not depend on any 'iniquity' on the part of the plaintiffs; that the defendants in interlocutory proceedings had to satisfy the court that they would be able, at the trial to establish a strong defence of public interest and did not have to show that the plaintiffs were guilty of iniquitous conduct. The Court concluded that the information contained in the documents was so important to the public as to outweigh the plaintiffs' interests and that, accordingly, the Court was entitled to override the judge's exercise of discretion and permit publication of specified documents. Whilst there is no authority whether in the case of government information the defendant bears the onus of establishing that the disclosure was made to a person having proper authority to receive it, the requirement that the government establish that non-disclosure is justified in the public interest would not sit comfortably with such a requirement. To impose upon a defendant the onus of establishing that the disclosure was made to someone with a proper interest to receive it would have the effect of shifting the burden of proof away from the government to a significant extent. The extent of disclosure can only be of relevance in the context of an argument by the government that the extent or likely extent of disclosure is such that non-disclosure is justified in the public interest.

Recipients of unlawfully disclosed confidential information

An area of particular difficulty is the extent to which a third or later hand recipient of confidential information will be under an obligation to maintain the confidence applying to the original confidant. Two situations need to be distinguished. First, there is the third party who is fixed with the knowledge of the confidant's breach of duty. Second, there is the third party who is unaware of the confidant's breach of duty and who may or may not be a *bona fide* purchaser for value of the information without notice of the confidant's breach of duty. The position of a third party who is aware of the confidant's breach of duty is straightforward. A third party who knowingly obtains information in breach of confidence will be under the same obligations to maintain confidentiality as the person from whom the

information was obtained.[95]

In the case of an innocent third party who receives confidential information, there are three possible scenarios. The first is that the original confider will always be entitled to relief against a third party who has acquired information to which he or she is not entitled regardless of whether the third party had knowledge of the breach. The second is that the third party will be protected if he or she is a *bona fide* purchaser for value without notice. The third view allows the discloser the *prima facie* right to proceed against the third party in all cases, subject to the third party having a defence where the third party has changed its position to his or her detriment.

The possibility of using the defence of *bona fide* purchaser for value without notice as it relates to a third party who gives consideration to an offending confidant for information which is subject to a duty of confidence was first adverted to by Turner VC in *Morison v Moat*[96] who, after referring to the defendant in that case as a mere volunteer, said:[97]

> It might indeed be different if the defendant was a purchaser for value of the secret without notice of any obligation affecting it; and the Defendant's case was attempted to be put on this ground.

In *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans*[98] an employee of a specialist accounting firm, a Mr Hemming, wrote a book on accounting techniques. It was alleged by the plaintiffs that the book disclosed information acquired by the employee during the course of his employment and the plaintiffs sought to enjoin the employee's publishers, the defendants, from distributing the book to the general public. The defendants asserted, *inter alia*, that by reason of their *bona fide* acquisition from Hemming of the right to publish, the fact that such publication would disclose the plaintiff company's secret and confidential information, if established, was no ground for restraint. Lloyd-Jacob J rejected the defence, and in granting the injunction said:[99]

> The Defendants contend that at the time they agreed to publish this work they had no knowledge or notice of the Plaintiffs' claims, nor were they aware that the work contained any secret or confidential information, and they claim that in consequence they cannot now be restrained. It is to be noted that the absence of any right to publish on Mr. Hemming's part must safeguard the Defendants from any claim for breach of contract by his estate. It would appear, therefore, to be the position that the Defendants' insistence on disclosing the contents of this book to the world, and thereby causing irreparable damage to the business of the Plaintiffs, is due in part to unwillingness to bear the cost already incurred in

95 *Wheatley v Bell* [1982] 2 NSWLR 544 at 550; *Prince Albert v Strange* [1849] 64 ER 293; *Morison v Moat* (1851) 68 ER 492.

96 [1851] 68 ER 492.

97 Ibid at 501.

98 [1951] 68 RPC 190.

99 Ibid at 195.

> preparing for publication (although the publishing agreement...specifically safeguards them against loss in this connection) and possibly in part to a public-spirited insistence upon a supposedly legal light...
>
> Counsel for the Plaintiffs expressly disclaimed any suggestion that at the date of the execution of [the publishing agreement] the Defendants were (or should have been) aware that Mr. Hemming was acting in breach of his duty to the plaintiffs. Does this circumstance frank their avowed intention to consummate Mr. Hemming's wrongdoing? The original and independent jurisdiction of this Court to prevent, by the grant of an injunction, any person availing himself of a title, which arises out of a violation of a right or a breach of confidence, is so well established as a cardinal principle that only a binding authority to the contrary should prevent its application by this Court...The wrong to be restrained is not the entry into the contract to publish, but the act of publishing, and an innocent mind at the time of the former cannot overcome the consequences of full knowledge at or before the time of the latter.

On appeal, the Court of Appeal found that confidential information had not been disclosed but that the plaintiffs had a copyright, which had been infringed, in one section of the book. Although it was not necessary to comment on the trial judge's observations, Evershed MR said that to his mind it would be 'somewhat shocking if reputable publishers, who discovered that there was in some work which they had acquired a gross breach of faith, publication of which would involve the ruin of some business, yet nevertheless could say, having discovered that fact before they had published or incurred any substantial expense, that they were entitled to insist on going on with their publication'.[100]

The clearest authority in Australia that the defence of *bona fide* purchaser does not apply to protect an innocent defendant in an action for breach of confidence is the decision of Helsham CJ in Equity in *Wheatley v Bell*.[101] In that case the plaintiffs, based in Perth, devised a system of advertising for small businesses and local service activities by dividing a metropolis up into localities. Each business would, according to the idea, pay to get his or her name into a local index (telephone directory). The idea of the scheme was that people would ordinarily call upon local businesses or services for their needs and so it would be advantageous for businesses to be in the index. Each locality would be operated as a separate business, selling off the advertising space to the local businesses in that locality. Each locality could be sold off to a person taking a franchise who would then operate that business for that locality. The defendant was one of the persons negotiating with the plaintiff for one of the franchises. After details of the scheme were disclosed to him he declined to pursue the matter. The defendant then proceeded to set up an identical scheme in Sydney and had, at the time this was discovered when the plaintiffs attempted to implement their scheme in Sydney, sold the idea for $9,500 and $1,000 respectively, to two innocent

100 [1952] 68 RPC 10 at 16.
101 [1982] 2 NSWLR 544.

third parties, the second and third defendants, who also incurred other significant expenses in setting up their business.

Helsham CJ was of the view that it was not appropriate to equate the innocent defendants to a *bona fide* purchaser for value without notice. That defence was directed to the resolution of priorities in relation to property rights as an attempt to sort out amongst the claimants interested in property the order in which various interests should prevail, and there are no property rights involved in restraining a person from acting in breach of confidence. His Honour drew support from Pettit[102] that a man who innocently obtains confidential information can be restrained from breaking that confidence once he gets to know that it was originally given in confidence, and from the following observations of Lord Denning in *Fraser v Evans*:[103]

> The jurisdiction is based not so much on property or on contract as on a duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence.

Consistent with the views expressed earlier in this paper, it is submitted that his Honour was correct in rejecting that confidential information was a species of proprietary right. Unlike property, more than one person may have the use of particular information, indeed information may be shared *ad infinitum* without the originator of that information losing the right to use that information. However, the practical effect on the originator of the information losing the exclusive use of it is, as *Wheatley v Bell* illustrates, no different from a person having their real property taken, for it is the confidential (exclusive) nature of the information which gives it its value.

It is submitted that the approach of Helsham CJ is consistent with the authorities in another important respect. Previously in this paper the nature of the obligation of confidence was considered in the context of the competing formulations of Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*[104] and Lord Denning in *Seager v Copydex Ltd.*[105] It will be recalled that the conclusion there reached was that equity imposed a strict duty to respect confidences irrespective of whether the confider suffered any detriment. If one applies Lord Greene MR's formulation the obligation is, as Helsham CJ concluded, strict enough to extend to an innocent third party who is unaware that it was divulged to him or her in breach of duty. According to this formulation, questions such as the third party's *bona fides*, the reasonableness of his or her behaviour and such like would simply be irrelevant on the question of liability, though those

102 Pettit P, *Equity and the Law of Trusts*, 3rd ed, Butterworths, London (1974) at 422.
103 [1969] 1 QB 349 at 361.
104 [1948] 65 RPC 203.
105 [1967] 1 WLR 923.

questions may be relevant to the question of damages.

It has been suggested by Jones[106] that defendants acting in good-faith who are later told that information has been given to them in breach of confidence should be excused from liability if they can establish that they irrevocably changed their position to their detriment, so that it would be inequitable to grant the plaintiff any relief. In each case it would be a question of fact whether the change of position is sufficiently detrimental to relieve him or her from liability. In cases where there has been no detrimental change of position, certainty of transaction can be preserved by the recognition of a strong rebuttable presumption that a good-faith purchaser is deemed to have changed its position to his or her detriment; and the financial interests of the defendant can be safeguarded by the condition that the plaintiff reimburse the defendant for any expenditure, with interest, before being granted relief. Jones argues that the application of a flexible notion of change of position may balance more effectively than an absolute defence of *bona fide* purchaser for value without notice the competing claims of the honest purchaser and the deceived plaintiff.

Jones' suggestion is primarily directed to ameliorating the harshness that the *bona fide* purchaser for value defence would have against an innocent plaintiff. However, on the present state of the authorities, the defence is not available in Australia. In the absence of such a defence the view propounded by Jones will have the effect of eroding the protection afforded to an innocent plaintiff and correspondingly increasing the protection afforded to an innocent third party. Ultimately the question comes down to which of two innocent parties, the confider or the innocent third party purchaser, must bear the loss.

In the case of government information, the non-disclosure of which is justified in the public interest, the scope for affording protection to an innocent third party purchaser would appear to be limited. If the public interest would be damaged by disclosure, there seems little alternative than that the defendant be precluded from disclosing the information. Whilst the government could be required to give an undertaking to compensate the innocent purchaser of the information, the refusal by the government to give such an undertaking would place the court in an invidious position. If the government were to refuse to give the undertaking, given that disclosure would be contrary to the public interest, the court may nevertheless be compelled to order that the information not be disclosed. The court could overcome this dilemma by making the payment of compensation part of the order of the court.

Remedies for breach of confidence

The reliance on several jurisdictional sources for the action for breach of

106 Jones G, 'Restitution of Benefits Obtained in Breach of Another's Confidence' [1970] 86 LQR 463 at 477-9.

confidence has, as has already been pointed out, been based on pragmatic considerations. The nature of the remedies available to a plaintiff will depend on the jurisdictional basis on which the court proceeds. If a decision is based exclusively on the independent jurisdiction in equity, one might expect that the plaintiff would have access only to the pecuniary remedy of an account of profits, and not to damages which would follow from a decision based on contract.[107] The policy of the courts in this area is that the upholding of confidences is sacrosanct. Once it is made explicit that the real jurisdiction of the court is the fundamental principle that confidences are enforceable, it becomes clear that equity, contract and property are but secondary jurisdictional mechanisms for implementing the law's policy of enforcing confidences. For instance, the courts have used the implied terms of a contract or equity as the basis of a decision when an express contractual term is badly drafted or would constitute an insecure basis for granting relief. With similar flexibility, where the court had doubted the orthodoxy of granting damages for breach of an equitable obligation of confidence, it has been prepared to reconstruct the defendant's liability in contract, thereby placing the award of damages beyond doubt.[108] Alternatively, the courts have relied simultaneously on both contract and equity to support damages and an injunction.[109] This facility for using various bases has been invoked not only to ensure that a confidant is obliged to respect the full duty of confidence, but also to assure to the confider the full range of remedies which may be available.[110]

Injunction

It is convenient to begin with the injunction, a remedy which will invariably be relied on where the unauthorised disclosure is anticipated rather than actual or, if disclosure has taken place, to prevent any further disclosures. In this context the interlocutory injunction is particularly significant in that where granted it has the effect of preventing any disclosure until a decision is made whether to grant a final injunction. Although a decision whether to grant an interlocutory injunction must often be made without the court having the opportunity to assess fully the cases of the respective parties, it often has the practical effect of finally determining the matter in dispute between the parties as the parties often agree to a settlement prior to the matter going to a full hearing. Consequently, the principles to which the court will have regard in deciding whether an interlocutory injunction should be granted are particularly important.

In *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[111] the High Court set out the basis on which interlocutory injunctions would be granted in the following terms:[112]

107 Gurry above n 8 chapter 6, in Finn P, *Essays* in *Equity*, Law Book Co, Sydney (1985) at 113.
108 Ibid at 114-5.
109 Ibid.
110 Ibid.
111 (1968) 118 CLR 618.
112 Ibid at 622-3.

> The Court addresses itself in all cases patent as well as other, to two main inquiries. The first is whether the plaintiff has made out a *prima facie* case, in the sense that if the evidence remains as it is there is the probability that at the trial of the action the plaintiff will be entitled to relief .... How strong the probability needs to be depends, no doubt, upon the nature of the rights he asserts and the practical consequences likely to flow from the order he seeks .... but in a particular case it may be that although the plaintiff has shown a probability of success other considerations make it unjust to grant an injunction, especially if another form of interlocutory relief is possible. The second inquiry is directed to this aspect of the matter. It is whether the inconvenience or injury which the plaintiff would suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.

However in *American Cyanamid Co v Ethicon Ltd*[113] Lord Diplock, with whom the other judges agreed, rejected 'the supposed rule that the Court is not entitled to take into account any balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the Court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunctions sought.'[114] His Honour continued: 'The use of such expressions as 'a probability', 'a *prima facie* case', or 'a strong *prima facie* case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried'.[115] His Honour concluded that 'unless the material available to the Court at the hearing of an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought'.[116] Following the decision in *American Cyanamid* it is unclear whether the decision of the High Court in *Beecham* will be followed by a majority of the present High Court. In *Re Castlemaine Tooheys*[117] Mason ACJ expressed the view that the *American Cyanamid* test was the correct test to be applied at least in the majority of cases.[118] However in *Davids Holdings Pty Ltd & Anor v Byrnes & Others*[119] Brennan J appeared to favour the *Beecham* test.

After all the relevant issues have been argued following a full healing of the matter a final injunction may be granted restraining a party from disclosing the information in issue. It is unclear what criteria the courts apply in determining the appropriate time period which an injunction should last.

113 [1975] AC 396.
114 Ibid at 407.
115 Ibid.
116 Ibid.
117 (1986) 67 ALR 553.
118 Ibid at 557.
119 (1987) 71 ALR 251.

In *Attorney-General v Guardian Newspapers (No 2)*[120] the House of Lords accepted that once information had lost its confidential character by becoming generally known in the public domain or could be obtained by anyone who desired to do so the 'law would indeed be an ass'[121] if it denied persons access to such material. Consequently, it would be futile for an injunction to be granted in such cases.

Even though information is in the public domain, a person who has obtained information in confidence may need to be placed under a special disability so that he or she does not get an unfair start. This requirement was described by Roxburgh J in *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* in the following terms:[122]

> ...a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public ...the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start.

The 'springboard doctrine', as it has come to be known, has been accepted in Australia.[123] Like the final injunction, it will only last for as long as the court deems necessary.[124]

Account of profits

In addition to, or independently of, the remedy of injunction, a successful plaintiff may be granted the equitable remedy of account of profits. Like the injunction it is a discretionary remedy. The principle behind the remedy is that a defendant should have to account for any gain made from his or her wrongdoing to the person whose trust the defendant breached.[125] It would seem that this extends to accounting for any profits made even though made innocently and not dishonestly[126] and even though the confider suffers no financial loss.[127] Whilst the defendant will be liable for the extent to which the unlawful use of the disclosure contributed to the profits made by the defendant, the total profit earned by the defendant will often be the result of a combination of the lawful and unlawful use of confidential information. It may also involve a payment to the provider of the information. Both issues were canvassed in *Attorney-General v Guardian Newspapers (No 2)*. In that

120 [1988] 3 All ER 545 at 638.
121 Ibid at 652.
122 [1967] RPC 375 at 391-2.
123 *United States Surgical Corporation v Hospital Products International* [1982] 2 NSWLR 766.
124 *Potters-Ballotini Ltd v Weston Baker* [1977] RPC 202 at 206.
125 *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 All ER 545 per Lord Keith at 644.
126 *Seager v Copydex Ltd* [1967] IWLR 923.
127 Above n 125.

case the House of Lords held that *The Sunday Times* newspaper had been in breach of the duty of confidence in publishing extracts from the book *Spycatcher*, the author of which, Mr Wright, had breached his duty to his employer, the British Security Service, in writing the book. Scott J at first instance was of the view that materials from *Spycatcher* which *The Sunday Times* was entitled to publish should not be taken into account as a credit in determining the profits for which it was liable to account.[128] In the Court of Appeal Sir John Donaldson MR agreed, adding that he could see no escape from the distasteful conclusion that the newspaper could deduct, in assessing its profits, the payments made to Wright. [129]

On appeal, the House of Lords held that *The Sunday Times* newspaper was liable to account for the profits accruing to it as a result of the publication of an extract from the book even though the Crown had suffered no financial loss. Lord Keith[130] and Lord Jauncey[131] refused to allow *The Sunday Times* to deduct the fee paid to Wright 'since neither Mr Wright nor his publishers were, or would in the future be, in a position to maintain an action for the recovery of such payments'. Lord Blightman could 'see no reason why *The Sunday Times* should not account for a due proportion of the entirety of the total net profits of the issue...with possibly an allowance for those copies of the paper which omitted the offending instalment as part of a deceit to hoodwink the government'.[132] Lord Brightman did not explain what he meant by 'due proportion'. Did he mean those increased sales which were attributable to the publication of the offending material, or all the profits made from the sale of the particular issue as Scott J appeared to suggest? Lord Griffiths simply agreed with Lord Keith that the *The Sunday Times* was liable to account to the Crown for any profits it may have made from that publication'.[133] With an equal absence of elaboration Lord Goff said that he could 'see no reason why *The Sunday Times* should not be liable to account for profits flowing from its wrong, subject, however, to all the difficulties attendant on this remedy and its (perhaps excessively) technical nature'.[134]

Might the cost of conducting an account of profits itself be a reason for not awarding the remedy, particularly where the cost of conducting the account is likely to far outweigh any amounts which may be awarded to a plaintiff, and where that account is likely to be no more than a rough estimate? Further, it is not inconceivable that a defendant may have incurred a loss in making the disclosure. In difficult economic times newspapers, television and radio may actually lose money. As advertising is the earner of profits in the case of newspapers in particular, in the absence of sufficient advertising revenue, the greater the sales the greater the loss.

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128 Ibid at 590.
129 Ibid at 612; and see also Dillon J at 621.
130 Ibid at 645.
131 Ibid at 668.
132 Ibid at 647-8.
133 Ibid at 655.
134 Ibid at 667.

Damages

Is the remedy of damages the solution where an account of profits would need to traverse the difficulties outlined above? Damages will not remove any difficulties a plaintiff may have in quantifying his or her loss, though in the case of a defendant who does not make a profit from the use of the confidential disclosure, the award of damages may operate to compensate the plaintiff for any losses suffered from any unauthorised use of the information, notwithstanding the defendant's failure to make a profit. Conversely, an award of damages may operate to enable the plaintiff to receive any profits made from the unauthorised use of the information notwithstanding that the plaintiff suffers no damage and would not have otherwise benefited from its use; for example, where an employee of a celebrity sells confidential and advantageous information about a celebrity to a newspaper.[135]

An account of profits is restitutionary, damages compensatory, and may yield different results. The distinction between an account of profits and damages was explained by Windeyer J in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* in the following terms:[136]

> The distinction between an account of profits and damages is that by the former the infringer is required to give up his ill-gotten gains to the party whose rights he has infringed: by the latter he is required to compensate the party wronged for the loss he has suffered. The two computations can obviously yield different results, for a plaintiff's loss is not to be measured by the defendant's gain, nor a defendant's gain by the plaintiff's loss. Either may be greater, or less, than the other. If a plaintiff elects to take an inquiry as to damages the loss to him of profits which he might have made may be a substantial element of his claim .... But what a plaintiff might have made had the defendant not invaded his rights is by no means the same thing as what the defendant did make by doing so.

It has not been settled, but it would seem that damages are available for a breach of a purely equitable obligation. Where a breach of confidence is found to constitute a breach of contract, or the claim is founded on liability for a negligent disclosure or for inducing breach of contract, it is clear that a breach of confidence may sound in damages.[137] However, the action for breach of confidence may arise in the exclusive jurisdiction in equity. Prior to the passage of the *Judicature Acts* in England the Court of Chancery was separate from the common law courts. The common law courts were empowered to award damages, whereas the Court of Chancery was empowered to entertain suits for the recovery of an equitable debt or liability in the nature of a debt. It was a suit for the restitution of the money or thing of which the plaintiff had been cheated. The inability of the Chancery to award a monetary remedy other than for restitution led to the passage of Lord Cairns'

135 *Prince Albert v Strange* [1849] 64 ER 293.
136 (1968)122 CLR 25 at 32.
137 Above n 7 at 120.

Act in 1858. The courts' jurisdiction to award damages in equity arose originally from section 2 of *Lord Cairns' Act*, which read as follows:

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract. or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

A similar power was granted to the Equity Court in NSW by section 22 of the *Equity Act 1880* (NSW), which is now to be found in section 68 of the *Supreme Court Act* 1970 (NSW) which reads:

> 68. Where the court has power:
>
> (a) to grant an injunction against the breach of any covenant contract or agreement, or against the commission or continuance of any wrongful act; or
>
> (b) to order specific performance of any covenant contract or agreement,
>
> the court may award damages to the party injured either in addition to or in substitution for an injunction or specific performance.

Whatever the intention of the legislature may have been there is persuasive authority that the reference to 'wrongful act' in section 68 of the *Supreme Court Act* (NSW) empowers the court to award damages for purely equitable wrongs. In *Talbot v General Television Corporation*[138] Harris J in the Victorian Supreme Court held that the Victorian equivalent of section 68 of the New South Wales Act applied to purely equitable wrongs. His Honour said:[139]

> For my part, I find the description 'wrongful act' an entirely appropriate one to describe an act which is the unauthorised use of confidential information. I can see no reason, in history or otherwise, why the expression should be given a restricted meaning and I am satisfied that the words are wide enough to cover this case. No reason was suggested why, if there was jurisdiction an inquiry as to damages should not be ordered.

It would also seem that there is jurisdiction toward damages for breach of confidence in the inherent jurisdiction of equity. In both *Saltman Engineering Co Ltd v Campbell Engineering Co*[140] and *Seager v Copydex Ltd*[141] the plaintiffs were awarded damages for breach of a purely equitable

138 [1980] VR 224.
139 Ibid at 241.
140 [1948] 65 RPC 203.
141 [1967] RPC 349.

obligation of confidence. In the latter case the Court made no mention of *Lord Cairns' Act*. As Professor Finn states, 'no great violence is wrought' by extending the compensatory jurisdiction in equity.[142]

Given the wide range of information which may give rise to a duty of confidence, and the desire of the courts to achieve a just result in individual cases, it is hardly surprising that the courts have endorsed more than one method for the calculation of damages.

In *Seager v Copydex Ltd (No 2)*[143] the Court of Appeal held that damages were to be assessed on the market value of the information.[144] If there was 'nothing very special' about the information and it was 'the sort of information which could be obtained by employing any competent consultant', the value of the information, and consequently the damages payable to the plaintiff, was the fee which a consultant would charge for the information.[145] If the information was 'something special, as for instance, if it involved an inventive step or something so unusual that it could not be obtained by just going to a consultant', then the value was the price that a willing buyer would pay for it to a willing seller.[146] If the information, is 'very special' then the court must give a lump sum which would be calculated on the basis of a capitalisation of royalty. Once the damages have been paid, the information will belong to the defendant.[147]

A similar approach was adopted in the Supreme Court of New South Wales by Bowen CJ in Equity in *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales*.[148]

In that case the plaintiff was held entitled to an award of damages assessed on the basis of what would be fair remuneration to the plaintiff for permission to use the information in the way in which the defendant did in fact use it.[149]

It would seem that damages will be assessed, whether awarded at law or in equity, at the date of the breach of confidence, unless this would lead to injustice, in which case the market value may be assessed at the date of the healing.[150]

Delivery up

In its inherent jurisdiction in equity the court may order the defendant to

142 Above n 24.
143 [1969] RPC 250.
144 Ibid per Lord Denning MR at 256; Salmon and Winn LJJ at 257.
145 Ibid at 256.
146 *Ibid.*
147 Ibid.
148 [1975] 2 NSWLR 104.
149 Ibid at 124.
150 Above n 8 at 450-1.

deliver up to the plaintiff any documents or material in his or her possession or control which have been obtained or made in breach of confidence. The remedy is available on its own, or in addition to other equitable relief such as the injunction. The purpose of the remedy is to ensure to the plaintiff the fruits of his or her success in the action.[151] Where the defendant is in possession of such material, delivery to the plaintiff will not be precluded for the reason that the defendant has added his or her own material to material taken from the plaintiff.[152] Where the defendant has misused the plaintiff's information but is not in possession of it, an order enjoining the plaintiff from making use of that information will readily be accompanied by an order for the destruction of the information or products embodying the information.[153] In many cases the decision by the court as to whether to make an order for destruction or delivery up will depend on the reliability of the defendant. Where the defendant has proved to be unreliable under oath, destruction may not be entrusted to the defendant and delivery up will be ordered. The social wastefulness of the remedy of destruction has not gone without comment. Gurry argues that where possible severance of the material obtained and used in breach of confidence from other material should be available in breach of confidence cases to overcome the social wastefulness of an order for destruction.[154]

151 *Industrial Furnaces Ltd v Reeves* [1970] RPC 605 at 627.
152 Ibid.
153 Above n 135.
154 Above n 8 at 415-6.