



The Law Commission

(LAW COM. No. 110)

BREACH OF CONFIDENCE

REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965

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by Command of Her Majesty
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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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BREACH OF CONFIDENCE

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THE LAW COMMISSION

BREACH OF CONFIDENCE

To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

PART I

INTRODUCTION

1.1 This report is made in response to your reference to the Law Commission of 16 March 1973 made under section 3(1)(e) of the Law Commissions Act 1965. We were requested:

- “(1) to consider the law of England and Wales relating to the disclosure or use of information in breach of confidence and to advise what statutory provisions, if any, are required to clarify or improve it; and
- (2) to consider and advise what remedies, if any, should be provided in the law of England and Wales for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained and in what circumstances such remedies should be available.”

1.2 At the end of 1974 we published Working Paper No. 58 on Breach of Confidence, as mentioned hereafter.¹ Although the working paper and this report spring directly from this reference, indirectly they are a sequel to the Report² in July 1972 of the Younger Committee on Privacy. That Committee rejected proposals³ that there should be a general remedy for the protection of privacy, but they recommended new remedies⁴ to cover certain *specific ways* in which privacy might be invaded and they drew attention⁵ to the action for breach of confidence, which they considered was potentially capable of affording greater protection to privacy than had hitherto been realised. However, since the Committee found the action for breach of confidence to be in many respects of uncertain character and scope, they recommended that it should be referred to the Law Commission and, so far as the law of Scotland was concerned, to the Scottish Law Commission with a view to its clarification and statement in legislative form. They suggested⁶ that the aims

¹See para. 1.7 below.

²(1972) Cmnd. 5012.

³As, for example, in the Bill of 26 November 1969 sponsored by Mr. Brian Walden, M.P.

⁴At para. 563 they envisaged a criminal offence of “surreptitious surveillance”, and at para. 565 a civil remedy which would cover overt and surreptitious surveillance, if in either case the surveillance had been carried out by a “technical device” in “circumstances in which, were it not for the use of the device, [the] person would be justified in believing that he had protected himself or his possessions from surveillance whether by overhearing or observation”.

⁵At para. 630 and in Appendix I, paras. 29–32.

⁶At para. 631.

of the action for breach of confidence should be:

- “(a) to provide remedies against the disclosure or other use of information (not already generally known) by persons in possession of that information under an obligation of confidence;
- (b) to make remedies available not only against a person who was entrusted by another with information in confidence but also against a third party to whom that person disclosed the information;
- (c) to protect the public interest in the disclosure of certain kinds of information, and the defendant’s right of disclosure in certain privileged situations, by the provision of appropriate defences;
- (d) to afford remedies, whether by way of injunction, damages or claims for loss of profit which do justice to the reasonable claims of plaintiffs and defendants in differing situations.”

1.3 The Younger Committee were however doubtful⁷ whether the existing action for breach of confidence sufficiently covered the use or disclosure of information which had been acquired not with any undertaking to keep it confidential but simply without the authority of the lawful possessor of the information. They pointed out that, although it was possible to steal a document, information as such did not appear capable of being stolen,⁸ and that it was uncertain⁹ whether the possession of information which a person knows to have been obtained, for example, from a stolen document, made him liable in a civil action for breach of confidence if he used or disclosed that information. They therefore recommended that “it should be a civil wrong, actionable at the suit of any person who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means.”¹⁰ They expressed the hope that, “if the task of clarifying and stating in legislative form the law relating to breach of confidence” were entrusted to the Law Commission, they would also “take into account and coordinate their work” with that recommendation.

1.4 Apart from its limited connection with the question of the general protection of privacy,¹¹ the action for breach of confidence is of great practical significance in its own right. This has become increasingly clear from judicial

⁷See para. 632 of the Younger Report.

⁸The assumption made by the Committee has been subsequently confirmed by the decision of the Divisional Court in *Oxford v. Moss* (1979) 68 Cr. App. R. 183. In that case it was held that there was no property in the information contained in an examination paper (of which latter the defendant did not intend permanently to deprive the owner) sufficient to sustain a charge of stealing “intangible property” within the meaning of s. 4 of the Theft Act 1968. Apart from this point it would appear to be of the nature of information as such (as distinguished from the material thing which contains it) that its appropriator does not necessarily have “the intention of permanently depriving the other of it” (as is required by s. 1(1) of the Theft Act 1968); see Griew, *The Theft Acts 1968 and 1978*, 3rd ed. (1978), paras. 2.14, 2.54; Glanville Williams, *Textbook of Criminal Law* (1978) pp. 688–689.

⁹The authorities which give some support to the proposition that a person who obtains information by reprehensible means is subject to an obligation of confidence in respect of the information so obtained are discussed in paras. 4.7–4.10 below.

¹⁰Para. 632.

¹¹See paras. 2.1–2.7 below.

decisions¹² since the Younger Committee reported in 1972. Information which may now become the subject of an action for breach of confidence is of many different kinds, covering, for example, such diverse material as marital communications,¹³ commercial and technical secrets¹⁴ and communications in a governmental context, such as Cabinet discussions.¹⁵ And as the potential range of the action has become apparent, the considerations of policy, which in the interests of the free circulation of information may in certain circumstances override any obligation of confidence, have assumed increasing importance. We think, indeed, in the light of our own deliberations and of the views expressed in the consultation on Working Paper No. 58, which was published in 1974, that the uncertainties and inadequacies of the action for breach of confidence call both for reform and for statutory reformulation, irrespective of any contribution which might thereby be made to the protection of privacy.

1.5 In 1973 the Scottish Law Commission was given a reference on breach of confidence by the Lord Advocate in the following terms:

“With a view to the protection of privacy—

- (1) to consider the law of Scotland relating to breach of confidence and to advise what statutory provisions, if any, are required to clarify or improve it;
- (2) to consider and advise what remedies, if any, should be provided in the law of Scotland for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained, and in what circumstances such remedies should be available.”

1.6 It will be seen that the terms of reference of the Scottish Law Commission specifically envisage their task as one directly concerned with the better protection of privacy. Their provisional proposals,¹⁶ apart from dealing with the circumstances in which a contractual obligation not to use or disclose information may arise (there being no separate legal category in the law of Scotland of obligations of confidence), include:

- (a) a declaratory provision to the effect that an action based upon the delict of *injuria* should be competent, where it is claimed that injury to the feelings has been sustained through the disclosure of information about the pursuer or through the means whereby information about him has been obtained, where these amount to an unwarranted aggression upon the pursuer’s person, dignity or reputation;
- (b) alternatively, the creation of a statutory delict covering the use or disclosure of information amounting to a substantial and

¹²See in particular *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752 in which it was held *inter alia* (a) that breach of confidence might cover discussions at Cabinet meetings, and (b) that it was for the plaintiff (contrary to the view hitherto generally accepted) to satisfy the court that, on a balancing of the public interests concerned, the public interest lay in protecting the confidence. The case is discussed in greater detail in paras. 4.41–4.44 below.

¹³See *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302 and para. 4.2 below.

¹⁴See, for example, *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41 and para. 4.4 below.

¹⁵See *Attorney-General v. Jonathan Cape Ltd.* (see n. 12 above).

¹⁶See Memorandum No. 40, 1977, Introduction, paras. 1–6 and Summary (p. 62), paras. 1–18.

unreasonable infringement of a right of privacy (which they treat as comprehending a right to be protected from substantial and unreasonable intrusion upon the pursuer's family);

- (c) if reliance for this purpose is not to be put on the general principles of the *actio injuriarum*, the creation of a statutory delict, actionable at the instance of any person who has suffered damage thereby, of disclosing or otherwise using information which, at the time of the disclosure or use, the discloser or user knew, or ought to have known, was obtained by unlawful means. The Scottish Law Commission also provisionally propose certain criminal offences in connection with the obtaining of information.¹⁷

1.7 We published our Working Paper¹⁸ on Breach of Confidence at the end of 1974. Consultation on the paper was prolonged and extensive, and included a seminar held at All Souls College, Oxford in January, 1975. The general importance attached to the subject was shown by the large number and detailed character of the comments made. The individual and institutional commentators came from many different backgrounds, including, for example, the Press, broadcasting, publishing, industry and commerce and governmental and other public bodies, as well as the judiciary and the practising and academic legal profession (among whom were a number with special experience in the field, cognate to breach of confidence, of patents, copyright and trademarks). We should like to express our thanks to Mr. Norman S. Marsh, C.B.E., Q.C., a former Law Commissioner, for his very considerable assistance in the preparation of this report.

1.8 The structure of this report is as follows. Part II deals with general considerations affecting the report. In Part III we give an outline of the development of the action for breach of confidence from its beginnings in the eighteenth century until the present day; since the action has been developed by the courts largely without legislative assistance, this is essentially a chronological survey of the more important decisions. Part IV contains a full analysis of the law regarding breach of confidence, at least so far as the present state of the law allows. In Part V we draw attention to what appear to us to be the main uncertainties and inadequacies of the existing law. In Part VI we explain how these defects can be remedied within the framework of comprehensive recommendations for the replacement of the present action by a new statutory action. Our recommendations are set out together in Part VII and a draft Bill to implement them is to be found in Appendix A. The names of those who commented on the working paper and of those who attended the seminar at All Souls College are given in Appendices B and C. In Appendix D we summarise developments within the European Economic Community which, in the light of the obligations of the United Kingdom under the Treaty of Rome and the European Communities Act 1972, might have an impact on our law relating to breach of confidence.

¹⁷ (1) Entry without the occupier's consent upon premises and without legal authority to obtain confidential information or information of value, (2) search or examination of property without the consent of the owner or lawful possessor and without legal authority with a view to obtaining confidential information or information of value, (3) the use of certain technical surveillance devices.

¹⁸ Working Paper No. 58.

PART II

GENERAL CONSIDERATIONS AFFECTING THIS REPORT

A. The distinction between privacy and confidence

2.1 As we have explained at paragraphs 1.2 and 1.3 above, the circumstances which have provided the immediate impetus for this report are closely connected with the protection of privacy. We must emphasise, however, that our terms of reference (set out at paragraph 1.1 above) are not directed to the protection of privacy as such, but are limited to the disclosure or use (i) of information in breach of confidence and (ii) of information "unlawfully obtained".

2.2 So far as information falling within the first limb of our terms of reference is concerned (that is to say, information disclosed or used in breach of confidence), we have seen our task as that of clarifying and improving the present right of action for breach of confidence, which is based on an obligation of confidence owed to another. Under our recommendations, once information has been entrusted in circumstances giving rise to an obligation of confidence, that information is in effect impressed with a duty of confidence owed to the person who has entrusted it.

2.3 By contrast, a right of privacy in respect of information would arise from the nature of the information itself: it would be based on the principle that certain kinds of information are categorised as private and for that reason alone ought not to be disclosed. In some situations, of course, a right of privacy and a right of confidence might confer similar protection. Thus, if A gives "private" information concerning, say, some aspect of his family life to B on a confidential basis, a subsequent unauthorised disclosure by B to a third party would at once constitute a breach of B's duty of confidence to A and, assuming that that kind of information has been categorised as private, an infringement of A's privacy.

2.4 It is important to bear in mind the essentially different nature of the two kinds of right, since otherwise the need to make distinctions that at first sight might seem arbitrary or anomalous may not be appreciated. For example, we propose that in general,¹⁹ as is the case under the existing law,²⁰ the only person entitled to sue for breach of confidence should be the person who gave the relevant information in confidence; and it is to him alone, therefore, that a duty is owed. Accordingly, if A, who has information of a personal character concerning C, gives that information in confidence to B, C will have no right of action should B subsequently publish it. We appreciate, of course, that a case can be made out for conferring a right of action upon those who suffer damage or distress from the publication of details of their private lives, even where no obligation of confidence in respect of that information is owed

¹⁹A limited exception is where, on behalf of B, A receives information from C. If A is under an obligation to B to treat the information so received as confidential B will have the right to sue A for breach of confidence. Thus if, for example, a doctor receives from a consultant a report upon a patient who has been referred to him by the doctor, the latter will owe a duty of confidence to the patient in respect of the information contained in the report: see para. 6.15 below.

²⁰See, for example, *Fraser v. Evans* [1969] 1 Q.B. 349, considered at para. 4.13 below.

to them; but a right of that general character could be based only upon an infringement of a right of privacy in relation to the information itself, not upon the breach of a duty of confidence. In the example given, to confer a right of action for breach of confidence upon C would be to place him, unjustifiably, in a better position than if A had given the information to B otherwise than in confidence, or if A had subsequently consented to publication. C's complaint is essentially based on the infringement of his privacy. The questions whether or not B owes a duty of confidence to A and, if B does owe such a duty, whether or not there has been a breach of it, do not affect that fact, and it is not our task in this report to make recommendations for the protection of privacy as such.²¹

2.5 We also make a distinction between a remedy for infringement of privacy and one based upon the disclosure or use of information within the second limb of our terms of reference (i.e. "information unlawfully obtained"). We have regarded this second limb as ancillary to the first—that is to say, as requiring us to consider whether the remedies for breach of confidence should be extended to cover situations in which there is no acceptance of an obligation of confidence but where it would be right to impose a constructive obligation of that nature. We have adopted this approach because the reason for the inclusion in our terms of reference of this second limb was, as we have explained in paragraph 1.3 above, the concern expressed by the Younger Committee that a person who has obtained information without the consent of the holder ought not to be in a better position than someone to whom the holder has entrusted it in confidence.

2.6 With this consideration in mind, we have formulated recommendations concerning information "unlawfully obtained" whereby an obligation of confidence will arise when information has been acquired in circumstances where, to put it broadly, certain reprehensible means have been used.²² We have thought it right not to limit these circumstances to the obtaining of information by what in a strict sense amounts to "unlawful" means.²³ On the other hand we think it would involve too great and indeterminate a limitation on the free circulation of information to impose a constructive obligation of confidence on anyone who comes into possession of information and knows or ought to know that in securing the information he is defeating the reasonable expectations of the previous holder.²⁴ Although the listing of specified circumstances involving reprehensible means of obtaining information may give rise to some arbitrary distinctions, this approach has the great advantage of comparative certainty, enabling those coming into possession of information to recognise whether or not it has to be treated as confidential. However, we

²¹The question whether the category of persons who can sue for breach of confidence should be widened is considered at para. 5.9 below.

²²Para. 6.46 below.

²³Thus, it is at present neither a criminal offence nor a civil wrong to use a technical device (not involving the broadcasting of wireless messages or an act of trespass) to overhear a private conversation. In para. 6.46 below we make a recommendation in regard to such circumstances.

²⁴We tentatively raised this possibility in Working Paper No. 58, paras. 139-140. We discuss this more fully in para. 6.30 below.

must emphasise that under the second limb of our terms of reference (as well as under the first) a person who is under a duty of confidence in respect of information will not incur liability for breach of confidence unless he discloses or uses the information. By contrast, the very acquisition, by certain means or in certain circumstances, of information categorised as private would constitute an infringement of a right of privacy relating to the information if there were such a right. Under the recommendations in this report, on the other hand, concerned as it is solely with the law concerning confidence, no liability will arise merely from the acquisition of information by any of the reprehensible methods that we list, since a breach of confidence would be committed only by a subsequent disclosure or use of such information.

2.7 One further point remains to be made with regard to the relationship between our recommendations and the protection of privacy, which is that we do not propose the creation of any criminal sanction. We refer to this point only in order to resolve any possible confusion as to the scope of this report that may arise from the fact that the Younger Committee, who considered in some detail the problems to which the use of technical surveillance devices gave rise,²⁵ recommended the creation of an offence of surreptitious surveillance by means of devices of that kind.²⁶ That recommendation (which has not been implemented) clearly relates to the protection of privacy, whereas the task which the Younger Committee suggested should be referred to us, and was in fact so referred under our terms of reference, was to review the law of confidence—a branch of the law which concerns only civil rights and remedies.²⁷

B. The relationship between the legal process of discovery and confidence

2.8 The court has wide powers to order a party to disclose information to another by way of discovery. The principles governing the exercise of these powers comprise a substantial, and developing, body of law, and they include detailed rules relating to the categories of documents which may be privileged from production. Where the person in possession of information of which an order for disclosure is sought is holding that information subject to an obligation of confidence, two related but distinct questions arise. The first is whether, under the law as to confidence, a disclosure of such information pursuant to an order of the court will constitute a breach of confidence. It is clear that the answer to that question is No—that is to say, a person who discloses confidential information in compliance with a court order in that regard has a defence to an action for breach of confidence founded on that disclosure.

²⁵(1972) Cmnd. 5012, Part IIE, chap. 19. The use by the police of surreptitious surveillance devices is examined in the Report of the Royal Commission on Criminal Procedure (1981), Cmnd. 8092, paras. 3.53–3.60.

²⁶(1972) Cmnd. 5012, Part IIE, chap. 19, paras. 562–563.

²⁷We have, however, found the detailed discussion by the Younger Committee of the question of technical devices helpful, in the different context of breach of confidence, for the purpose of formulating one of the situations in which we recommend that a duty of confidence should be imposed upon the acquirer of information: see para. 6.46 below. We consider also, in paras. 6.98–6.99 below, the relevance to this report of the recommendations made by the Lindop Committee on Data Protection, (1978) Cmnd. 7341.

The second, quite separate, question is: in what circumstances (under the law relating not to breach of confidence, but to discovery) will the court treat information which has been impressed with an obligation of confidence as being privileged from disclosure? We must emphasise at the outset that the latter issue does not form part of the law of confidence, and that it accordingly falls outside the scope of our recommendations in this report. However, we have taken the view that an account of some recent developments in the law governing discovery might be helpful for the purpose of avoiding possible confusion between these two fields of law.²⁸

C. The distinction between unjust enrichment and breach of confidence

2.9 Questions analogous to those concerning the relationship between confidence and privacy arise in regard to the relationship between confidence and a principle of unjust enrichment. Under the latter it would be possible in every case to give a remedy to a person who possessed information of a secret nature (relating, for example, to a new industrial process) if such information fell into the hands of someone who then disclosed or used the information for his own profit; and it would not be necessary, as it is under the recommendations in this report, to ascertain whether the information had been impressed with confidence either because it had been entrusted to a recipient in confidence or because it had been acquired by one of the reprehensible means referred to in paragraph 2.6 above. We refer to unjust enrichment only for the purpose of pointing out that we are aware of the existence of cases which, though falling outside the scope of a remedy for breach of confidence, and hence outside our recommendations, might be considered to call for a remedy. For example, A picks up in the street a document which an inventor has inadvertently dropped. The document is addressed by the inventor to a manufacturer offering to sell the latter a new industrial process. A finder reads it and returns it to the inventor but subsequently makes use of the information for his own profit. It could be argued that the inventor should have some remedy against the finder. However, as will appear later in this report (see paragraphs 6.6–6.14 below) we take the view that as a general principle an obligation of confidence should only arise when it has been expressly accepted or can be inferred from the relationship between the giver of the information and its recipient or from the conduct of the latter. We think that the exceptions to this principle should be limited (see paragraphs 6.28–6.46 below) to a number of specific circumstances in which the method used by the acquirer to obtain the information is in a broad sense improper and where therefore it is reasonable to impose on him an obligation of confidence in respect of the information so acquired. Whether a remedy should lie against a finder of information who discloses or uses it, by reason of its private character or because he has used it for his pecuniary advantage, raises questions concerning the protection of privacy or unjust enrichment, which in our view lie beyond the scope of this report.

²⁸See paras. 4.57–4.67 below, and especially the recent decision of the House of Lords in *British Steel Corporation v. Granada Television Ltd.* [1980] 3 W.L.R. 774, considered in detail in paras. 4.63–4.66 below. We have in mind in particular the important part played by the issue of public interest in both areas of law.

D. The distinction between confidential information and property

2.10 A right to confidential information is similar in some respects to a proprietary right: the courts have often referred to such information as being "property",²⁹ and for certain specific purposes it has been treated as such.³⁰ Nevertheless, the nature of confidential information is such as to place it in a category of its own, distinct from that of property; and we have borne in mind the special features of such information in making our recommendations. In the case of information there exists a peculiarly high risk that a person, and indeed a "chain" of persons, may receive information without knowledge of its confidential character, with consequent competing claims between the person to whom the duty of confidence was owed and the person or persons who have acquired the information. Problems of this kind (that of the "competing innocents") are familiar in property law, where they are resolved by the application of the established legal or equitable principles that are appropriate to the category of property in question. However, those principles are unsuited to the purpose of resolving the problems relating to the rights and obligations of third parties in the field of information. In the first place, although it is true that in certain cases the owner of property may transfer his rights in it and yet remain in possession thereafter (for example, by constituting himself a trustee for another), such cases do not represent the usual situation where property is transferred. A person may, on the other hand, commonly impart information to others and continue to be in possession of it, concurrently with those others. Furthermore, the present law of confidence has developed along lines different from the principle governing the transfer of property rights and it would clearly be inappropriate for us to introduce the latter principles into a field of law to which hitherto they have not been applied by the courts.³¹

E. Classes of confidential information

2.11 One general issue that we had to take into account at an early stage of our consideration of the subject was the obvious distinction between information of a commercial or industrial nature on the one hand and information concerning an individual's private life and experience on the other. At first sight it would seem that, at least as to some aspects, the two categories of information ought to be governed by different principles. In the event, however, we have come to the conclusion that it is not only impracticable to construct a satisfactory test whereby to distinguish commercial from personal information but also unnecessary to do so. Accordingly, our recommendations have been formulated in relation to information in general.³²

²⁹For example, in *Boardman v. Phipps* [1967] 2 A.C. 46, 107, Lord Hodson agreed with the trial judge and with the Court of Appeal's opinion that "the confidential information acquired in this case which was capable of being and was turned to account can be properly regarded as the property of the trust"; and a similar view was expressed by Lord Guest (*ibid.*, 115).

³⁰In *Re Keene* [1922] 2 Ch. 475 (C.A.), for instance, it was held that a secret formula relating to certain proprietary articles passed to its owner's trustee in bankruptcy. For a fuller consideration of this question see Gareth Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463, at pp. 464-465.

³¹We consider the position of third parties who receive information which is subject to a pre-existing obligation of confidence at paras. 6.52-6.55 below and, in regard to remedies, at paras. 6.110-6.112 below.

³²This question is discussed fully at paras. 6.68-6.69 below.

F. The relationship between our proposed action for breach of confidence and the law of contract

2.12 We explain in Part VI³³ below the relationship between the law of contract and the action for breach of confidence which we recommend. However, it may be helpful to point out here that, although an obligation of confidence may arise (among other situations) under a contract, subject to one qualification we make no recommendation in this report affecting the law of contract as such. The only point on which we have found it necessary to recommend a change in the law of contract as it affects contracts restricting the disclosure or use of information relates to the part to be played by considerations of public interest. We are recommending that the changes which we propose in the rules concerning the part played by the element of public interest in determining whether in a particular case the use or disclosure in question is justifiable will apply to both contractual and non-contractual obligations.³⁴

PART III

THE DEVELOPMENT OF THE ACTION FOR BREACH OF CONFIDENCE

3.1 That there is an action for breach of confidence independent of statute has been beyond doubt for many years. Broadly speaking, it may be described as a civil remedy affording protection against the disclosure or use of information which is not publicly known and which has been entrusted to a person in circumstances imposing an obligation not to disclose or use that information without the authority of the person who has imparted it. There has, however, been uncertainty as to the nature and scope of the remedy owing to its somewhat obscure legal basis.³⁵

3.2 One line of cases in the eighteenth century was based on the common law right of property of an author in his unpublished work.³⁶ But what was protected was work in a particular form, not information as such. In later cases, decided in the early years of the nineteenth century, the Court of Chancery recognised an equitable right in the confidentiality of information.

³³See paras. 6.127-6.134 below.

³⁴See paras. 6.130-6.133 below.

³⁵See Gareth Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463:

"A cursory study of the cases, where the plaintiff's confidence has been breached, reveals great conceptual confusion. Property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment, have all been claimed, at one time or another, as the basis of judicial intervention. Indeed some judges have indiscriminately intermingled all these concepts. The result is that the answer to many fundamental questions remains speculative."

³⁶See *Pope v. Curl* (1741) 2 Atk. 342 (right of property of Alexander Pope in letters written by him); *Duke of Queensberry v. Shebbeare* (1758) 2 Eden 329 (similar right of owner of unpublished manuscript of Earl of Clarendon's "History of the Reign of Charles II"); *Thompson v. Stanhope* (1774) Amb. 737 (right of executors of Lord Chesterfield in letters written by him to his son).

Lord Eldon L.C. was reported as saying in a case in 1820³⁷ that “[i]f one of the late king’s [i.e. George III’s] physicians had kept a diary of what he heard and saw, this Court would not, in the king’s lifetime, have permitted him to print and publish it”. And in the same year in another case³⁸ Lord Eldon granted an injunction, on the grounds of breach of trust and confidence, to restrain an employee of the plaintiff from selling medicines based on recipes to which he had surreptitiously obtained access while in the plaintiff’s employ. However in 1825 in *Abernethy v. Hutchinson*³⁹ where the plaintiff, a surgeon, was seeking to restrain the publication by “The Lancet” of lectures which he had given at St. Bartholomew’s Hospital, Lord Eldon was at first doubtful whether subsequent publication of oral lectures could be restrained, even if read or memorized from a written text unless the text was produced; but he finally decided to grant the plaintiff an injunction. He implied a contract between the lecturer and his audience that the lectures were not to be published for profit and—which is the particular significance of the case—held that on this basis publication by “The Lancet” could be restrained as being what the Court of Chancery would have called “fraud on a third party”.

3.3 It was on the basis of the cases which have been referred to above that in *Prince Albert v. Strange*⁴⁰ Lord Cottenham L.C. was able to say, perhaps not entirely accurately: “The importance which has been attached to this case arises entirely from the exalted station of the Plaintiff, and cannot be referred to any difficulty in the case itself; the precise facts may not have occurred before, but those facts so clearly fall within established principles, that the application of them is not attended with any difficulty.”⁴¹ The case concerned impressions of plates etched by Queen Victoria and the Prince Consort. They had sent the plates to a printer in Windsor in order that impressions might be made for their private use. Some impressions which had not been authorized came into the possession of Strange’s co-defendant who prepared a descriptive catalogue of the etchings. The catalogue was printed by Strange and copies sent to a number of persons preparatory to a public exhibition of the etchings which the co-defendant and Strange were planning to hold. Lord Cottenham granted an injunction in respect both of the proposed exhibition of the etchings and of the circulation of the catalogue. He held that the plaintiff had a right of property in the unpublished etchings, and that the protection given must, to be effective, necessarily extend to a catalogue describing them, even though the catalogue itself was not prepared by the

³⁷ *Wyatt v. Wilson* cited in *Prince Albert v. Strange* (1849) 1 Mac. & G. 25, 46, by Lord Cottenham L.C. who attributes the dictum quoted in the text to Lord Eldon.

³⁸ *Yovatt v. Winyard* (1820) 1 J. and W. 394. In *Williams v. Williams* (1817) 3 Mer. 157, 160, Lord Eldon had said “so far as the injunction goes to restrain the Defendant from communicating the secret, . . . I do not think that the Court ought to struggle to protect this sort of secrets in medicine”. This remark is a significant early anticipation of the later importance in breach of confidence actions of considerations of the public interest. See paras. 4.36–4.53 below.

³⁹ (1825) 3 L.J. Ch. 209, 212, 218–19. It is noteworthy that at this stage in the development of the action for breach of confidence the contention of the defendants (see p. 211) that the lectures contained nothing new and were more or less a reflection of the published work of John Hunter was ignored by Lord Eldon. This contrasts strongly with the requirement of the developed action that the information to be protected should not be already in the public domain. See paras. 4.15–4.31 below.

⁴⁰ (1849) 1 Mac. & G. 25.

⁴¹ *Ibid.*, 40.

plaintiff. Apart from these grounds Lord Cottenham held that, as the etchings must have come into the possession of the defendant or his co-defendant by reason at some time of a "breach of trust, confidence, or contract", they could be restrained by injunction in the same way as "The Lancet" had been restrained from publishing Mr. Abernethy's lectures.

3.4 *Morison v. Moat*,⁴² decided two years after *Prince Albert v. Strange*, has proved to be one of the most frequently cited early authorities; but although the subject-matter was different—information relating to a secret recipe for a medicine rather than to royal etchings—the legal issues involved and their resolution were similar to those in the earlier case. An unpatented secret recipe had been communicated by Moat senior to his son in breach of an express obligation by the former to his partner Morison. After referring to the different grounds⁴³ which had been given for granting an injunction in such a case, Turner V.-C. held⁴⁴ that "it was clearly a breach of faith and of contract on the part of [Moat senior] to communicate the secret". The son could therefore gain no title, and an injunction was granted restraining him from using the secret recipe. The Vice-Chancellor then raised, but did not decide, as it was not relevant on the facts of the case, the question whether a third party who was a purchaser for value without notice of the obligation of confidence affecting the information could be restrained from using it. This is an issue to which we return later.⁴⁵

3.5 In the course of the next hundred years the principles developed in the earlier cases were applied in a number of decisions,⁴⁶ for the most part without notable qualification or extension. However, a limitation on the

⁴²(1851) 9 Hare 241.

⁴³"In some cases it [the jurisdiction of the court] has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but, upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." (*ibid.*, 255).

⁴⁴*Ibid.*, 263.

⁴⁵See paras. 4.11–4.12 below.

⁴⁶For example, in *Tuck & Sons v. Priester* (1887) 19 Q.B.D. 629 it was held that the plaintiffs were entitled to damages and an injunction to restrain the defendant from printing for his own use copies of a drawing which the plaintiffs had sent to the defendant to be copied. The plaintiffs' claim was independent of any statutory rights of copyright and, according to Lord Esher M.R. (at p. 638), arose "under the general law, by reason of the defendant's breach of contract, and of the trust reposed in him" (emphasis added). The dual grounds of breach of confidence and of contract were also held to be the basis of the decision in *Pollard v. Photographic Co.* (1888) 40 Ch.D. 345, 349, in which the plaintiff obtained an injunction to prevent a negative, made by the defendant photographers when the plaintiff had her portrait taken, being used to make a print as a commercial Christmas card. In *Lamb v. Evans* [1893] 1 Ch. 218, 235 the defendants had formerly been employed by the plaintiff, the proprietor of a trades directory consisting of advertisements; they were restrained by injunction from using information (the addresses of advertisers) which they had obtained while in the plaintiff's employ, the court relying on *Abernethy v. Hutchinson*, *Prince Albert v. Strange* and *Morison v. Moat* (see paras. 3.2–3.4 above). And in *Robb v. Green* [1895] 2 Q.B. 315, 319, where the information in question was a list of customers of the former employer of the defendant, it was stated once again that the right of action could be based either on breach of trust or breach of contract.

protection given against breach of confidence emerged in *Gartside v. Outram*⁴⁷ which, as it will later appear,⁴⁸ has in more recent times become of increasing importance. In that case the plaintiffs were seeking to prevent the defendant from disclosing certain information which he had acquired while in their employ. It was held that they must answer interrogatories as to the allegedly dishonest dealings which were the subject-matter of the information. Wood V.-C. said:

“The equity upon which the bill is founded is a perfectly plain and simple one, recognized 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.”⁴⁹

3.6 In *Weld-Blundell v. Stephens*⁵⁰ it was sought to invoke the principle enunciated in *Gartside v. Outram* to excuse the disclosure of confidential information which was of a defamatory character. In this case a client had sued his accountant for breach of an implied duty to keep secret a letter of instructions which contained a libel and which, following the careless conduct of the accountant, had subsequently come into the hands of the subjects of the libel. In the Court of Appeal *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 L.J. declined to accept the existence of a wide principle at common law 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 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.”⁵¹

⁴⁷(1856) 26 L.J. Ch. 113.

⁴⁸See paras. 4.36–4.53 below.

⁴⁹(1856) 26 L.J. Ch. 113, 114.

⁵⁰[1919] 1 K.B. 520 (C.A.); [1920] A.C. 956.

⁵¹[1919] 1 K.B. 520, 535.

In the House of Lords, no attempt was made to impugn the correctness of this portion of the judgment and Viscount Finlay said that it was obviously right, adding:

“Indeed, any decision to the contrary would involve consequences at once extravagant and unreasonable. It would be startling if it were the law that an agent who is negligent in the custody of a letter handed to him in confidence by his principal might plead in defence that the letter was libellous. There may, of course, be cases in which some higher duty is involved. Danger to the State or public duty may supersede the duty of the agent to his principal. But nothing of that nature arises in this case.”⁵²

3.7 A further limitation on the scope of the action for breach of confidence had previously appeared in *James v. James*.⁵³ The allegedly confidential information in this case related to a blister ointment for horses. An injunction was granted only to restrain the defendant from passing off his ointment as that prepared by the plaintiff. It was emphasized that the plaintiff had no right to prevent the sale of ointment made up after analysis of the plaintiff's ointment which was freely available on the open market. Similarly in *Reuter's Telegram Co. v. Byron*⁵⁴ it was held in proceedings for an interlocutory injunction that there was nothing confidential, and therefore nothing capable of protection, in the cipher names of certain customers of the plaintiffs and that therefore no injunction would be granted to prevent former agents of the plaintiffs from informing those customers that they were ready to take telegrams on the basis of their existing cipher names. These last two cases have provided a basis for an important requirement of the modern action for breach of confidence, namely that the information in respect of which confidence is claimed is not in the “public domain”.⁵⁵

3.8 The decision of the House of Lords in *Weld-Blundell v. Stephens*,⁵⁶ to which reference has already been made, also demonstrated that, at least where the parties are in a contractual relationship (as the accountant and his client were in that case), the person to whom the information is confidential may be liable⁵⁷ not only when he himself has disclosed or used it but also if it is disclosed or used through his negligence. If, however, the situation is one where no contractual duty of confidence can be relied upon, the law is less certain. Such a case might arise, for example, where A employs B under contract and, pursuant to that contract, imparts certain information to B in confidence. C, who is in no contractual relationship with A, then acquires that information from B, knowing that it is subject to an obligation of

⁵²[1920] A.C. 956, 965–966.

⁵³(1872) 41 L.J. Ch. 353.

⁵⁴(1874) 43 L.J. Ch. 661. Jessel M.R.'s language appeared to ignore the possible element of confidentiality in the list of the customers as such, as distinguished from their cipher names, and it was presumably for that reason that his remarks were criticised and repudiated in *Lamb v. Evans* [1893] 1 Ch. 218. (See n. 46 above.)

⁵⁵See paras. 4.15–4.31 below.

⁵⁶[1920] A.C. 956. (See para. 3.6 above.)

⁵⁷On the facts of *Weld-Blundell v. Stephens* the House of Lords held by a majority that only nominal damages were obtainable, on the ground that any damage flowing from the libel action brought as a result of the disclosure of the confidential information was too remote.

confidence. If C carelessly leaves a document containing the information in a public place where it is picked up and used by D, a trade competitor of A, is C liable to A for breach of confidence?⁵⁸

3.9 The practical importance of the principles enunciated in *Prince Albert v. Strange*⁵⁹ and *Morison v. Moat*⁶⁰ obviously depended on the readiness of the courts to recognize relationships involving the transfer of information and giving rise to an obligation of confidence in respect of that information. An obligation of confidence on an employee in respect of his employer's trade secrets was perhaps most readily recognized.⁶¹ Such an obligation might also be binding on a craftsman⁶² vis-à-vis his customer or arise as between partners in a business.⁶³ In *Tournier v. National Provincial and Union Bank of England*,⁶⁴ where the obligation of confidence of a banker towards his customer was in issue, Bankes L.J.⁶⁵ recognized that professional men—such as barristers, solicitors, doctors and bankers—owed some obligation of confidence towards those who consulted them, but said that the precise extent of that obligation would depend on the exact nature of the particular relationship involved.

3.10 It has been, however, the growing commercial importance of technical information bearing on the practical working of manufacturing processes (i.e. "know-how"), whether or not itself of a patentable character, which in more recent times has given a new impetus to the action for breach of confidence. A leading modern case on the protection of this kind of information is *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*⁶⁶ The principles for which it has frequently been cited as authority were not in fact new,⁶⁷ but it was on their reaffirmation in this decision of the Court of Appeal that the more recent development of the action for breach of confidence has been based. The Saltman Engineering Co. Ltd. (the first plaintiffs) planned to manufacture certain leather punches. Under agreement with them the second plaintiffs prepared drawings for the manufacture of dies from which

⁵⁸See para. 4.14 below.

⁵⁹(1849) 1 Mac. & G. 25 (see para. 3.3 above).

⁶⁰(1851) 9 Hare 241 (see para. 3.4 above).

⁶¹For example, as in *Lamb v. Evans* [1893] 1 Ch. 218 and *Robb v. Green* [1895] 2 Q.B. 315 (see n. 46 above).

⁶²For example, the printers in *Prince Albert v. Strange* (see para. 3.3 above) and in *Tuck & Sons v. Priester* (1887) 19 Q.B.D. 629 (see n. 46 above).

⁶³As in *Morison v. Moat* (see para. 3.4 above).

⁶⁴[1924] 1 K.B. 461. It should be noted that the obligation in this case was discussed only in terms of an implied contract. The recognition or rather rediscovery of the independent equitable principle of confidence had to wait until *Saltman's* case—see para. 3.10 below; but it would seem that Bankes L.J.'s observations regarding professional men would apply whether or not they were in a contractual relationship with their clients.

⁶⁵[1924] 1 K.B. 461, 474. Another professional man under an obligation of confidence in respect of his client's affairs was an accountant—see *Weld-Blundell v. Stephens*, discussed in para. 3.6 above.

⁶⁶(1948) 65 R.P.C. 203; and later also reported in [1963] 3 All E.R. 413.

⁶⁷Thus, the principle that breach of confidence is not necessarily dependent on contract was clear from *Prince Albert v. Strange* and *Morison v. Moat* (see paras. 3.3 and 3.4 above). And the principle that the information to be given protection must not be a matter of public knowledge, although apparently disregarded by Lord Eldon in *Abernethy v. Hutchinson* (see n. 39 above) is implicit in *James v. James* and *Reuter's Telegram Co. v. Byron* (see para. 3.7 above).

these punches could be made. The second plaintiffs then placed an order for the manufacture of the dies with the third plaintiff who, however, took the drawings to the defendants and asked them to make the dies. The defendants thereafter used the confidential drawings to manufacture leather punches on their own account. Lord Greene M.R. said⁶⁸ that the case was a simple one; there had been a breach of the duty of confidence owed in the circumstances of the case by the defendants to the first plaintiffs. It was not necessary to go into the question whether there was an implied contractual obligation of confidence between the defendants and the third plaintiffs because, if there was, the third plaintiffs could only hold the benefit of any relief obtained for the benefit of the first plaintiffs. Lord Greene M.R. summed up the law in the following proposition (for which he cited *Morison v. Moat*⁶⁹):

“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 rights.”⁷⁰

3.11 *Saltman*’s case is also important because of the consideration there given to the question of the confidentiality of the information itself. The judgment recognised that the information must have “the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge”.⁷¹ But after stating this general principle, Lord Greene M.R. went on to point out that it was perfectly possible to have a confidential document which was the result of work done by the maker on materials available to anybody; what made the document confidential was, he explained, the fact that its maker had “used his brain and thus produced a result which can only be produced by somebody who goes through the same process”.⁷² Although the materials were public property the work done on them was not. On the facts of this particular case, the defendants had dispensed in material respects with the necessity of going through the process that had been gone through in compiling the drawings, and thereby saved themselves a great deal of labour, calculation and draughtsmanship. It was true that the defendants could have obtained the necessary information by purchasing one of the first plaintiffs’ leather punches and taking it to an expert draughtsman for the necessary drawings to be prepared—but they had not done this and instead had relied on the information (which was still confidential as far as they were concerned) contained in the drawings entrusted to them.

3.12 In the thirty years which have elapsed since *Saltman*’s case, the action for breach of confidence has been used in a wide variety of contexts and in respect of many different kinds of information. Thus information subject to an obligation of confidence may be contained in marital communications⁷³ and, as appears from the important decision in *Attorney-General v.*

⁶⁸(1948) 65 R.P.C. 203, 215; [1963] 3 All E.R. 413, 415.

⁶⁹(1851) 9 Hare 241 (see para. 3.4 above).

⁷⁰(1948) 65 R.P.C. 203, 213; [1963] 3 All E.R. 413, 414.

⁷¹*Ibid.*, 215 and 415 respectively.

⁷²*Ibid.*

⁷³*Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302. (See para. 4.2 below.)

Jonathan Cape Ltd.,⁷⁴ in Cabinet discussions. The last mentioned case is significant not only because of the nature of the information to which it related but also for the light which it shed on the circumstances in which the protection of confidence will be subordinated to what, on balance, the courts consider to be the higher public interest. Earlier cases,⁷⁵ although quite recent, had only tentatively explored the limits set by public policy to the protection of confidence; moreover they tended to treat such limits as a matter to be raised by way of defence to an action for breach of confidence rather than to regard the balance of advantage to the public interest in the protection of confidences as an essential requirement of the action.

3.13 Other recent cases have been concerned with various aspects of the action for breach of confidence. They will be mentioned in their appropriate place in the systematic treatment of the present law which we seek to give, so far as the present state of the law allows, in Part IV of this report. It may suffice here to draw particular attention to *Coco v. A. N. Clark (Engineers) Ltd.*,⁷⁶ *O. Mustad & Son v. Dosen*,⁷⁷ *Terrapin Ltd. v. Builders' Supply Co. (Hayes)*⁷⁶ *Ltd.*,⁷⁸ *Seager v. Copydex Ltd.*,⁷⁹ and *Seager v. Copydex Ltd. (No. 2)*.⁸⁰

3.14 *Seager v. Copydex Ltd.* demonstrated that an obligation of confidence may be implied in respect of information passing in the course of pre-contractual negotiations, and that breach of the obligation may occur even when the discloser or user of the information is only subconsciously plagiarizing another man's ideas. The case also gives some support to the view that damages can now be awarded for breach of confidence independent of the court's power to make an award of damages in lieu of or in addition to the grant of an injunction under Lord Cairns' Act.⁸¹ In *Coco's* case Megarry J. considered the test to be applied in determining what circumstances import an obligation of confidence; his conclusion, in brief, was that such an obligation arises whenever a reasonable man in the position of the recipient of the information would realise that the information was given to him in confidence.

⁷⁴[1976] Q.B. 752. (See paras. 4.41–4.44 below.)

⁷⁵See *Initial Services Ltd. v. Putterill* [1968] 1 Q.B. 396, discussed in para. 4.38 below; *Fraser v. Evans* [1969] 1 Q.B. 349 (see para. 4.39 below); *Hubbard v. Vosper* [1972] 2 Q.B. 84 (see para. 4.39 below).

⁷⁶[1969] R.P.C. 41 (see para. 4.4 below).

⁷⁷"Recent" only in the sense that, although decided in 1928, no report of the decision was published until [1963] R.P.C. 41; [1964] 1 W.L.R. 109. See para. 4.16 below.

⁷⁸This case was decided in 1959. However, although the decision of the Court of Appeal was reported at [1960] R.P.C. 128, the judgment of Roxburgh J. at first instance was not separately and fully reported until later, at [1967] R.P.C. 375. See paras. 4.24 and 4.26 below.

⁷⁹[1967] R.P.C. 349; [1967] 1 W.L.R. 923. See para. 4.3 below.

⁸⁰[1969] R.P.C. 250; [1969] 1 W.L.R. 809. See para. 4.101 below.

⁸¹Chancery Amendment Act 1858, s. 2. See further paras. 4.75–4.77 below. The Act was repealed by the Statute Law Revision and Civil Procedure Act 1883 but its substance was re-enacted: Supreme Court of Judicature Act 1873, s. 16 (now Supreme Court of Judicature (Consolidation) Act 1925, s. 18) and Statute Law Revision Act 1898, s. 1. The manner in which the repeal and re-enactment were effected was not straightforward: see *Leeds Industrial Co-operative Society Ltd. v. Slack* [1924] A.C. 851, 861–863 per Viscount Finlay and 872–873 per Lord Sumner. However, s. 50 of the Supreme Court Act 1981, which is to replace the 1925 Act as from 1 January 1982, confers the relevant power in specific terms.

3.15 In *Mustad's* case in 1928 the House of Lords had held that an injunction could not be obtained to restrain the publication of information subject to an obligation of confidence once the information had entered the public domain by being published by the plaintiffs in a patent specification. The case, when first reported in 1963, put in some doubt the decision in *Terrapin* in 1959; in the latter case Roxburgh J. formulated what has come to be known as the "springboard doctrine", according to which a person who uses information in breach of confidence may be restrained by injunction even when the information has reached the public domain, at least as long as his breach of confidence has given him an unfair start over others who have only obtained access to the information through its release into the public domain. However, as we explain in greater detail below,⁸² doubt as to the doctrine can in large measure be attributed to an imperfect understanding of its principles, owing to an eight-year delay in the publication of a full report of Roxburgh J.'s judgment.

3.16 Finally, we may mention *Seager v. Copydex Ltd. (No. 2)*, which owes its importance to the consideration there given to the remedies available for breach of confidence: in particular, to the appropriate method of assessing any damages that may be awarded, and to the extent to which a defendant who has paid damages under such an award may be entitled thereafter to treat the information as his own.⁸³

PART IV

THE EXISTING LAW ON BREACH OF CONFIDENCE

A. Relationships in which information initially becomes impressed with an obligation of confidence

4.1 An obligation of confidence in respect of information may be created by contract, express or implied. This appears from a number of the cases already cited⁸⁴ where one basis⁸⁵ of the obligation of confidence held to exist was stated to be an express or implied contract. A more recent case is *Ackroyds (London) Ltd. v. Islington Plastics Ltd.*⁸⁶ where the plaintiffs supplied a mould to the defendants so that the latter might make "swizzle sticks" to their order. The defendants secretly supplied swizzle sticks made from the mould to the plaintiffs' customer and also had a mould of their own made based on the

⁸²See para. 4.31 below.

⁸³See para. 4.101 below.

⁸⁴See n. 46 above.

⁸⁵The suggestion by Lord Greene M.R. in *Vokes Ltd. v. Heather* (1945) 62 R.P.C. 135, 141-142, that in master and servant cases any obligation of confidence is *conclusively* to be found in the terms of the contract between the parties and that "the introduction of equitable principles, apart from contract [i.e. except where the contract itself asks for good faith], into relationships of this kind is a thing which I think should be, in general, repudiated" was inconsistent with earlier cases, and has been disregarded in later cases. The suggestion is indeed difficult to reconcile with Lord Greene's remarks in *Saltman's* case (see para. 3.10 above).

⁸⁶[1962] R.P.C. 97.

experience gained in carrying out the plaintiffs' order. Havers J., before considering whether, on the principles laid down by Lord Greene M.R. in *Saltman's* case,⁸⁷ there was an obligation of confidence on the defendants, said the first question was whether there was a breach of contract. He held that the defendants' conduct amounted to a breach of a term which it was necessary to imply in the contract between the plaintiffs and the defendants in order to give it business efficacy.⁸⁸

4.2 In our account of the earlier development of the action for breach of confidence we have given examples of relationships which, irrespective of contract, equity has recognised as giving rise to an obligation of confidence.⁸⁹ They can only be examples of typical confidential relationships; to compile an exhaustive list of such relationships would not be practicable, and, even if it were, the list would be of limited value because the extent of the obligation of confidence varies according to the exact nature of the relationship. An obligation of confidence will arise when the circumstances of the relationship import it which is a matter to be determined by the court in each case.⁹⁰ Thus in *Duchess of Argyll v. Duke of Argyll*⁹¹ it was held that communications passing between husband and wife pursuant to "the normal confidence and trust between husband and wife"⁹² were subject to an obligation of confidence. It could "hardly be an objection that such communications are not limited to business matters".⁹³ Furthermore, in *Attorney-General v. Jonathan Cape Ltd.*⁹⁴ where the Attorney-General sought an injunction to restrain the publication of information relating to discussions at Cabinet meetings, Lord Widgery C.J., although declining in the particular case to protect Cabinet discussions from disclosure,⁹⁵ the earliest of which had taken place eleven years previously, said that he could not "see why the courts should be powerless to restrain the publication of public secrets, while enjoying the *Argyll* powers in regard to domestic secrets".⁹⁶ He concluded that "when a Cabinet Minister receives information in confidence [the confidence being imposed to enable the efficient conduct of the Queen's business, owed to the Queen and not capable of being released by members of the Cabinet themselves]⁹⁷ the improper publication of such information can be restrained by the court, and

⁸⁷See para. 3.10 above.

⁸⁸Havers J. cited in this connection the well known passage from Wright J.'s judgment in *Banco de Portugal v. Waterlow & Sons Ltd.* (1931) 47 T.L.R. 214, 215: "In his (his Lordship's) view, it was of the essence of a contract like the one in question that the printers of bank notes were left in possession of the plates on condition that there was not to be any use of the plates for any purpose other than that of the bank which issued the notes, or for any purpose other than a purpose authorized by that bank. Such a term was necessary to give effect to such business efficacy as the parties contemplated."

⁸⁹See para. 3.9 above.

⁹⁰In *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461, 483, Atkin L.J. said that what implied term, if any, as to an obligation of secrecy rested on the bank was a question of law. It would seem that the same must apply to an obligation of secrecy arising irrespective of contract.

⁹¹[1967] Ch. 302.

⁹²*Ibid.*, 331.

⁹³*Ibid.*, 329.

⁹⁴[1976] Q.B. 752.

⁹⁵On this point see para. 4.43 below.

⁹⁶[1976] Q.B. 752, 769.

⁹⁷Paraphrased from [1976] Q.B. 752, 770.

his obligation is not merely to observe a gentleman's agreement to refrain from publication".⁹⁸

4.3 A good example of a relationship which may give rise to an obligation of confidence in respect of information passing during the continuance of the relationship is that between parties in the pre-contractual stage of business negotiations. In *Seager v. Copydex Ltd.*⁹⁹ the plaintiff was negotiating with the defendant, in the event abortively, for the marketing by the defendants of a carpet grip A which he had invented and patented. In the course of the discussions he mentioned grip B which he had also invented. Later the defendants brought out a similar grip to grip B, giving it the name by which the plaintiff had called it, made an application to patent it and then marketed it with success. The defendants conceded that in such circumstances any information which they obtained from the plaintiff would have been given in confidence and the court made clear that the misuse of such information need not amount to deliberate copying; the information might be "subconsciously reproduced and used"¹⁰⁰ or be the object of "unconscious plagiarism".¹⁰¹

4.4 In *Coco v. A. N. Clark (Engineers) Ltd.*¹⁰² Megarry J. drew attention to the doubt which may arise as to whether a given situation is one in which a duty of confidence arises. In that case an interlocutory injunction was being sought to restrain the defendants from exploiting for their own advantage information which had been communicated to them for the purposes of a proposed joint venture in the manufacture of moped engines. Megarry J. said:

"From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence. In the *Argyll* case [[1967] Ch. 302] at page 330, Ungood-Thomas, J. concluded his discussion of the circumstances in which the publication of marital communications should be restrained as being confidential by saying, 'If this was a well-developed jurisdiction doubtless there would be guides and tests to aid in exercising it.' In the absence of such guides or tests he then in effect concluded that part of the communications there in question would on any reasonable test emerge as confidential. It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon

⁹⁸ *Ibid.*

⁹⁹ [1967] R.P.C. 349; [1967] 1 W.L.R. 923.

¹⁰⁰ *Per* Salmon L.J., [1967] R.P.C. 349, 371 and [1967] 1 W.L.R. 923, 936.

¹⁰¹ *Per* Winn L.J., *ibid.*, 374 and 939 respectively.

¹⁰² [1969] R.P.C. 41.

him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence."¹⁰³

It should, however, be pointed out that, in the actual circumstances of *Coco's* case, Megarry J. said he "would imply a term if there were a contract and so, a fortiori, [he would] imply the equitable obligation."¹⁰⁴ He went on to say that it was "fortunately . . . unnecessary for [him] to attempt to resolve the degree of less compelling circumstances which would suffice to establish that obligation." It seems therefore that the wide-reaching test of the judgment of a reasonable man as determining when an obligation of confidence arises¹⁰⁵ was not really necessary for the decision in *Coco's* case and may be regarded as an *obiter dictum*.

4.5 Another situation in which information becomes initially impressed with an obligation of confidence arises where a party to an action obtains it by way of the legal process of discovery. Thus in *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*¹⁰⁶ Talbot J. said:

"Those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed."¹⁰⁷

And he indicated¹⁰⁸ that this protection is distinct from any right to bring proceedings for contempt of court, quoting in this connection a statement to that effect by Jenkins J. in *Alterskye v. Scott*.¹⁰⁹ The principle stated by Talbot J. in the *Distillers* case was applied by the Court of Appeal in *Riddick v. Thames Board Mills Ltd.*¹¹⁰ In that case an attempt was made to use a document obtained on discovery, and which was alleged to contain a libel on the party to whom it was disclosed, to ground a further action for defamation. Lord Denning M.R. said: ". . . documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose."¹¹¹

¹⁰³[1969] R.P.C. 41, 48.

¹⁰⁴*Ibid.*, 51.

¹⁰⁵See the passage cited from Megarry J. at the outset of this paragraph.

¹⁰⁶[1975] Q.B. 613. The information was not in the first instance given on discovery to Times Newspapers Ltd; they subsequently came into possession of it as a third party. For the position of third parties who acquire information which has already been impressed with an obligation of confidence see paras. 4.11-4.12 below. The case was also particularly concerned with the circumstances in which the public interest may justify the disclosure of information subject to an obligation of confidence, as to which see para. 4.40 below.

¹⁰⁷*Ibid.*, 621.

¹⁰⁸*Ibid.*, 618 and see also at 621.

¹⁰⁹[1948] 1 All E.R. 469, 471.

¹¹⁰[1977] Q.B. 881.

¹¹¹*Ibid.*, 896. But see *Rank Film Distributors Ltd. v. Video Information Centre* [1981] 2 W.L.R. 668, 675, 679 (H.L.), where it was said that this principle did not extend to criminal proceedings. This decision is discussed in n.777 below.

B. The parties to the original relationship of confidence

4.6 A relationship initially giving rise to an obligation of confidence will frequently, but not necessarily, be between the person supplying and the person receiving the information. Persons may also be in a relationship of confidence in respect of information discovered or acquired by one of them on behalf of the other. Thus, in *Cranleigh Precision Engineering Ltd. v. Bryant*¹¹² the plaintiffs manufactured swimming-pools and the defendant was their managing director. In that capacity he invented certain special features of the plaintiffs' pools. The defendant was restrained by injunction from turning to his own advantage the ideas which he had not in fact obtained from the plaintiffs but which he had worked out while in their employ. Another example would be where a person goes to see his doctor who refers his case to a specialist. The obligation of confidence owed by the doctor to his patient will cover not only the information which the patient imparts to his doctor but also any information relating to that patient which the doctor secures from the specialist.

C. Can information initially become impressed with an obligation of confidence by reason only of the reprehensible means by which it has been acquired?

4.7 In paragraph 1.3 above we have referred to the doubts of the Younger Committee as to whether under the existing law information which has been obtained from another without the latter's authority can become subject to an obligation of confidence by reason only of the reprehensible means by which it has been acquired. The Committee were particularly concerned with the striking, and as they felt indefensible, contrast in liability which would arise if their doubts were justified: on the one hand a person who undertook to keep confidential certain information entrusted to him would be subject to an action if he broke that confidence; on the other hand a person who simply stole a document containing the information, although he would be criminally liable for theft of the document,¹¹³ would not be subject to an action if he disclosed or used the information. However, the question whether information obtained from another without his authority may be subject to an obligation of confidence is not only concerned with information obtained from stolen documents. It also relates to information obtained by an unauthorized temporary borrowing of the document (which would not technically amount to theft) or by an unauthorized reading of the document without removing it at all. The same question arises where information is obtained without the authority of the holder of the information, even if there is no material thing, such as a document, in which the information is contained. For example, a person may eavesdrop on another's conversation, with or without the aid of a microphone; and a person may obtain information directly

¹¹²[1966] R.P.C. 81; [1965] 1 W.L.R. 1293. This case is further discussed in connection with the position of information in the "public domain" in paras. 4.27-4.28 below.

¹¹³That there is no criminal liability for "theft" of information as such is now clear from *Oxford v. Moss* (1979) 68 Cr. App. R. 183. (See n. 8 above.)

from another by deceiving the giver of the information as to his authority to receive the information.¹¹⁴

4.8 Any attempt to state the existing law on a field untouched by legislation, and where the decided cases have provided no clear signposts, runs the danger of being rendered out-of-date by an innovating decision. We think, nevertheless, that the doubts of the Younger Committee, to which we referred in the preceding paragraph, were well founded. The Committee referred¹¹⁵ to *Webb v. Rose*¹¹⁶ where an injunction was granted to restrain the printing of conveyancing precedents taken from the conveyancer's chambers, and also mentioned¹¹⁷ *Millar v. Taylor*¹¹⁸ where it was said that an injunction would lie to prevent "surreptitiously or treacherously publishing what the owner had never made public at all, nor consented to the publication of; . . . Ideas are free. But while the author confines them to his study, they are like birds in a cage which none but he can have a right to let fly". However, the Committee emphasized that *Millar v. Taylor* (and they might have added *Webb v. Rose*) was an early copyright case, concerned with the form in which ideas are expressed rather than with ideas as such, which are the concern of breach of confidence. In the present century the Court of Appeal in *Lord Ashburton v. Pape*,¹¹⁹ which related to a clear breach of confidence by a solicitor's clerk, spoke in general terms of its power to restrain publication of information "improperly or surreptitiously obtained". And in the recent Australian decision of *Franklin v. Giddins*¹²⁰ an action for breach of confidence was successfully brought in respect of the "genetic information" relating to a strain of nectarines contained in bindwood cuttings stolen by the defendant.

4.9 A recent and relevant English decision is that of Sir Robert Megarry V.-C. in *Malone v. Metropolitan Police Commissioner*.¹²¹ The case concerned the tapping by the Post Office at the request of the police of a subscriber's

¹¹⁴In *Director of Public Prosecutions v. Withers* [1975] A.C. 842 the House of Lords held that there was no crime of conspiracy to commit a public mischief which could apply to the obtaining of information by deception but that in certain circumstances such a deception could amount to conspiracy to defraud where the person deceived was holding a public office or was a public authority. A. Tettenborn in (1979) 129 New L.J. 967 suggests that the obtaining of information by deception may amount to the crime of obtaining services by deception under s. 1 of the Theft Act 1978 but admits that the section is subject to "two serious limitations": that the benefit which the giving of the information involves is conferred "on the understanding that the benefit has been or will be paid for"; and that unauthorized obtaining of information from, for example, a computer, is probably not a deception within the meaning of the Act.

¹¹⁵(1972) Cmnd. 5012, p. 194, n. 176.

¹¹⁶(1732) cited (1769) 4 Burr. 2303, 2330.

¹¹⁷(1972) Cmnd. 5012, p. 297, n. 44.

¹¹⁸(1769) 4 Burr. 2303, 2378-2379.

¹¹⁹[1913] 2 Ch. 469, 475. See, supporting this view of the law (or at all events arguing that it is open to the courts to take this view): Gareth Jones (1970) 86 L.Q.R. 463, 482 and J. and R. Jacobs (1969) 119 New L.J. 133. The latter authors maintain that an action for breach of confidence could be successfully brought against a person who has, for example, obtained information by the use of a secret microphone, as to which see now however *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, discussed in para. 4.9 below.

¹²⁰[1978] Qd. R. 72 (commented on by W. J. Braithwaite in (1979) 95 L.Q.R. 323).

¹²¹[1979] Ch. 344. The European Commission on Human Rights in July 1981 declared admissible an application by Malone for an examination of his case.

telephone line. Having ruled out any contractual obligation of confidence on the part of the Post Office vis-à-vis its subscriber,¹²² Megarry V.-C. said that one of the requirements of an action for breach of confidence was that the "information must have been imparted in circumstances importing an obligation of confidence". In this connection he contrasted the facts on which his own decision in *Coco's case*¹²³ was based with the circumstances of the present case where "the alleged misuse [of information]" was "not by the person to whom the information was intended to be communicated, but by someone to whom the plaintiff had no intention of communicating anything", which introduced "a somewhat different element, that of the unknown over-hearer".¹²⁴ He then gave examples of the risks of being overheard inherent in the circumstances of communication, and said:

"I do not see why someone who has overheard some secret in such a way should be exposed to legal proceedings if he uses or divulges what he has heard. No doubt an honourable man would give some warning when he realises that what he is hearing is not intended for his ears; but I have to concern myself with the law, and not with moral standards. There are, of course, many moral precepts which are not legally enforceable.

When this is applied to telephone conversations, it appears to me that the speaker is taking such risks of being overheard as are inherent in the system. . . . In addition, so much publicity in recent years has been given to instances (real or fictional) of the deliberate tapping of telephones that it is difficult to envisage telephone users who are genuinely unaware of this possibility. No doubt a person who uses a telephone to give confidential information to another may do so in such a way as to impose an obligation of confidence on that other: but I do not see how it could be said that any such obligation is imposed on those who overhear the conversation, *whether by means of tapping or otherwise.*"¹²⁵ (emphasis added)

4.10 We conclude that under the present law it is very doubtful to what extent, if at all, information becomes impressed with an obligation of confidence by reason solely of the reprehensible means by which it has been acquired, and irrespective of some special relationship between the person alleged to owe the obligation and the person to whom it is alleged to be owed. As we have seen, no such obligation was held to arise where the information had been obtained by tapping a telephone; with regard to other reprehensible means of obtaining information, there are only dicta in two eighteenth century cases,¹²⁶ relating to copyright rather than breach of confidence, and an

¹²²*Ibid.*, 375.

¹²³[1969] R.P.C. 41 (see para. 4.4 above).

¹²⁴[1979] Ch. 344, 376.

¹²⁵*Ibid.* Megarry V.-C. (*ibid.*, 376-378) would have been prepared to hold (if it had been necessary) that tapping for police purposes in relation to crime would constitute a "just cause or excuse for breaking confidence"; see Lord Denning M.R. in *Fraser v. Evans* [1969] 1 Q.B. 349, 362 and the discussion of public interest as a factor limiting the scope of the action for breach of confidence in paras. 4.36-4.53 below.

¹²⁶*Webb v. Rose* (1732) cited in (1769) 4 Burr. 2303, 2330 and *Millar v. Taylor* (1769) 4 Burr. 2303, 2378-2379. (See para. 4.8 above.)

observation of the Court of Appeal in 1913,¹²⁷ which, so far as English law is concerned,¹²⁸ suggest that the acquirer of the information becomes subject to an obligation of confidence.

D. The position of third parties receiving information which has already become subject to an obligation of confidence

4.11 The position of third parties into whose hands comes information which is already subject to an obligation of confidence is now fairly clear. In the old decisions of *Prince Albert v. Strange*¹²⁹ and *Morison v. Moat*¹³⁰ the respective defendants were third parties in this position. And in the modern case of *Duchess of Argyll v. Duke of Argyll*¹³¹ which, as already mentioned, dealt with confidential communications passing between husband and wife, the second and equally unsuccessful defendant was a third party, namely the newspaper to which the Duke had passed the confidential information. The third party is liable to be restrained from disclosing or using information which he knows or, it would seem, he ought to know was subject to an obligation of confidence.

4.12 A person is not liable for breach of confidence in disclosing or using information which is in fact subject to an obligation of confidence as long as he has no actual or constructive knowledge of its confidential character, but once he acquires such knowledge he becomes liable from that time onwards for any subsequent disclosure or use. To this general proposition there is one possible exception. In *Morison v. Moat*¹³² Turner V.C. said¹³³ that the position of the unsuccessful defendant might have been different if he had been "a purchaser for value of the secret without notice of any obligation affecting it", but that in the particular case he was a mere volunteer. However, at first instance in *Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans*,¹³⁴ where a claim for an injunction to restrain publication of a book alleged to contain material obtained in breach of confidence was met by the plea that the publishers were bona fide purchasers for value, Lloyd-Jacob J. refused to recognise such a defence. On appeal¹³⁵ Lord Evershed M.R. declined to affirm or disaffirm Lloyd-Jacob J.'s views, the case being decided in favour

¹²⁷ *Lord Ashburton v. Pape* [1913] 2 Ch. 469, 475 (see para 4.8 above).

¹²⁸ As to Australian law, where the information is contained in something stolen, see *Franklin v. Giddins* [1978] Qd. R. 72 (see para. 4.8 above).

¹²⁹ (1849) 1 Mac. & G. 25 (see para. 3.3 above).

¹³⁰ (1851) 9 Hare 241 (see para. 3.4 above).

¹³¹ [1967] Ch. 302 (para. 4.2 above). Ungoed-Thomas J. referred to *Prince Albert v. Strange* and *Lord Ashburton v. Pape* [1913] 2 Ch. 469 (para. 4.8 above). He regarded it as established by the latter case that "an injunction may be granted to restrain the publication of confidential information not only by the person who was a party to the confidence but by other persons into whose possession that information has improperly come" ([1967] Ch. 302, 333), citing to this effect Cozens-Hardy M.R. and Swinfen Eady L.J. ([1913] 2 Ch. 469, 472 and 475). See also *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.* [1975] Q.B. 613 where an interlocutory injunction was granted restraining the defendants from using or disclosing documents which they knew to be "the product of discovery" in an action for personal injuries that had been brought against Distillers.

¹³² (1851) 9 Hare 241 (see para. 3.4 above).

¹³³ *Ibid.*, 263.

¹³⁴ (1951) 68 R.P.C. 190.

¹³⁵ (1952) 69 R.P.C. 10, 16; [1952] W.N. 7, 8; [1952] 1 T.L.R. 101, 105.

of the defendants on the ground that there had never been an original breach of confidence on which to base subsequent liability of the publishers.

E. Who can sue for breach of confidence?

4.13 In an action for breach of confidence the plaintiff in the most obvious case will be the person who gave the information in confidence to the defendant or at all events on whose behalf the defendant received the information in confidence. There is the further question whether a breach of a duty of confidence is also actionable at the suit of a person to whom that information relates. This problem arose in *Fraser v. Evans*.¹³⁶ The plaintiff, who as a public relations consultant had made a report to the military régime then in power in Greece on its public relations in Europe, sought an interlocutory injunction to prevent the defendants, the editor and publishers of "The Sunday Times", from publishing and commenting on the report, a copy of which had come into their hands from sources in Greece. The plaintiff's application was refused because, although he was under an obligation of confidence to the Greek authorities in respect of the contents of the report and of the fact that he was working for them, he himself was owed no duty of confidence by them and so lacked standing to bring the action. Lord Denning M.R. said:

"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. But the party complaining must be the person who is entitled to the confidence and to have it respected. He must be a person to whom the duty of good faith is owed. It is at this point that I think Mr. Fraser's claim breaks down. There is no doubt that Mr. Fraser himself was under an obligation of confidence to the Greek Government. The contract says so in terms. But there is nothing in the contract which expressly puts the Greek Government under any obligation of confidence. Nor, so far as I can see, is there any implied obligation. The Greek Government entered into no contract with Mr. Fraser to keep it secret. . . . It follows that they alone have any standing to complain if anyone obtains the information surreptitiously or proposes to publish it."¹³⁷

F. Can negligence leading to a disclosure or use of information which is subject to an obligation of confidence involve liability for breach of confidence?

4.14 We have already explained in paragraph 4.3 above that, in the light of the decision in *Seager v. Copydex Ltd.*,¹³⁸ there may be liability for breach of confidence in respect of information held under an obligation of confidence whenever the holder of that information in fact discloses or uses it, even if he is not consciously aware at the time that he is disclosing or using information held in confidence. The further question arises whether he can be so liable if the disclosure or use of the information occurs not by his direct act but by

¹³⁶[1969] 1 Q.B. 349.

¹³⁷*Ibid.*, 361.

¹³⁸[1967] R.P.C. 349; [1967] 1 W.L.R. 923.

reason of his negligent handling of the information. Where the parties are in a contractual relationship, there is no doubt that the confidant is in breach of his contractual obligations if the information is disclosed as a result of his failure to take reasonable care of it. Thus in *Weld-Blundell v. Stephens*¹³⁹ an accountant investigating a company on behalf of his client negligently left his letter of instructions at the offices of the company where it came to their notice; it was held that he was in breach of his duty to his client in failing to use reasonable care to keep secret the contents of the letter. There does not appear to be any clear answer in the present state of the law to the question we raised in paragraph 3.8 above, namely whether a person who is under a duty of confidence, but is not in any contractual relationship with the person to whom it is owed, can be liable for breach of confidence if the information to which the duty relates is disclosed or used owing to his negligence.

G. The information capable of protection by the action for breach of confidence

1. The information must be secret—i.e. not in the “public domain”

4.15 We have already referred (in paragraph 3.11 above) in our account of the development of the action for breach of confidence to a passage in the judgment of Lord Greene M.R. in *Saltman*'s case in which he emphasised that the information concerned “must . . . apart from contract,¹⁴⁰ . . . not be something which is public property and public knowledge.”¹⁴¹ Influenced by the negative form of Lord Greene's statement, in Working Paper No. 58 we classified this element in the action as one of the available defences. However, Lord Greene also said that the information must have “the necessary quality of confidence about it”; and we now think that this quality, which, broadly speaking, is simply the secret character of the information, should be described as a positive requirement of the action for breach of confidence.

¹³⁹[1920] A.C. 956.

¹⁴⁰Theoretically there is no reason why a person should not by contract bind himself regarding matters which are common knowledge or easily ascertainable. But (i) a contract restricting a former employee's disclosure or use of an employer's “trade secrets” will be construed to exclude what is generally known; (ii) express cover of matters which are generally known may amount to an unreasonable restraint on trade or may be contrary to Article 85 of the E.E.C. Treaty (as to which see para. 4.68 below); (iii) in the unusual case where such a contract would be binding what is being secured is merely the *silence* of the other party, not the secrecy of the information. It may be possible, for example, for an author to contract with his publisher that his address is not to be given even though that address is easily ascertainable in reference books available in a public library. In the United States there was a conflict between decisions of the Second and Eighth Circuit Courts of Appeal. In the former, *Warner-Lambert Pharmaceutical Co. Inc. v. John J. Reynolds Inc.* (1960) 280 F. 2d 197, it was held that a licensee of a secret formula must continue to pay royalties under a licence agreement without time limitation even after trade rivals had by “reverse engineering” discovered the formula and put a competing product on the market. In the latter, *Quick Point Pencil Co. v. Aronson* (1977) 567 F. 2d 757 a long-standing licence to manufacture a keyholder of simple design against payment of a royalty was declared unenforceable. The Supreme Court of the United States ((1979) 59 L. Ed. 2d 296) has now reversed the latter decision, holding that the licence agreement, which had been freely undertaken in arm's length negotiations with no fixed reliance on a patent or probable patent grant, was not inconsistent with the aims of the federal patent system, and did not prevent anyone from copying the keyholder, but merely required the defendant to pay the promised royalty.

¹⁴¹(1948) 65 R.P.C. 203, 215; [1963] 3 All E.R. 413, 415.

4.16 The leading case on this requirement of the action for breach of confidence is the decision of the House of Lords in *O. Mustad & Son v. Dosen*.¹⁴² In that case an application for an injunction to restrain the communication of confidential information regarding a process for the manufacture of fish hooks was refused on the ground that the plaintiffs had disclosed the process in a patent specification filed for the purpose of obtaining patent protection. Lord Buckmaster said:

“... after the disclosure had been made by the plaintiffs to the world, it was impossible for them to get an injunction restraining the defendants from disclosing what was common knowledge. The secret, as a secret, had ceased to exist.”¹⁴³

It is, however, important, having regard to later decisions, to point out that Lord Buckmaster immediately went on to say that the position would have been different if the plaintiff had discharged the burden of proof of showing that the defendant Dosen had, whilst in the plaintiffs' service, gained

“knowledge of ancillary secrets connected with the patented invention which were not in fact included in the invention but which would be of very great service to any person who proceeded to make the machine to which the invention related.”

4.17 In referring to this requirement the courts have used a variety of expressions,¹⁴⁴ but it has become increasingly common¹⁴⁵ to say that the information for which protection is sought by the action for breach of confidence must not be in the “public domain”. Thus in *Woodward v. Hutchins*¹⁴⁶ the plaintiffs, who were well-known entertainers, and their manager had obtained an interim injunction against their former press agent, his company and his publishers, the “Daily Mirror”, to restrain them “from disclosing, divulging or making use of or from writing, printing, publishing or circulating any confidential information acquired during the course of employment with the plaintiffs or any of them relating to the private lives, personal affairs or private conduct of the plaintiffs or any of them.” The information related, *inter alia*, to an incident during a passenger flight in a Jumbo Jet, and in that connection Lord Denning M.R., in his judgment in the successful

¹⁴²[1963] R.P.C. 41; [1964] 1 W.L.R. 109. The decision was given in 1928 but not reported until 1963.

¹⁴³*Ibid.*, 43 and 111 respectively.

¹⁴⁴Apart from the “public property and public knowledge” test of *Saltman's* case, there have been references to “common knowledge” (*Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 47), to a “disclosure made to the world” (*O. Mustad & Son v. Dosen* [1963] R.P.C. 41, 43; [1964] 1 W.L.R. 109, 111), to “information available to the public” and “generally available for the public” (*Ackroyds (London) Ltd. v. Islington Plastics Ltd.* [1962] R.P.C. 97, 104). See also the *American Restatement of the Law of Torts* (1939), vol. IV, Ch. 36 comment at pp. 5-6 on section 757: “The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret”. The *Restatement, Second, Torts* (1979) does not include a chapter on Miscellaneous Trade Practices: see the Introductory Note to Division Nine, vol. 4.

¹⁴⁵Apart from *Woodward's* case cited in the text, see *Seager v. Copydex Ltd.* [1967] R.P.C. 349, 368 and [1967] 1 W.L.R. 923, 932; *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 49; *Potters-Ballotini Ltd. v. Weston-Baker* [1977] R.P.C. 202, 206; *Lennon v. News Group Newspapers Ltd.* [1978] F.S.R. 573, 574-575.

¹⁴⁶[1977] 1 W.L.R. 760.

appeal to discharge the injunction, said:

“[The injunction] speaks of “confidential information”. But what is confidential? As Bridge L.J. pointed out in the course of the argument, Mr. Hutchins, as a press agent, might attend a dance which many others attended. Any incident which took place at the dance would be known to all present. The information would be in the public domain. There could be no objection to the incidents being made known generally. It would not be confidential information. So in this case the incident on this Jumbo Jet was in the public domain. It was known to all the passengers on the flight. Likewise with several other incidents in the series”.¹⁴⁷

4.18 The simple and—were its features to be disclosed—obvious character of information does not necessarily mean that the information is in the public domain. In *Under Water Welders & Repairers Ltd. v. Street and Longthorne*¹⁴⁸ the plaintiffs had a secret method of cleaning ships’ hulls. One defendant had a term in his contract of employment requiring him not to disclose the secret for three years, while the other had nothing stated about this in his contract of employment. The plaintiffs relied successfully against both defendants on an implied obligation of confidence, Buckley J. saying:

“The fact that some new invention or some new process may be one which, when someone looks at it, is found to provide a self-evident solution for some problem—it may be a very simple solution once it has been recognised—does not mean that that is not something which may merit protection as being a secret process or something of that nature or a process which the person operating it is not entitled to protect by a certain degree of confidentiality”.¹⁴⁹

4.19 Information in the public domain is also to be distinguished from information which is only obtainable from something in the public domain (such as a product available on the open market) by the expenditure of a significant element of labour, skill or money. We have already referred in this connection to Lord Greene M.R.’s remarks in *Saltman*’s case¹⁵⁰ to the effect that the leather punches in the case were available on the market but that the drawings for making them were still confidential. This principle was applied in *Ackroyds (London) Ltd. v. Islington Plastics Ltd.*¹⁵¹ to a tool for making “swizzle sticks”, Havers J. saying:

“the mere publication of an article by manufacturing it and placing it upon the market, whether by means of work done in it or calculation or measurement which would enable information to be gained, is not

¹⁴⁷*Ibid.*, 764.

¹⁴⁸[1968] R.P.C. 498.

¹⁴⁹*Ibid.*, 506.

¹⁵⁰See para. 3.11 above.

¹⁵¹[1962] R.P.C. 97, 104. See also a case in the Supreme Court of South Africa (Transvaal Provincial Division) *Harvey Tiling Company (Pty.) Ltd. v. Rodomac (Pty.) Ltd. and Another* [1977] R.P.C. 399. The second defendant was the works manager of the plaintiffs’ tile company; he left and became managing director of the first defendants, a rival company. Although visitors were allowed to tour the plaintiffs’ factory, very close study would be required to understand and copy it. The knowledge required to set up the plant as a whole as distinguished from information about individual items of it was not in the public domain.

necessarily sufficient to make such information available to the public. The question in each case is: Is such information available to the public? It is not, in my view, if work would have to be done upon it to make it available."

4.20 Nor is information to be regarded as having reached the public domain merely because, as Cross J. has said:¹⁵²

"there are other people in the world who know the facts in question besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them.

There appear to be no English cases on this branch of the law of trade secrets, but the plaintiffs referred me to the United States case of *Vulcan Detinning Co. v. Assam* (1918) 185 N.Y. App. Div. 399 (mentioned in Turner on the Law of Trade Secrets, page 25) where it was held that the fact that a German and a Dutch firm had complete knowledge of the process in question which one of the defendants (an employee of the plaintiffs) had disclosed to the other defendant was no bar to the plaintiff's success. If it is not impertinent for me to say so, that seems to me sound sense. *It must be a question of degree depending on the particular case, but if relative secrecy remains, the plaintiff can still succeed.*" (emphasis added)

4.21 The decision of the majority of the Court of Appeal in *Schering Chemicals Ltd. v. Falkman Ltd.*¹⁵³ would appear to limit the effect of the information concerned in an action for breach of confidence being already in, or coming into, the public domain. In that case Falkman undertook for a fee to organise a training course for the executives of Schering, at which they were to be instructed in the best ways to counteract the unfavourable publicity received by one of Schering's products, a pregnancy testing drug marketed as "Primodos". The second defendant, Elstein, was employed by Falkman for a daily fee to give instruction at this course, receiving for this purpose information from Schering which the latter regarded as confidential. The third defendant, Thames Television, made a film based on the information which Elstein had received from Schering and which he had passed on to Thames Television. This information was in fact already in the public domain when received by Elstein, having been the subject of previous press articles and television programmes. Shaw and Templeman L.JJ. (Lord Denning M.R. dissenting) upheld the decision at first instance granting an interlocutory injunction against Falkman, Elstein and Thames Television. So far as Falkman is concerned, the decision presents no special difficulty. The terms of Falkman's contract with Schering required him to preserve confidentiality in respect of the information given to him by Schering and there is no doubt that a contract can provide for information to be kept confidential by one or both of the parties, whether or not that information is in or comes into the

¹⁵²*Franchi v. Franchi* [1967] R.P.C. 149, 152-153. On the facts (the plaintiffs' secret as to tile-making had been imparted to the defendant in confidence but the particulars of the secret had been published by the plaintiffs themselves in their Belgian patent specification) Cross J. held, however, that the information was in the public domain.

¹⁵³[1981] 2 W.L.R. 848. For criticism of this decision see para. 6.67 below.

public domain.¹⁵⁴ However, Shaw L.J.¹⁵⁵ and, somewhat equivocally, Templeman L.J.¹⁵⁶ did not rest the liability of Elstein on contract; and there was clearly no contractual connection between Schering and Thames Television. In regard to Elstein's liability, Shaw L.J. said that

"the communication in a commercial context of information which at the time is regarded by the giver [i.e. Schering] and recognised by the recipient [i.e. Elstein] as confidential, and the nature of which has a material connection with the commercial interests of the party confiding that information, imposes on the recipient a fiduciary obligation to maintain that confidence thereafter unless the giver consents to relax it".¹⁵⁷

And Templeman L.J. said that, even if Elstein did not expressly promise to preserve confidentiality in regard to the information given to him by Schering, he was subject to an "implied promise"¹⁵⁸ to this effect. In respect of the position of Thames Television, both judges held that Thames were bound to preserve confidentiality in view of their knowledge of the circumstances in which Elstein had received the information imparted to them.

4.22 In the context of our present discussion of public domain, what is significant about the liability of Elstein (on which that of Thames Television depended) is that it was stated to exist, although without the citation of any authority, irrespective of the fact that the information received by Elstein was already in the public domain. Shaw L.J. said:

"It is not the law that where confidentiality exists it is terminated or eroded by adventitious publicity".¹⁵⁹

And Templeman L.J. said:

"The information supplied by Schering to Mr. Elstein had already been published, but it included information which was damaging to Schering when it was first published and which could not be re-published without the risk of causing further damage to Schering. Any re-publication and re-cycling by Mr. Elstein of any of the information supplied to him by Schering could be unwelcome to Schering, could be inimical to the best interests of Schering and could reasonably be regarded by Schering as further bad publicity. Mr. Elstein must have realised that if he revived and re-cycled and re-published information which he received from Schering, that action on his part was liable to be damaging. Mr. Elstein must have realised that Schering would not supply Mr. Elstein with any

¹⁵⁴See para. 4.15 and n. 141 above.

¹⁵⁵[1981] 2 W.L.R. 848, 867H.

¹⁵⁶He did not use the word "contract" in regard to the relationship between Schering and Elstein but said (*ibid.* 879A-B):

"In my judgment, when Mr. Elstein agreed for reward (n.b. a fee paid by Falkman not by Schering) to take part in the training course and received and absorbed information from Schering, he became under a duty not to use that information and *impliedly promised* Schering that he would not use that information for the very purpose which Schering sought to avoid, namely, bad publicity in the future, including publicity which Schering reasonably regarded as bad publicity" (emphasis added).

¹⁵⁷*Ibid.*, 869E.

¹⁵⁸See n. 156 above.

¹⁵⁹[1981] 2 W.L.R. 848, 871B.

information at all if they thought for one moment that there was any possibility that he might make use of that information for his own purposes and in a manner which Schering might find unwelcome or harmful. As between Schering and Mr. Elstein, the information which Mr. Elstein received from Schering was confidential and cannot be published by Mr. Elstein in the film 'The Primodos Affair' [the film made by Thames Television]".¹⁶⁰

Templeman L.J., however, added:

"There is nothing to prevent any journalist or television company, including Thames, from making a film about Primodos provided that they do not employ the services of Mr. Elstein who can only give those services by making use of information which he received from Schering. If Mr. Elstein is restrained from breach of his duty to Schering and if Thames are restrained from exploiting any breach of duty on the part of Mr. Elstein, there will be no concealment of any fact from the public. Those facts have already been made available to the public and may again be made available to the public but not through the medium of Mr. Elstein who engaged himself to advise Schering, received relevant information from Schering to enable him to advise Schering and thus voluntarily debarred himself from making use of that information for his own purposes".¹⁶¹

4.23 Lord Denning M.R. in his dissenting judgment emphasised that the proceedings concerned an interlocutory application in which it was not possible to know the full facts.¹⁶² He drew attention however to the research which Elstein organised:

"She [the researcher whom Elstein engaged] assembled a great mass of material: research papers, periodicals, other publications, newspapers and magazines, and television programmes. She consulted many individuals. *David Elstein went into it and made up a programme—all of material which had been made public already in the newspapers and on television*"¹⁶³ (emphasis added)

The Master of the Rolls conceded that Elstein owed a duty of confidence to Schering,¹⁶⁴ but he did not consider that in the circumstances there had been a breach of the confidence so owed:

"In these circumstances I would go with Schering to this extent: neither Elstein nor Thames were at liberty to use any private information without the consent of Schering; nor to use any public information (this was recognised in the letter of July 4, 1979) unless they did the research and collected it themselves. But they were at liberty to use *public information by going and collecting it themselves. As they said that they did. And they were at liberty to use any ideas which came into their heads by reason of*

¹⁶⁰ *Ibid.*, 879C-G.

¹⁶¹ *Ibid.*, 881F-H.

¹⁶² *Ibid.*, 859A.

¹⁶³ *Ibid.*, 855B-C.

¹⁶⁴ *Ibid.*, 858F.

the course; and, in particular, the idea of making a documentary on the story of the Primodos Affair. As they said they did. Ideas are not the subject of copyright; nor of breach of confidence. So on the evidence as it stands, it seems to me very arguable that, although David Elstein was under a duty of confidence to Schering, he was not in breach of that duty. It is, to my mind, quite unfair to accuse him, on the present evidence, of a flagrant breach of duty, or of being a traitorous adviser seeking to make money out of his misconduct; or to base any decision against him on that assumption. I look at it in this way: the correspondence shows that if Schering had approved of the film—if it had been good publicity for them—they would gladly have let it be shown. But, because they disapproved of it, thinking it was bad publicity, they claim to be entitled to ban the showing of it indefinitely—the whole of it”.¹⁶⁵ (emphasis added)

And in a later passage, which was primarily concerned with the question (which he would have answered in the negative) whether an injunction was appropriate in the present case, Lord Denning returned to the issue of the public domain, saying:

“The public interest in the drug Primodos and its effects far outweighs the private interest of the makers in preventing discussion of it. *Especially when all the information in the film is in the public domain, and where there has already been considerable coverage in newspapers and on television.*”¹⁶⁶ (emphasis added)

4.24 Another difficulty concerning public domain has arisen in regard to a line of cases concerned with what has come to be known as the “springboard doctrine”. It has not proved easy to reconcile these cases with the decision of the House of Lords in *O. Mustad & Son v. Dosen*.¹⁶⁷ The springboard doctrine was originally enunciated by Roxburgh J. at first instance in *Terrapin Ltd. v. Builders’ Supply Co. (Hayes) Ltd.* in 1959. At first the only published report of the relevant part of his judgment consisted of a brief footnote to the report of the Court of Appeal decision¹⁶⁸ in the same case. According to that note, the essence of the springboard doctrine is that:

“... a person who has 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 the confidential information still has a long start over any member of the public. . . . It is, in my view, inherent in the principle upon which the *Saltman* case rests that the possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start.” (emphasis added)

¹⁶⁵*Ibid.*, 859B-E.

¹⁶⁶*Ibid.*, 865H.

¹⁶⁷[1963] R.P.C. 41; [1964] 1 W.L.R. 109. The decision was given in 1928 but was not reported until 1963. See para. 4.16 above.

¹⁶⁸[1960] R.P.C. 128, 130. The question whether the information was any longer confidential once it had been published by the plaintiffs was not argued in the Court of Appeal. For the subsequent fuller report of the judgment of Roxburgh J., see n. 175 below.

4.25 In *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.*¹⁶⁹ particulars of the method of constructing a brassière had been given in confidence by the plaintiffs to the defendants. The plaintiffs, relying on the brief extract from Roxburgh J.'s judgment in *Terrapin* quoted in the previous paragraph, argued that they were entitled to an injunction indefinitely precluding the defendants from manufacturing brassières by that method of construction. The defendants replied that the injunction would be inconsistent with the decision of the House of Lords in *Mustad's case*.¹⁷⁰ Pennycuik J. described this issue as one of "considerable general importance and difficulty, i.e. broadly where one trader has given to another in confidence particulars of a process for the manufacture of a given article, in what circumstances, if any, is the second trader thereafter entitled to manufacture that article in competition with the first trader?"¹⁷¹ However, he declined to express a view on this question, on the grounds that it was not necessary for his decision and that, in any event, on the facts then available to him he could not prejudice any future dispute which might arise between the parties.¹⁷²

4.26 Before discussing later cases bearing on the possible inconsistency of Roxburgh J.'s judgment in *Terrapin*¹⁷³ with the decision of the House of Lords in *Mustad's case*¹⁷⁴ we think it will be helpful to give a summary of the facts in *Terrapin* and to set out the whole of the relevant passage from Roxburgh J.'s judgment, so that the extract quoted in paragraph 4.24 above may be seen in its full context. The defendants manufactured under contract portable buildings to the design of the plaintiffs, and for that purpose received from the plaintiffs certain confidential information. After the contract had been determined, the defendants put on the market a building in the manufacture of which they had used the confidential information obtained from the plaintiffs. On a claim by the plaintiffs for an interlocutory injunction, the defendants argued that their obligation of confidence had been discharged by the public disclosure of the features of the buildings consequent upon the sale of such buildings by the plaintiffs and by their publication of brochures describing them. Roxburgh J. rejected this argument and granted an interlocutory injunction, saying:

"... The brochures would not enable anybody to see exactly how the unit was constructed. They would give the general idea, but not the details. The dismantling [of a unit] would, of course, enable any competent carpenter to see exactly how the building was constructed. 'And', says Mr. Aldous [counsel for the defendants], 'that publication discharges the confidential obligation.'

¹⁶⁹[1963] R.P.C. 45; [1964] 1 W.L.R. 96.

¹⁷⁰See para. 4.16 above.

¹⁷¹[1963] R.P.C. 45, 55; [1964] 1 W.L.R. 96, 104.

¹⁷²*Ibid.* The plaintiffs were in fact "perpetually restrained" against manufacturing, selling, advertising or distributing two types of brassière which were found to have been based on methods of construction as to which information had originally been given by the plaintiffs to the defendants in confidence. No doubt, if the defendants had subsequently applied for discharge of the injunction on the ground that the information in question had by then reached the public domain, the question left unanswered by Pennycuik J. would have fallen for decision.

¹⁷³See para. 4.24 above.

¹⁷⁴See n. 167 above.

Frankly he admitted that there is no suggestion of such a doctrine in any reported case. I go further and say that it is inconsistent with the principles stated by Lord Greene in Saltman's case.

As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public. *The brochures are certainly not equivalent to the publication of the plans, specifications, other technical information and know-how. The dismantling of a unit might enable a person to proceed without plans or specifications, or other technical information, but not, I think, without some of the know-how, and certainly not without taking the trouble to dismantle. I think it is broadly true to say that a member of the public to whom the confidential information had not been imparted would still have to prepare plans and specifications. He would probably have to construct a prototype, and he would certainly have to conduct tests. Therefore, the possessor of the confidential information still has a long start over any member of the public. The design may be as important as the features. It is, in my view, inherent in the principle upon which the Saltman case rests that 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; or, in other words, to preclude the tactics which the first defendants and the third defendants and the managing director of both of those companies employed in this case.*¹⁷⁵ (emphasis added)

4.27 In *Cranleigh Precision Engineering Ltd. v. Bryant*¹⁷⁶ the first defendant in his capacity as the managing director of the plaintiffs had developed certain methods of construction of an above-ground swimming pool in respect of which he owed a duty of confidence to his employers; he left the plaintiffs' employ, having been informed while still in their employ of the existence of a published Swiss patent application covering the essential features of the method of construction in question. He kept this information secret from his employers and, having secured for himself the United Kingdom rights in the Swiss patent, proceeded through the second defendants, a company which he had formed before leaving the plaintiffs' employ, to put on the market a swimming pool based on the method of construction he had originally developed while employed by the plaintiffs. The plaintiffs brought two actions. In the first they successfully claimed an injunction to restrain the first and second defendants from using the methods of construction developed by the first defendant while in the plaintiffs' employ. The second was concerned with the first defendant's failure to disclose his knowledge of the existence of the Swiss patent and with the subsequent exploitation of that knowledge for their

¹⁷⁵[1967] R.P.C. 375, 391-2. The emphasized portions were not cited in the footnote set out in para. 4.24 above. The case was decided in 1959; the passage from Roxburgh J.'s judgment cited in para. 4.24 above was partially quoted by Roskill J. in *Cranleigh Precision Engineering Ltd. v. Bryant* [1966] R.P.C. 81, 96; [1965] 1 W.L.R. 1293, 1317-18; but it was not separately reported until 1967.

¹⁷⁶[1966] R.P.C. 81; [1965] 1 W.L.R. 1293.

own advantage by both defendants. In the second action the plaintiffs were held entitled in principle to claim damages and were granted an injunction in respect of their exploitation of their knowledge of the patent. Roskill J. said:

“...I have no doubt that Bryant [the first defendant] acted in grave dereliction of his duty to the plaintiffs in concealing from the plaintiffs’ board the information [about the Swiss patent]... , and in taking no steps whatsoever to protect the plaintiffs against the possible consequences of the existence and publication of the [Swiss] patent. I also have no doubt that Bryant acted in breach of confidence in making use, as he did as soon as he left the plaintiffs, of the information regarding the ... patent which he had acquired in confidence and about its various effects upon the plaintiffs’ position, for his own advantage and for that of the defendant company. Any other conclusion would involve putting a premium upon dishonesty by managing directors.

In reaching this conclusion I have not lost sight of the fact that the heads of agreement... contained no express obligation not to divulge confidential information, but this makes no difference, for, were it necessary, I would not hesitate to imply into the contract of employment between Bryant and the plaintiffs the relevant obligation.”¹⁷⁷

4.28 The defendants in *Cranleigh* argued in regard to the second action that the information to which it related—namely, that contained in the Swiss patent specifications—was no longer capable of protection once the specifications had been published; for this contention they relied on *Mustad*’s case¹⁷⁸ and argued that if the statement of the law in *Terrapin* placed difficulties in their path it was inconsistent with the House of Lords’ decision in *Mustad*. Roskill J., who unlike Pennycuik J. in the *Peter Pan* case¹⁷⁹ had before him a full transcript of the judgment in *Terrapin*,¹⁸⁰ said that this judgment correctly stated the law and rejected the view that it was inconsistent with *Mustad*; but in deciding the case before him, Roskill J. distinguished *Mustad* on the ground that in *Mustad* it was the employer himself who published the confidential information, whereas in the instant case publication had been made not by the plaintiffs but by a third party—i.e. the applicant for a Swiss patent.

4.29 Notwithstanding the view of *Mustad* taken by Roskill J., however, it is doubtful whether an obligation of confidence, as distinguished from any express or implied contractual obligation which may exist between the parties, can persist after the information in question has reached the public domain, irrespective of the way in which it has come into the public domain. Suppose an inventor has given particulars of a certain device to a draughtsman who accepts an obligation in respect of that information. The draughtsman passes on the information to a third party, who knows that he is obtaining the information in breach of the draughtsman’s obligation of confidence. Subsequently all the details of the device are independently published in a trade journal. Is the third party thereafter subject to indefinite restraint in making

¹⁷⁷ *Ibid.*, 97–98 and 1319–1320 respectively.

¹⁷⁸ [1963] R.P.C. 41; [1964] 1 W.L.R. 109. See para. 4.16 above.

¹⁷⁹ [1963] R.P.C. 45; [1964] 1 W.L.R. 96. See para. 4.25 above.

¹⁸⁰ Ultimately reported in [1967] R.P.C. 375. See para. 4.26 and n. 175 above.

and marketing the device at a time when any of his trade rivals are free to exploit the information in the article?

4.30 It has recently been suggested¹⁸¹ that *Cranleigh's* case was wrongly decided and that, once information is in the public domain, it ceases to be confidential whether it was put into the domain by the plaintiff himself, by the person who accepted an obligation of confidence regarding it, or by a third party. Even when a remedy for breach of confidence is sought at a time when the information in question has not yet reached the public domain, it is argued that a permanent injunction would go too far because it would place the person subject to a then operative obligation of confidence under a "special disability" for all time which would be "to punish him for his breach of faith rather than protect confidential information."¹⁸² In Working Paper No. 58¹⁸³ we drew attention in this connection to the divergence of opinion in the American courts between those which follow "the rule in *Shellmar*",¹⁸⁴ according to which a defendant can be enjoined in perpetuity from using what he has once misused, and those which follow "the *Conmar* rule",¹⁸⁵ under which a defendant who has misused information may nevertheless legitimately use it once it has passed into the public domain. We provisionally expressed a preference for the *Conmar* approach, saying:

"It does not seem to us realistic to enjoin a defendant from the use of information which is freely available to everyone else, even if its availability is the direct result of the defendant's wrongful act. We believe that the proper remedy against such a defendant is damages and that the amount of the damages awarded should take into account the fact that the defendant's wrongful act has placed the information in the public domain and thereby rendered it unprotectable in future. If the plaintiff is fully compensated for the defendant's wrongful act in placing his information in the public domain, we can see no reason why he should, in addition, be able to obtain an injunction preventing the defendant from using the information thereafter."

4.31 It does not seem that the "springboard doctrine" is in total conflict with the principle that information once it has entered the public domain no longer can enjoy the protection of the action for breach of confidence. Suppose A in breach of the obligation of confidence which he owes to B uses certain information to manufacture a particular product, which he is about to put on the market. At that point C puts on to the market an identical product. If B were allowed to argue that he is from that time free to market the product himself because the information is now available to the public, he would by his breach of confidence have gained an unfair advantage over other competitors of A, whose information had to be derived from the product when first marketed by C. They would not reach the stage of manufacture which A had reached at the time C's product appeared on the market until by "reverse engineering" they had acquired all the information to be derived

¹⁸¹ By W. J. Braithwaite in (1979) 42 M.L.R. 94, 96.

¹⁸² *Ibid.*

¹⁸³ Para. 100.

¹⁸⁴ *Shellmar Products Co. v. Allen-Qualley Co.* (1936) 87 F. 2d 104.

¹⁸⁵ *Conmar Products Corporation v. Universal Slide Fastener Co. Inc.* (1949) 172 F. 2d 150.

from the product and necessary for making it themselves and had put themselves in a position to manufacture it. In a more realistic sense therefore information of this kind cannot be regarded as effectively in the public domain until it would be reasonably possible for an interested member of the public in fact to use the information even though some of the information was already available to the public. If reference is made to the full text of Roxburgh J.'s judgment in *Terrapin's* case,¹⁸⁶ it will be seen that it was particularly in regard to this kind of situation that he thought that the "springboard doctrine" was applicable.¹⁸⁷ The "springboard doctrine" has, however, to cover every element in the unfair start which a person in breach of confidence may have thereby obtained over competitors who have to rely on information which has reached the public domain. The doctrine therefore allows for the further period, after the information has in the fullest sense reached the public domain, which competitors would need in order to put their product on the market, as for example by "tooling-up" their factory and organizing production and distribution. To this extent the "springboard doctrine" is a qualification of the public domain principle. This approach must in the present state of the law be somewhat speculative but it gains support from observations of Lord Denning M.R. in *Seager v. Copydex Ltd.*:¹⁸⁸

"When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it; or, at any rate, not be in a better position than if he had gone to the public source. *He should not get a start over others by using the information which he received in confidence.* At any rate, he should not get a start without paying for it. It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him in saving him time and trouble." (emphasis added)

Furthermore, in *Potters-Ballotini v. Weston-Baker*¹⁸⁹ Lord Denning added that the "spring-board" giving the recipient of confidential information a start over others "does not last for ever"; and in *Harrison v. Project & Design Co. (Redcar) Ltd.*¹⁹⁰ Graham J., citing the *Potters-Ballotini* case, also emphasized the limited protection in time given by the springboard doctrine.

¹⁸⁶See para. 4.26 above.

¹⁸⁷See the passage cited in para. 4.26 above where, in referring to the "brochures" published in connection with the product put on public sale, he said: "The brochures are certainly not equivalent to the publication of the plans, specifications, other technical information and know-how. The dismantling of a unit might enable a person to proceed without plans or specifications, or other technical information, but not, I think, without some of the know-how, and certainly not without taking the trouble to dismantle. I think it is broadly true to say that a member of the public to whom the confidential information had been imparted would still have to prepare plans and specifications. He would probably have to construct a prototype, and he would certainly have to conduct tests."

¹⁸⁸[1967] R.P.C. 349, 368; [1967] 1 W.L.R. 923, 931-2. The facts of the case are given in para. 4.3 above.

¹⁸⁹[1977] R.P.C. 202, 206.

¹⁹⁰[1978] F.S.R. 81.

2. The information must be other than personal knowledge, skill or experience¹⁹¹ acquired in work

4.32 The House of Lords in *Herbert Morris Ltd. v. Saxelby*¹⁹² gave authoritative expression to the well-known common law principle that it is against public policy to allow a person in a particular employment to covenant that after he has left that employment he will not use "the general skill and knowledge which an employee of any ability must necessarily obtain as opposed to knowledge of any matter and skill in any process in which [his former employer] could be said to have any property at all".¹⁹³ A similar distinction had been made in the earlier decision of the House of Lords in *Mason v. Provident Clothing and Supply Company Ltd.*¹⁹⁴ in which Lord Shaw of Dunfermline contrasted the divulging, actual or threatened, of trade secrets and the case of an employee who in that capacity acquires mental or manual skills; the former relates to knowledge which is "as real and objective as the possession of material goods" and the latter concerns the subjective "equipment of the workman [which] becomes part of himself" and is to be used "for his own maintenance and advancement".

4.33 It is clear that what public policy will not allow to be enforced under the law of contract cannot be achieved by resort to the action for breach of confidence. In other words, the latter will not lie in respect of knowledge, skill or experience acquired at work which is personal to the acquirer. There will therefore be difficult border-line cases where a person who has acquired information in one employment may be somewhat inhibited from taking up new employment in the same line of business because he cannot easily distinguish between information which he should treat as confidential to his first employer and the knowledge, skill or experience which he is free to carry away with him. In *Printers and Finishers Ltd. v. Holloway*,¹⁹⁵ for example, the first defendant had been the manager of the plaintiffs' flock printing factory. After having, while still in the employment of the plaintiffs, committed a number of undoubted breaches of duty to his employers in his dealings with the second defendants, he was dismissed by the plaintiffs and entered the employment of the second defendants. The plaintiffs sought *inter alia* to obtain an injunction against the first defendant restraining him from disclosing information within his knowledge relating to the plaintiffs' process. Cross J.

¹⁹¹It was in our view rightly pointed out in consultation that these terms are better indications of the relevant considerations than "skill, experience and ability" which we used in Working Paper No. 58 (see paras. 24, 106 and 108) and that they have the further advantage of being sanctioned by judicial usage. (See e.g. Bennett J. in *United Indigo Chemical Co. Ltd. v. Robinson* (1932) 49 R.P.C. 178, 187: "[The Plaintiffs] are trying to stop the Defendant from using after he has left the Plaintiffs' service knowledge, skill and experience which as the result of his service have become his own.") We also think in accord with views expressed in consultation that the fact that information relates to such knowledge, skill or experience does not provide a defence (as we suggested in the working paper—see para. 107) but that it is a positive requirement of the action for breach of confidence that it relates to information other than that knowledge, skill or experience.

¹⁹²[1916] 1 A.C. 688.

¹⁹³*Ibid.*, 711, *per* Lord Parker of Waddington.

¹⁹⁴[1913] A.C. 724, 740-741.

¹⁹⁵[1965] R.P.C. 239; [1965] 1 W.L.R. 1. See also *United Sterling Corporation Ltd. v. Felton* [1974] R.P.C. 162; *Aveley/Cybervox Ltd. v. Boman* [1975] F.S.R. 139.

referred to the difficult position in which the defendant might be placed in the following way:

“What is asked for here, however, goes far beyond any relief granted in any case which was cited to me. The plaintiffs are saying, in effect: ‘True it is that other flock printers use plant and machinery similar to ours and that as we did not trouble to exact any covenant from him not to do so Holloway was entitled to go and work for a trade competitor who uses such plant and machinery. Nevertheless we are entitled to prevent him from using for the benefit of his new employers his recollection of any features of our plant, machinery or process which are in fact peculiar to us.’ If this is right then, as it seems to me, an ex-employee is placed in an impossible position. One naturally approaches the problem in this case with some bias in favour of the plaintiffs, because [the first defendant] has shown himself unworthy of their trust; but to test their argument fairly one must take the case of an employee who has been guilty of no breach of contract. Suppose such a man to be told by his new employers that at this or that stage in the process they encounter this or that difficulty. He may say to himself: ‘Well, I remember that on the corresponding piece of machinery in the other factory such-and-such a part was set at a different angle or shaped in a different way’; or again, ‘When that happened we used to do this and it seemed to work,’ ‘this’ being perhaps something which he had been taught when he first went to the other factory, or possibly an expedient which he had found out for himself by trial and error during his previous employment.

Recalling matters of this sort is, to my mind, quite unlike memorising a formula or list of customers or what was said (obviously in confidence) at a particular meeting. *The employee might well not realise that the feature or expedient in question was in fact peculiar to his late employer’s process and factory; but even if he did, such knowledge is not readily separable from his general knowledge of the flock printing process and his acquired skill in manipulating a flock printing plant.*¹⁹⁶ (emphasis added)

4.34 In deciding when information, which an employer claims to be confidential, is too much bound up with the personal knowledge, skill or experience of the employee to justify the protection of the action for breach of confidence, Cross J. resorted to the concept of the judgment of the ordinary or average man. Thus, in declining to grant an injunction in the case before him, he said:

“I do not think that any man of average intelligence and honesty would think that there was anything improper in [the first defendant] putting his memory of particular features of his late employer’s plant at the disposal of his new employer. The law will defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary man.”¹⁹⁷

¹⁹⁶[1965] R.P.C. 239, 256; [1965] 1 W.L.R. 1, 5-6.

¹⁹⁷*Ibid.*, 256 and 6 respectively.

On the other hand he accepted that :

“if the information in question can fairly be regarded as a separate part of the employee’s stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer, and not his own to do as he likes with, then the court, if it thinks that there is a danger of the information being used or disclosed by the ex-employee to the detriment of the old employer, will do what it can to prevent that result by granting an injunction.”¹⁹⁸

4.35 In Working Paper No. 58¹⁹⁹ we pointed out that the principle applicable to information acquired by an employee appeared equally relevant to the personal knowledge, skill or experience acquired by an independent contractor in the course of carrying out work for another. We gave the example of a consultant on business management who during the course of a lengthy assignment on behalf of his client adds to his personal knowledge, skill or experience in the same way as an actual employee of the client. There seems no reason either why a similar principle should not also apply to information acquired by a partner. There does not however appear to be any direct judicial authority on the position either of independent contractors or of partners.

3. The public interest in relation to the protection of information by the action for breach of confidence

4.36 In paragraphs 3.5 and 3.6 above we referred to *Gartside v. Outram*²⁰⁰ and *Weld-Blundell v. Stephens*²⁰¹ which respectively mark the beginnings of, and early limitations on, the very important principle that protection by the action for breach of confidence is subject to considerations of public interest. Later cases, perhaps the most significant of which occurred after the publication of Working Paper No. 58, have further illustrated, but also raised new problems concerning this principle.

4.37 However, before considering those cases, we would make an important preliminary point concerning the meaning in this context of the expression “public interest”—namely, that only the question whether it is “in the public interest” to disclose certain information is in point, not the quite distinct question whether that information is “of public interest”. This distinction has been drawn by the Younger Committee²⁰² and the Press Council in this country,²⁰³ and by the Australian Law Reform Commission in their report

¹⁹⁸*Ibid.*, 255 and 5 respectively. Cross J. gave as an illustration of the kind of case where the courts would grant an injunction *Reid and Sigrist Ltd. v. Moss and Mechanism Ltd.* (1932) 49 R.P.C. 461. Here the defendant was restrained from disclosing the methods of construction and features of the design of turn indicators for use in aeroplanes, he having, while still in the plaintiff’s employ, made and taken away drawings covering the matters discussed between the plaintiffs and an outside expert called in to advise on problems which had arisen in developing the indicators. Cross J. thought that an injunction would have still been obtainable even if the defendant had taken away no drawings but relied on his memory.

¹⁹⁹Para. 108.

²⁰⁰(1856) 26 L.J. Ch. 113.

²⁰¹[1919] 1 K.B. 520 (C.A.); [1920] A.C. 956.

²⁰²Report of the Committee on Privacy (1972), Cmnd. 5012, para. 157.

²⁰³In a “Declaration on Privacy” (1976).

on *Unfair Publication: Defamation and Privacy* published in 1979.²⁰⁴ Although in each case the relevant body was concerned with privacy, the limitation placed upon the meaning of "public interest" applies with equal force to the field of confidence. In other words, though the public may be interested in a particular matter, it does not follow that it is in the public interest that their interest should necessarily be gratified at the expense of a breach of confidence.

4.38 We turn now to the first of the later cases to which we have referred in the preceding paragraph. In *Initial Services Ltd. v. Putterill*²⁰⁵ a former sales manager of the plaintiff's laundering and towel supply business had disclosed to a daily newspaper information obtained from his employment and alleged that the information showed, first, that a group of firms had entered into an agreement to keep up prices which had not been registered under the Restrictive Trade Practices Act 1956, and, secondly, that the plaintiff firm had issued a misleading trade circular blaming increased charges on selective employment tax when the increases would in fact bring in substantial additional profits. In successful proceedings on an appeal against an interlocutory order striking out a defence that disclosure was in the public interest, Lord Denning M.R., referring to the suggestion of Bankes L.J. in *Weld-Blundell v. Stephens*²⁰⁶ that such a defence was restricted to information relating to the proposed or contemplated commission of a crime or civil wrong, said:

"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."²⁰⁷

Lord Denning M.R. further thought that, even where the information in question relates to matters in which there is legitimate public interest:

"The disclosure must . . . be to one who has a proper interest to receive the information."²⁰⁸ Thus it would be proper to disclose a crime to the

²⁰⁴The Commission propose, as one defence (among others) to the action which they recommend should be made available in respect of the publication of certain private facts, that the publication is relevant to "a topic of public interest". That expression is defined so as to apply to facts relating to certain specified matters (for example, to any property or services offered to the public) or which are otherwise "of legitimate concern to the general public or to any section of the public". However, they recommend specific provision excluding from the ambit of the defence publication "merely for the purpose of arousing prurient or morbid curiosity". (Report No. 11, para. 247; and draft Unfair Publication Bill, clauses 7(3) and (4), and 21(h).)

²⁰⁵[1968] 1 Q.B. 396.

²⁰⁶[1919] 1 K.B. 520, 527.

²⁰⁷[1968] 1 Q.B. 396, 405.

²⁰⁸Salmon L.J. (at p. 409) seemed unwilling to go as far as this. Commenting on counsel for the plaintiff's argument that where disclosure is justified it must be to the proper authority and that in this case the press was not the proper authority, he merely said that it would be impossible to strike out a defence on this narrow ground. He tentatively suggested, however, that information which by statute had to be disclosed might not initially be "clothed with confidence". This is a significant anticipation of an approach to "public interest" in relation to breach of confidence, which was later adopted by Lord Widgery in *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752. See paras. 4.41–4.44 below.

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.”²⁰⁹

4.39 The defence of public interest was also raised on behalf of the editor and publishers of “The Sunday Times” in *Fraser v. Evans*.²¹⁰ As already mentioned,²¹¹ in that case Lord Denning M.R. in the Court of Appeal refused an interlocutory injunction on the ground that the plaintiff, being owed no duty of confidence (although himself owing such a duty), lacked standing to bring the action. He continued:

“Even if Mr. Fraser had any standing to complain, ‘The Sunday Times’ say that in any event they have just cause or excuse for publishing. They rely on a line of authority from *Gartside v. Outram*²¹² to the latest case, *Initial Services Ltd. v. Putterill*.²¹³ They quote the words of Woods V.-C. that ‘there is no confidence as to the disclosure of iniquity.’²¹⁴ *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.*”²¹⁵ (emphasis added)

However, in the particular case Lord Denning was doubtful whether the defendants would have been able successfully to argue that publication of the report (revealing that the plaintiffs had been engaged by the new military régime in Greece to improve their public relations in Europe) was in the public interest.²¹⁶ On the other hand in *Hubbard v. Vosper*,²¹⁷ in which an interlocutory injunction was unsuccessfully sought to prevent publication of a book describing certain courses given by the “Church of Scientology”, Lord Denning, having quoted the last sentence of the above-cited passage from his judgment in *Fraser v. Evans*, said:

“We cannot decide on it today [i.e. whether ‘it is in the public interest that these goings-on should be made known’], as this is only an interlocutory application. But, I think that, even on what we have heard so far, there is good ground for thinking that these courses contain such

²⁰⁹[1968] 1 Q.B. 396, 405-6.

²¹⁰[1969] 1 Q.B. 349.

²¹¹See para. 4.13 above.

²¹²(1856) 26 L.J. Ch. 113. See para. 3.5 above.

²¹³[1968] 1 Q.B. 396. See para. 4.38 above.

²¹⁴(1856) 26 L.J. Ch. 113, 114.

²¹⁵[1969] 1 Q.B. 349, 362.

²¹⁶Contrast the case of 8 July 1977 (referred to in “The Sunday Times” of 10 July 1977) where MacKenna J. refused an injunction to J. Donne Holdings restraining “The Sunday Times” from publishing an article on “British techniques in advanced sabotage and silent killing” which the article claimed were “being offered for sale to foreign governments by a London firm [i.e. the plaintiffs]”.

²¹⁷[1972] 2 Q.B. 84.

dangerous material that it is in the public interest that it should be made known."²¹⁸

4.40 In *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*²¹⁹ the plaintiffs, pursuant to an order for discovery in an action brought against them by users of the drug thalidomide, had given information to an expert employed by the latter. The expert passed the information to Times Newspapers, who were aware of the circumstances in which the expert had obtained it.²²⁰ The plaintiffs sought an interlocutory injunction to prevent the defendants from using or disclosing the information. The defendants argued that their intended publication would be in the public interest. Talbot J., while accepting that "the thalidomide story" was a matter of public interest, granted an injunction saying that he was not persuaded that the proposed publication by the defendants was:

"of greater advantage to the public than the public's interest in the need for the proper administration of justice, to protect the confidentiality of discovery of documents."²²¹

4.41 In the cases of public interest in relation to breach of confidence which have been discussed above it was generally taken for granted that it was a matter of defence to an action for breach of confidence that disclosure of the information subject to an obligation of confidence was in the public interest. The main uncertainty lay in the determination of the public interest in any particular context, bearing in mind two factors. They were first, the relatively small number of cases in which the question of public interest had arisen, and where interlocutory proceedings were involved, their indecisive character, and, secondly, the discretionary nature of the remedy of injunction. *Attorney-General v. Jonathan Cape Ltd.*²²² has now given to the issue of public interest in breach of confidence a new significance but also left unanswered many questions as to the application of the principles there enunciated by Lord Widgery C.J. to factual situations differing from those involved in that case. In *Cape*, the Attorney-General sought an injunction restraining the publication of the first volume (covering the years 1964-1966) of the diary kept by the late Richard Crossman. The diary disclosed (a) Cabinet discussions and differences of view and (b) advice given by senior civil servants and

²¹⁸*Ibid.*, 96. In *Church of Scientology of California v. Kaufman* [1973] R.P.C. 635, Goff J. suggested that there were two possible tests for the defence of public interest, either the wide test of having "just cause or excuse for breaking confidence" (see the passage from Lord Denning's judgment in *Fraser v. Evans* cited above) or the narrower test that the information in question concerns "such dangerous material that it is in the public interest that it should be made known" (see the passage from Lord Denning's judgment in *Hubbard v. Vosper* also cited above). We would think Lord Denning intended the "danger" test to be only a particular application of the broader test and in fact Goff J. held that by reference to either test it was in the public interest that information about courses in scientology should be made public.

²¹⁹[1975] Q.B. 613. We have referred above (see para. 4.5) to the finding of Talbot J. that information obtained by way of discovery is impressed with an obligation of confidence not to be used otherwise than in the action in which it has been disclosed.

²²⁰As to the position of third parties in possession of confidential information see paras. 4.11-4.12 above.

²²¹[1975] Q.B. 613, 625, and see *Rank Film Distributors Ltd. v. Video Information Centre* [1981] 2 W.L.R. 668, 679.

²²²[1976] Q.B. 752.

observations by Ministers on those civil servants' capacity and suitability for specific appointments. With regard to (b) Lord Widgery could "see no ground in law which entitles the court to restrain publication"²²³ of information on such matters; but, having referred to *Prince Albert v. Strange*,²²⁴ *Saltman's case*,²²⁵ *Coco v. A. N. Clark (Engineers) Ltd.*²²⁶ and *Duchess of Argyll v. Duke of Argyll*,²²⁷ he held that the expression of individual opinions by Cabinet ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court where this is clearly necessary in the public interest.²²⁸

4.42 However, in our view the main significance of Lord Widgery's judgment lies in the way in which he treated the issue of public interest and the importance which he attached to the length of time which had elapsed since the relevant Cabinet discussions had taken place. Whereas in earlier cases public interest had been considered as a defence, in the instant case he felt that it was for the plaintiff—i.e. in the particular circumstances the Attorney-General—to show:

- "(a) that . . . publication would be a breach of confidence;
- (b) that the public interest requires that . . . publication be restrained, and
- (c) that there are no other facets²²⁹ of the public interest contradictory of and more compelling than that relied upon."²³⁰

In other words, in the view of Lord Widgery it is a positive requirement of the action for breach of confidence that on balancing the public interest in the protection of the information given in confidence against public interest in its disclosure the scales are tipped in favour of protection of the information.

4.43 Lord Widgery emphasised a particular aspect of point (b) above, namely that the public interest could not be said to "require" restraint on the publication of certain information without any limit of time. The limit might vary according to the nature of the information involved, but in regard to the Crossman diaries, the relevant volume of which related to the years 1964–1966, the duty of the court to restrain publication had lapsed by 1976. "I cannot believe", Lord Widgery said, "that the publication at this interval

²²³*Ibid.*, 772. Lord Widgery may, however, have intended to qualify this to some extent in saying (*ibid.*): "I can find no ground for saying that either the Crown or the individual civil servant has an enforceable right to have the advice which he gives treated as confidential for all time" (emphasis added).

²²⁴(1848) 1 Mac. & G.25. See para. 3.3 above.

²²⁵(1948) 65 R.P.C. 203. See paras. 3.10–3.11 above.

²²⁶[1969] R.P.C. 41. See para. 4.4 above.

²²⁷[1967] Ch. 302. See para. 4.2 above.

²²⁸[1976] Q.B. 752, 770. For further citations from Lord Widgery's judgment relevant to the applicability of the action for breach of confidence to Cabinet discussions see para. 4.2 above. The principles laid down in *Cape* have recently been applied by the High Court of Australia in the similar context of the proposed publication of Government documents relating to matters of foreign policy and defence; *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1981) 55 A.L.J.R. 45; see further para. 6.78 below. (An interim injunction was, however, granted on the ground of infringement of copyright).

²²⁹The term "facts" appears in the Law Reports, but from the context this would appear to be an error. The report at [1975] 3 All E.R. 484, 495 has "facets".

²³⁰[1976] Q.B. 752, 770.

of anything in volume one would inhibit free discussion in the Cabinet of today, even though the individuals involved are the same, and the national problems have a distressing similarity with those of a decade ago.²³¹

4.44 The judgment in *Cape* provides an important statement of the law applicable to the special category of information with which it dealt, but whether it applies to the action for breach of confidence in other contexts, and if so to what extent, is as yet uncertain. In the law as we stated it in Working Paper No. 58 before *Cape* there appeared to be various problems for which we suggested certain tentative solutions but which, if the approach of Lord Widgery is to be generally accepted, may be thought considerably less serious. For example, the law on breach of confidence, considered apart from *Cape*, is a not insubstantial check on freedom of speech and on the exploitation of ideas in the commercial and industrial sphere. If Lord Widgery's test is applicable to the action for breach of confidence in all circumstances this check may be more acceptable in that it only operates if the plaintiff can show that it is justified on a balance of the public interests involved. Furthermore, this justification would have to be shown to be applicable at the time when the case is brought. The court would thus be enabled to apply to the action for breach of confidence the considerations of public policy in regard to time which in the analogous area of patent law have moved the legislature to limit the duration of a patent to twenty years.²³² On the other hand, where the information concerned was not of a patentable character, such as personal information relating to the plaintiff, Lord Widgery's test would enable a court to hold that the balance of interest lay in favour of protecting the confidence; the claim of the individual to have this information kept secret may well with the passage of the years become stronger, while a claim on behalf of the public to have access to it may in time tend to be less compelling.²³³ Incidentally, although it would still be necessary to have rules as to the effect of death on an action for breach of confidence,²³⁴ they would not come into operation where, considering the time which had elapsed since the confidence came into being, a case for protecting the information could not in any event be made out. However, in the light of later cases these wider implications of *Attorney-General v. Jonathan Cape Ltd.*²³⁵ are somewhat speculative.

²³¹ *Ibid.*, 771. It should be borne in mind that various categories of information may become accessible to the public by or under statutory provision after the lapse of a specified period of time. Thus, under s. 5(1) of the Public Records Act 1958 (as amended) "public records", other than those to which members of the public have had access before transfer to the Public Record Office, are not publicly available until either (a) the records have been in existence for "thirty years beginning with the first day of January in the year next after that in which they were created" or (b) after the expiration of such other longer or shorter period "as the Lord Chancellor may, with the approval, or at the request, of the Minister or other person, if any, who appears to him to be primarily concerned, for the time being prescribe as respects any particular class of public records." The decennial census returns, for example, have been made publicly available after 100 years under the second limb of this provision.

²³² See s. 25(1) of the Patents Act 1977.

²³³ Parliament has recognised the force of this consideration in the Rehabilitation of Offenders Act 1974.

²³⁴ See paras. 4.105-4.107 below.

²³⁵ [1976] Q.B. 752.

4.45 In *Woodward v. Hutchins*,²³⁶ to which we have already referred in paragraph 4.17 above in our discussion of the "public domain", one of the grounds given by Lord Denning M.R. for refusing an interlocutory injunction was that, on a balance being taken between "the public interest in maintaining the confidence" and "the public interest in knowing the truth", the balance came down on the side of the latter. The prevailing public interest in the disclosure of the information related to the importance to the public of knowing the discrepancy between the actual behaviour of the plaintiffs (the pop stars) and the publicity put out on their behalf. Although the balancing of the public interests involved in Lord Denning's approach appears to be in line with that of Lord Widgery C.J. in *Cape*, it should be borne in mind that Lord Denning drew attention to the special facts in the case before him, where there was a public interest in "truth in publicity" (rather than a public interest in the disclosure of the information as such, which was what was in issue in *Cape*).

4.46 The extent to which the disclosure or use of information covered by an obligation of confidence may be justified on the grounds that such disclosure or use would be in the public interest was discussed incidentally by the House of Lords (but was not the central issue) in *British Steel Corporation v. Granada Television Ltd.*²³⁷ In that case Granada had broadcast a programme using certain documents handed to them by a then unknown person which they knew to be the confidential property of British Steel. Two days after the broadcast British Steel started proceedings against Granada claiming (1) an injunction against further breaches of confidence and copyright, (2) an order for the delivery up of the originals and copies of the documents, (3) an enquiry as to damages and (4) an account of profits. On the same day British Steel also applied for and obtained a separate injunction against further publication or reproduction of the documents by Granada. British Steel later amended this claim and sought an order requiring Granada to identify the source from which they had obtained the confidential documents. Their claim for this order became the sole issue in the case after they had abandoned all other claims in the course of the hearing at first instance before Sir Robert Megarry V.-C.²³⁸

4.47 Although Granada made no attempt to justify the breach of confidence on the ground that disclosure of the information in the documents was in the public interest, a number of observations were made by the Law Lords which bear on this issue. Thus Lord Wilberforce, in reference to the circumstances in which confidential information might legitimately be disclosed, said:

"There is an important exception to the limitations which may exist upon the right of the media to reveal information otherwise restricted. That is based on what is commonly known as the 'iniquity rule'. It extends in

²³⁶[1977] 1 W.L.R. 760.

²³⁷[1980] 3 W.L.R. 774.

²³⁸This was emphasised in the House of Lords by Lord Wilberforce: "Granada do not make the case that they had the right to publish. The question before us, as to disclosure of the source, is another question altogether." (*ibid.*, 821). See also to the same effect Viscount Dilhorne (*ibid.*, 829), Lord Fraser of Tullybelton (*ibid.*, 852) and Lord Russell of Killowen (*ibid.*, 853).

fact beyond 'iniquity' to misconduct generally: see *Initial Services Ltd. v. Putterill* [1968] 1 Q.B. 396. It is recognised that, in cases where misconduct exists, publication may legitimately be made even if disclosure involves a breach of confidence such as would normally justify a prohibition against disclosure. It must be emphasised that we are not in this field in the present case; giving the widest extension to the expression 'iniquity' nothing within it is alleged in the present case. The most that it is said the papers reveal is mismanagement and government intervention. Granada has never contended that it had a right to publish in order to reveal 'iniquity'.²³⁹

Similarly, Viscount Dilhorne said that "there are times when a breach of confidence by an employee is and can be justified, as, for instance, when it reveals some iniquity or crime . . .", but he emphasised that in the instant case Granada had not "sought to justify the conduct of the person who gave them the documents."²⁴⁰ Lord Fraser of Tullybelton also said that Granada had made no attempt to justify the disclosure of the information by their informant, which "did not reveal criminal conduct or anything that could be described as iniquity by B.S.C.", although "if it had done so, its disclosure would have been justified and not wrongful."²⁴¹ In this connection he cited *Gartside v. Outram*,²⁴² *Initial Services Ltd. v. Putterill*²⁴³ and *Woodward v. Hutchins*.²⁴⁴

4.48 On the other hand, Lord Salmon (who dissented on the central issue, namely whether Granada should be ordered to reveal their source) took a much wider view of the circumstances in which the disclosure of confidential information might be justified in the public interest:

"No doubt crime, fraud and misconduct should be laid bare in the public interest; and these, of course, did not occur in B.S.C. There was however much else, even more important in all the circumstances, which called aloud to be revealed in the public interest."²⁴⁵

Among the circumstances of the instant case he laid particular emphasis on the fact that the affairs of a nationalized undertaking were involved where the losses would fall on the public, who in his view would not however have the same safeguards as would be available to the shareholders of a private corporation.²⁴⁶ Having referred to the immense losses suffered by British Steel and, in spite of the introduction of new machinery, to their low productivity per man²⁴⁷ he said that Granada had rightly taken the view that "if any

²³⁹[1980] 3 W.L.R. 774, 821-822. *Initial Services Ltd. v. Putterill* has been discussed in para. 4.38 above.

²⁴⁰*Ibid.*, 829.

²⁴¹*Ibid.*, 851.

²⁴²(1856) 26 L.J. Ch. 113. See para. 3.5 above.

²⁴³[1968] 1 Q.B. 396. See para. 4.38 above.

²⁴⁴[1977] 1 W.L.R. 760. The facts of the case have been given in para. 4.17 above and the case has been further discussed in connection with the "public interest" in para. 4.45 above.

²⁴⁵[1980] 3 W.L.R. 774, 843.

²⁴⁶*Ibid.*, 837.

²⁴⁷*Ibid.*, 836. He later also mentioned (at p. 843) "failure to meet targets because of mechanical breakdown and design faults," "lateness and inaccuracy of export documentation which must be costing the Corporation . . . almost certainly millions of pounds" and "errors of estimation up to £200 million."

of these [documents provided by British Steel's employee] exposed the faults and mistakes which were causing the immense losses made by B.S.C., it would be Granada's public duty to disclose the contents of those papers to the public."²⁴⁸ And he reached the conclusion that British Steel had not established wrong-doing either by their employee, who had given the documents to Granada, or by Granada who had disclosed them in their broadcast.²⁴⁹

4.49 It remains to refer to certain observations in the Court of Appeal in *Schering Chemicals Ltd. v. Falkman Ltd.*,²⁵⁰ the facts of which have been summarised in paragraph 4.21 above. They certainly have some bearing on the role played by considerations of the public interest in the action for breach of confidence. It is difficult, however, to determine (1) whether they relate to the proper scope of the public interest in being informed of the subject-matter of an action for breach of confidence, which, to determine whether the defendant is liable for the breach, has to be weighed by the court against the public interest in the preservation of the obligation; or (2) whether they refer to the extent to which the public interest in being so informed should be taken into account by a court in determining whether or not to grant an interlocutory injunction,²⁵¹ or (3) whether they are concerned with the extent to which such public interest is a factor to be considered by the court in determining in its discretion whether to grant a final injunction, irrespective of any claim which the plaintiff may make for damages.²⁵²

4.50 It would seem that Lord Denning in his dissenting judgment was particularly concerned to assert the right of the press to be free from "prior restraint", citing Blackstone's Commentaries in support.²⁵³ He conceded that there was an exception to this right which, however, he said, was of narrow content. He illustrated the scope of this exception by reference to the reluctance of the courts to grant an interim injunction to restrain the publication of a libel.²⁵⁴ Furthermore, with regard to liability for contempt of court, he referred to the narrow interpretation given by the European Court of Human Rights²⁵⁵ to restrictions on freedom of expression which are "necessary in a democratic society" under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁵⁶ Up to this point in his judgment it seems reasonably clear that Lord Denning was not directly dealing with the first, and for our present purpose most relevant, of the three questions mentioned in paragraph 4.49 above, namely what is the scope of the public interest in being informed of the subject-matter of an action for breach of confidence which, in order to determine whether there is liability

²⁴⁸*Ibid.*, 837.

²⁴⁹*Ibid.*, 843.

²⁵⁰[1981] 2 W.L.R. 848.

²⁵¹See paras. 4.87-4.98 and, in particular, paras. 4.93-4.94 below.

²⁵²See paras. 4.99-4.101 below.

²⁵³Book IV, 17th ed. (1830), pp. 151-152.

²⁵⁴[1981] 2 W.L.R. 848, 861A-D. See on interim injunctions and libel para. 4.94 below.

²⁵⁵(1979) 2 E.H.R.R. 245, 282. This was the decision which, under the European Convention for the Protection of Human Rights and Fundamental Freedoms, took a different view from that reached by the House of Lords on the basis of English municipal law in *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273.

²⁵⁶[1981] 2 W.L.R. 848, 861D-864A.

for the breach, falls to be weighed against the public interest in the upholding of an obligation of confidence. When, however, he turned to consider breach of confidence,²⁵⁷ although he continued to refer to the granting or denying of an injunction, it would seem that he had this wider question in mind. Thus, speaking of the information in issue in *Schering's* case he said:

"I am clearly of opinion that no injunction ought to be granted to prevent the publication of this information, even though it did originate in confidence. *It dealt with a matter of great public interest. It contained information of which the public had a right to know.*²⁵⁸ It should not be made the subject of an injunction." (emphasis added)

And in a later passage he made the foregoing remark more specific in saying that:

"The *public* interest in the drug Primodos and its effects far outweighs the *private* interest of the makers in preventing discussion of it."²⁵⁹ (emphasis in the original)

This would suggest a wider concept of what it may be in the public interest to be generally known than was envisaged by at least some of the Law Lords in *British Steel Corporation v. Granada Television Ltd.*²⁶⁰

4.51 There do not appear to be the same doubts about the observations of Shaw L.J. in regard to the role which may be played by considerations of the public interest in a breach of confidence case. He said:

"The obligation of confidentiality may in some circumstances be overborne. If the subject matter is *something which is inimical to the public interest or threatens individual safety*, a person in possession of knowledge of that subject matter cannot be obliged to conceal it although he acquired that knowledge in confidence. In some situations it may be his duty to reveal what he knows."²⁶¹ (emphasis added)

Thus, he too would seem to take a rather wider view of what it may be in the public interest to be generally known than was suggested in the *British Steel* case. However, he took the view that, as the information in question was in fact already in the public domain, which in his view was not inconsistent with a liability for breach of confidence in respect of it,²⁶² there was no public interest in making the information generally available to balance against the public interest in preserving confidence.²⁶³

4.52 Templeman L.J. would appear to have been particularly concerned with considerations of the public interest as they may affect the second, and possibly also the third, question mentioned in paragraph 4.49 above, namely how far they are relevant to the granting or withholding of an injunction. In

²⁵⁷ *Ibid.*, 864A-865A.

²⁵⁸ *Ibid.*, 865A.

²⁵⁹ *Ibid.*, 865H.

²⁶⁰ [1980] 3 W.L.R. 774. See para. 4.46 above.

²⁶¹ [1981] 2 W.L.R. 848, 869F-G.

²⁶² See para. 4.22 above.

²⁶³ [1981] 2 W.L.R. 848, 869G.

this context he emphasised that the press was not above the law.²⁶⁴ However, like Shaw L.J. he took the view that, although the information was already in the public domain, this fact did not in itself nullify the obligation of confidence which the court considered to have been created in the circumstances of this case. He concluded, therefore, that no question arose of weighing the public interest in the general availability of that information against the public interest in the protection of confidence. Only the defendants would, in view of their obligation of confidence, be debarred by an injunction from using or passing on the information; there would be no concealment from the public.²⁶⁵

4.53 To sum up the present law, it is clear that the disclosure or use of information may be justified when the public interest in the protection of the confidence is outweighed by the public interest in such disclosure or use. But it is uncertain whether the public interest in any kind of information can thus be measured against the public interest in the protection of confidence, or whether, for such a balancing process to take place, the information must relate to crime, fraud or misconduct, even if "misconduct" is for this purpose given a fairly wide connotation. In *Attorney-General v. Jonathan Cape Ltd.*²⁶⁶ (which was not referred to in the speeches of any of the Law Lords in *British Steel Corporation v. Granada Television Ltd.*²⁶⁷) Lord Widgery C.J. recognised a public interest in the disclosure of Cabinet discussions, advice given by senior civil servants and views of Ministers on their capacity and suitability for appointments, and in the particular circumstances of that case he gave preference to the public interest in the disclosure of the information as against the public interest in protecting its confidentiality. But in the *British Steel* case the Law Lords, apart from Lord Salmon, appeared to take a more restrictive view of the kinds of information disclosure of which might be justified on the ground that such disclosure was in the public interest.²⁶⁸ A further uncertainty in the light of *Cape's* case is whether, as Lord Widgery there held, it is for the plaintiff to satisfy the court that the balance of the public interest lies in favour of protecting confidence or whether, as previously widely accepted, it is for the defendant to raise the issue of public interest as a defence.

H. The defences to an action for breach of confidence

4.54 We have already explained²⁶⁹ that under the existing law it is doubtful whether it is a defence to an action for breach of confidence that the

²⁶⁴"It has been suggested that an injunction restraining breach of confidentiality should only be granted in circumstances in which the right to preserve confidentiality is so important that it takes priority over the freedom of the press. If this means that the court should consider the consequences to the public of withholding or granting an injunction, then I fully agree. In the *Granada* case it was important to the public that if the injunction was withheld, the court would protect a disloyal employee. It is important in the present case that, if the injunction is withheld the court will enable a trusted adviser to make money out of his dealing in confidential information. These consequences must be weighed against the argument that if an injunction is granted, the public will be deprived of information." (*ibid.*, 881D-E).

²⁶⁵See the second of the two citations from Templeman L.J. in para. 4.22 above.

²⁶⁶[1976] Q.B. 752. See paras. 4.41-4.44 above.

²⁶⁷[1980] 3 W.L.R. 774. See paras. 4.46-4.48 above.

²⁶⁸There is some indication of the wider view in *Schering Chemicals Ltd. v. Falkman Ltd.* [1981] 2 W.L.R. 848. See paras. 4.49-4.52 above.

²⁶⁹See para. 4.12 above.

information in question was obtained for value and in good faith. We have also considered at length the issue of public policy in relation to breach of confidence, which in Working Paper No. 58, and in the law as it was generally understood before *Attorney-General v. Jonathan Cape Ltd.*²⁷⁰ fell to be considered as a defence to the action. It remains to be considered what other matters may constitute defences to the action.

1. *The defence that breach of confidence is required or authorized by statute*

4.55 It is a defence to an action for breach of confidence that the disclosure or use of information constituting the breach is required or authorized by statute. In Working Paper No. 58²⁷¹ we gave as examples "a provision of the Companies Act requiring the disclosure of particular transactions or a provision of the Road Traffic Act enabling a police officer to demand the answer to a particular question."²⁷²

2. *Is it a defence that disclosure or use of information subject to an obligation of confidence was made pursuant to a contractual duty?*

4.56 Although we are not aware of any direct authority on the point, we do not think it is a defence to an action for breach of confidence that the disclosure or use of information constituting the breach was made pursuant to a contractual duty. In Working Paper No. 58²⁷³ we gave as an example the case of:

"a doctor or a psychologist employed in industry is faced with a demand by his employer for the disclosure of medical records relating to other employees of the firm who have frankly discussed their personal problems with him on a confidential basis and without any express or implied understanding that the information would be made available to the employer."

Assuming that no question of the public interest is involved (as it might be, for instance, if the health or safety of other employees was at stake) we think that the doctor or psychologist must preserve the confidences of those who confide in him. Of course, if he only accepts the confidence on the express or implied understanding that, pursuant to his contractual duty, he may disclose the information to the employer, this would constitute a limitation on the scope of the obligation of confidence to which he is subject.

²⁷⁰[1976] Q.B. 752.

²⁷¹Para. 87.

²⁷²We referred to *Hunter v. Mann* [1974] Q.B. 767 where a police officer, acting under s. 168(2)(b) of the Road Traffic Act 1972, asked a doctor to furnish information in his possession which might have led to identification of the driver of a stolen car who was alleged to be guilty of dangerous driving. The doctor's claim that he was entitled to withhold the information on the grounds that it was the subject of a professional confidence was not upheld. A further example is provided by the Social Security Act 1975, s. 164 of which (as amended) permits the transfer of confidential information from the Inland Revenue to (*inter alia*) the Department of Health and Social Security.

²⁷³Para. 88.

3. An order to disclose information under the inherent jurisdiction of the court as a defence to an action for breach of confidence²⁷⁴

4.57 It is a defence to an action for breach of confidence that disclosure of the information in question has been ordered by a court under the powers attaching to its inherent jurisdiction, as, for example, its power to order discovery. This proposition necessarily follows from the cases which have decided that documents are not protected from discovery merely on the ground that the information which they contain was given in confidence, although the fact that the information was confidential may be "a very material consideration".²⁷⁵ Thus in *Chantrey Martin v. Martin*²⁷⁶ it was held by the Court of Appeal that even if the notes made by a firm of accountants auditing a company's accounts contained information which, vis-à-vis that company, it would be a breach of confidence to reveal, it did not follow that in an action between the firm and one of its employees (who had pointed out, and wanted the firm to pursue, irregularities in the company) the firm could not be compelled for purposes of litigation to disclose the papers. The court cited with evident approval *Bray on Discovery*:²⁷⁷

"The mere fact that the giving of the discovery will involve a breach of confidence as against some third person or in any way affect or prejudice his interests *does not constitute of itself an independent objection* to giving the discovery."²⁷⁸ (emphasis added)

²⁷⁴This defence may be viewed as an aspect of the wider defence of absolute privilege in that it concerns statements made in connection with judicial proceedings: see para. 4.69 below. We give it, however, separate treatment in view of the number of important decisions on the law relating to discovery which are relevant to the law on breach of confidence.

²⁷⁵*Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Commissioners (No. 2)* [1974] A.C. 405, 433 per Lord Cross. *Crompton's* case is discussed in para. 4.59 below.

²⁷⁶[1953] 2 Q.B. 286.

²⁷⁷(1885), at p. 206. That journalists could not refuse to answer questions put to them by a lawfully constituted court, or tribunal with in this respect the powers of a court, on the ground that the information has been received by them in confidence was demonstrated by *Attorney-General v. Clough* [1963] 1 Q.B. 773 and *Attorney-General v. Mulholland* [1963] 2 Q.B. 477. In the latter case Lord Denning M.R. said (at pp. 489-90): "[The journalist] claims to be entitled to publish all his information without ever being under any obligation, even when directed by the court or a judge, to disclose whence he got it. It seems to me that the journalists put the matter much too high. The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests—to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done or, in the case of a tribunal such as this, in a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse." See further on the question of the circumstances in which the press could be compelled to disclose its sources the *British Steel* case discussed in paras. 4.63-4.66 below. However, the right of a journalist or a newspaper editor to withhold disclosure of his source of information is now governed by express statutory provision. The Contempt of Court Act 1981, s. 10, provides that a court may not require a person to disclose "the source of information contained in a publication for which he is responsible, unless it be established . . . that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

²⁷⁸[1953] 2 Q.B. 286, 294. This passage from *Bray* was also quoted by Lord Cross with implicit approval in the *Crompton* case [1974] A.C. 405, 429 referred to in para. 4.59 below.

4.58 In this report we are concerned only with breach of confidence. It is not strictly our task to consider the law governing the exercise by the courts of their inherent powers. However, it may help to avoid possible confusion between these two fields of law if we give some account of certain recent developments relating to discovery, having regard particularly to the important part played by the issue of public interest in both fields.²⁷⁹

4.59 In *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)*²⁸⁰ discovery of certain documents was sought, in the course of a statutory arbitration relating to purchase tax, against the Customs and Excise Commissioners. The documents related *inter alia* to information supplied by third parties in confidence. Lord Cross, with whose speech Lords Reid and Morris of Borth-y-Gest agreed, emphasised that:

“‘confidentiality’ is not a separate head of privilege [from the duty to disclose on discovery], but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other.”²⁸¹

In the particular circumstances of the case the House of Lords declined to order discovery.²⁸²

4.60 In *D v. National Society for the Prevention of Cruelty to Children*²⁸³ a mother began an action for damages for personal injuries alleged to have resulted from the Society’s negligence in failing properly to investigate a complaint that she had ill-treated her child and from the manner and circumstances of the inspector’s case which she said had caused her severe and continuing shock. The Society opposed discovery of any documents which

²⁷⁹We have not endeavoured to deal with every relevant case in this field. However, we would mention two Court of Appeal decisions in addition to the authorities considered in paras. 4.59–4.66 below. The first is *Gaskin v. Liverpool City Council* [1980] 1 W.L.R. 1549, in which child care documents in the possession of a local authority were held to be privileged from production in an action brought against that authority alleging negligence and breach of duty in respect of psychological injury and neurosis suffered by the plaintiff while in their care. The second case is *Neilson v. Laugharne* [1981] 2 W.L.R. 537, where, in an action for damages against the police arising from the plaintiff’s attendance for interview at a police station, the court refused to make an order for disclosure of statements that had been taken pursuant to the complaints procedure (under s. 49 of the Police Act 1964). See also *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1981] Q.B. 223, 262, 265.

²⁸⁰[1974] A.C. 405.

²⁸¹*Ibid.*, 433–434.

²⁸²Lord Cross distinguished the earlier decision of the House of Lords in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133 on the grounds that in that case “... it was probable that all the importers [i.e. the third parties] whose names were disclosed were wrongdoers and the disclosure of the names of any ... who were innocent would not be likely to do them any harm at all.” [1974] A.C. 405, 434. This approach to information that had been supplied by third parties who were wrong-doers was followed by the Court of Appeal in *Bankers Trust Co. v. Shapira* [1980] 1 W.L.R. 1274, 1281–1282, *per* Lord Denning M.R.

²⁸³[1978] A.C. 171.

revealed or might reveal the identity of the complainant. The Society's claim was denied by the Master in interlocutory proceedings and allowed on appeal to a judge in chambers who in turn was overruled by a majority of the Court of Appeal. Finally, the House of Lords reinstated the judgment of the judge in chambers and upheld the Society's claim to withhold discovery. The House emphasised, however, that the fact that information has been given in confidence does not as such justify its non-disclosure, explaining that where non-disclosure is justified it is on grounds of public policy, which may exist whether or not the information in question purports to be confidential. It equated the position of a body with public responsibilities such as the N.S.P.C.C.²⁸⁴ with that of the police²⁸⁵ or of the Gaming Board,²⁸⁶ where the desirability of protecting the anonymity of informers was an overriding consideration.²⁸⁷

4.61 The issue which the House of Lords had to decide in *Science Research Council v. Nassé* and *Leyland Cars v. Vyas*²⁸⁸ was succinctly stated by Lawton L.J. in the proceedings before the Court of Appeal²⁸⁹ as follows:

“When Parliament made discrimination because of trade union activities (sections 53 to 55 of the Employment Protection Act 1975), sex (sections 62 to 66 of the Sex Discrimination Act 1975) and race (section 56 of the Race Relations Act 1976) a cause of action, did it intend to give aggrieved parties the right, through discovery and before the hearing, to have inspection of all relevant documents in the possession of or under the control of the other party, even though such documents had come into existence under a promise, whether expressed or implied, that they would be treated as confidential?”²⁹⁰

The cause of action to which Lawton L.J. referred was in both cases maintainable before an industrial tribunal, as each related, albeit on different grounds,²⁹¹ to discrimination in employment. The relevant regulations

²⁸⁴Lord Diplock (at pp. 215–216), Lord Hailsham of St. Marylebone (at pp. 228–229) and Lord Simon of Glaisdale (at p. 240) pointed out that care proceedings in a juvenile court under s. 1 of the Children and Young Persons Act 1969 could be brought only by a local authority, a constable or the N.S.P.C.C. (see s. 1(1) and (6) of the Act and S.I. 1970 No. 1500).

²⁸⁵See *Marks v. Beyfus* (1890) 25 Q.B.D. 494 (C.A.).

²⁸⁶See *Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388.

²⁸⁷Whereas Lords Diplock, Hailsham of St. Marylebone, Simon of Glaisdale and Kilbrandon saw the case merely as extending by analogy from the police or the Gaming Board to the N.S.P.C.C. the heading of public policy which requires the identity of informers not to be disclosed (see Lord Diplock at p. 218, Lord Hailsham, with whose judgment Lord Kilbrandon agreed, at p. 228 and Lord Simon at p. 241), Lord Edmund-Davies, taking a broader view of the law, considered (at p. 245) that “where (i) a confidential relationship exists (other than that of lawyer and client) and (ii) disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence provided it considers that, on balance, the public interest would be better served by excluding such evidence.”

²⁸⁸[1980] A.C. 1028.

²⁸⁹[1979] Q.B. 144.

²⁹⁰*Ibid.*, 174.

²⁹¹In *Nassé* the alleged grounds were the plaintiff's trade union activities and new status as a married woman (contrary respectively to the Employment Protection Act 1975 and the Sex Discrimination Act 1975) and in *Vyas* discrimination was alleged contrary to the Race Relations Act 1976.

provided²⁹² that a tribunal might grant to a party to proceedings "such discovery or inspection of documents as might be granted by a county court". The latter has a discretion whether or not to order discovery,²⁹³ the principles on which such discretion is to be exercised being subject to section 103 of the County Courts Act 1959, according to which "in any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court".

4.62 The House of Lords²⁹⁴ unanimously affirmed the decision of the Court of Appeal which had allowed the appeal from orders for discovery in both cases made by the Employment Appeal Tribunal. In the course of his speech²⁹⁵ Lord Wilberforce said:²⁹⁶

"There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence. . . .

As a corollary to the above, it should be added that relevance alone, though a necessary ingredient, does not provide an automatic sufficient test for ordering discovery. The tribunal always has a discretion. . . .

The ultimate test in discrimination (as in other) proceedings is whether discovery is necessary for disposing fairly of the proceedings. If it is, then discovery must be ordered notwithstanding confidentiality. . . .

In order to reach a conclusion whether discovery is necessary notwithstanding confidentiality the tribunal should inspect the documents. It will naturally consider whether justice can be done by special measures such as 'covering up' substituting anonymous references for specific names or, in rare cases, hearing in camera."

And in referring to cases "where the courts have recognised that confidences, particularly those of third persons, ought, if possible, in the interests of justice, to be respected", Lord Wilberforce added that:

"It is sometimes said that in taking this element into account, the court has to perform a balancing process. The metaphor is one well worn in the law, but I doubt if it is more than a rough metaphor. Balancing can only take place between commensurables. But here the process is to consider fairly the strength and value of the interest in preserving confidentiality and the damage which may be caused by breaking it; then

²⁹²See rule 4(1)(b) of the Schedule to the Industrial Tribunals (Labour Relations) Regulations 1974, S.I. 1974, No. 1386 (now revoked and replaced by the Industrial Tribunals (Rules of Procedure) Regulations 1980, S.I. 1980 No. 884: see Sched. 1, rule 4(1)(b)(ii).

²⁹³Order 14, r. 2(2) of the County Court Rules provides that "On the hearing of the application the court may order such discovery to be made, . . . either generally or limited to certain classes of documents as the court thinks fit, but discovery shall not be ordered if and so far as the court is of opinion that it is not necessary either for disposing fairly of the proceedings or for saving costs".

²⁹⁴[1980] A.C. 1028.

²⁹⁵With the reasoning of which Lord Edmund-Davies agreed (*ibid.*, 1073). Although the other Law Lords expressed themselves somewhat differently, their speeches do not appear inconsistent with the observations of Lord Wilberforce cited in this paragraph.

²⁹⁶*Ibid.*, 1065-1066.

to consider whether the objective—to dispose fairly of the case—can be achieved without doing so, and only in a last resort to order discovery, subject if need be to protective measures. This is a more complex process than merely using the scales: it is an exercise in judicial judgment.”²⁹⁷

Finally, it should be noted that, although the House of Lords upheld the decision of the Court of Appeal, Lord Wilberforce²⁹⁸ and other Law Lords²⁹⁹ made clear that in their view it was not, as Lord Denning M.R. had suggested in the Court of Appeal, only “in the very rare cases” that confidence could be overridden.

4.63 In *British Steel Corporation v. Granada Television Ltd.*³⁰⁰ the central issue³⁰¹ was whether Granada could and ought to be compelled to reveal the name of the employee of British Steel who had handed to a representative of Granada confidential documents relating to the internal management of the corporation, the representative having promised on behalf of Granada that the informant’s identity would not be revealed. All the Law Lords,³⁰² other than Lord Salmon, were in agreement that the “press” (which was taken for the purposes of the case to include all the media of information) enjoyed no special immunity from liability on discovery to disclose the sources of their information.³⁰³ Thus, Lord Wilberforce, having referred with approval to *Attorney-General v. Clough*³⁰⁴ and *Attorney-General v. Mulholland*,³⁰⁵ and in particular to what he called a “classic” passage³⁰⁶ in Lord Denning M.R.’s judgment in the latter case, denied that these cases were exceptional in that discovery was ordered because the security of the State required it.³⁰⁷ He also declined to interpret Lord Denning’s judgment in the Court of Appeal in the instant case³⁰⁸ as suggesting that journalists enjoy immunity from the obligation to disclose, which may however be withheld in exceptional cases, saying that:

“Such a reversal would place journalists (how defined?) in a favoured and unique position as compared with priest-confessors, doctors, bankers

²⁹⁷*Ibid.*, 1067.

²⁹⁸*Ibid.*, 1066.

²⁹⁹Lord Salmon (p. 1072); Lord Edmund-Davies (p. 1077); Lord Fraser of Tullybelton (pp. 1086–1087).

³⁰⁰[1980] 3 W.L.R. 774.

³⁰¹Incidental discussion in the case of the extent to which the disclosure of information protected by an obligation of confidence may be justified on the ground of public interest has been considered in paras. 4.46–4.48 above.

³⁰²Lord Wilberforce, Viscount Dilhorne, Lord Fraser of Tullybelton and Lord Russell of Killowen.

³⁰³We have pointed out in n. 277 above that the right of a journalist or newspaper editor to withhold disclosure of his source of information is now governed by express statutory provision under the Contempt of Court Act 1981, s. 10.

³⁰⁴[1963] 1 Q.B. 773.

³⁰⁵[1963] 2 Q.B. 477.

³⁰⁶Cited in n. 277 above.

³⁰⁷[1980] 3 W.L.R. 774, 823. In this context he also spoke of the “force” of the judgment of Dixon J. in *McGuinness v. Attorney-General of Victoria* (1940) 63 C.L.R. 73 in which, in a case concerned with a tribunal of enquiry into allegations of bribery, a claim to immunity for a journalist was rejected by the High Court of Australia.

³⁰⁸[1980] 3 W.L.R. 774, 804–5.

and other recipients of confidential information and would assimilate them to the police in relation to informers."³⁰⁹

4.64 Lord Wilberforce, however, emphasised the ultimate discretionary nature of the order for discovery:

"Courts have an inherent wish to respect [the] confidence [of information obtained in confidence] whether it arises between doctor and patient, priest and penitent, banker and customer, between persons giving testimonials to employees, or in other relationships. A relationship of confidence between a journalist and his source is in no different category: nothing in this case involves or will involve any principle that such confidence is not something to be respected. But in all these cases the court may have to decide, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance. The only question in this appeal is whether the present is such a case."³¹⁰

And, in concluding that in the instant case, Granada should be ordered to reveal their source, Lord Wilberforce said:

"Although . . . the media, and journalists, have no immunity, it remains true that there may be an element of public interest in protecting the revelation of the source. . . .³¹¹ The court ought not to compel confidence bona fide given to be breached unless necessary in the interests of justice. . . .³¹² There is a public interest in the free flow of information, the strength of which will vary from case to case. In some cases it may be very weak; in others it may be very strong. The court must take this into account. How ought the discretion which the court undoubtedly has to be exercised in this case?"³¹³

Having said that he would give somewhat greater weight in the instant case than Sir Robert Megarry V.-C. had given at first instance to the public interest element involved in preserving the confidence under which the information was obtained, Lord Wilberforce continued:

" . . . I think that even so the balance was strongly in B.S.C.'s favour. They suffered a grievous wrong, in which Granada itself became involved, not innocently, but with active participation. To confine B.S.C. to its remedy against Granada and to deny it the opportunity of remedy against the source, would be a significant denial of justice. Granada had, on its side, and I recognise this, the public interest that people should be informed about the steel strikes of the attitude of B.S.C., and perhaps that of the government

³⁰⁹*Ibid.*, 823. Further statements to the effect that journalists are not in a special position are to be found in the speeches of Viscount Dilhorne (*ibid.*, 833) and Lord Fraser of Tullybelton, with whose reasons Lord Russell of Killowen agreed, (*ibid.*, 847).

³¹⁰*Ibid.*, 821.

³¹¹Lord Wilberforce in this connection referred to the *Norwich Pharmacal* case [1974] A.C. 133 (see n. 282 above) and *Broadcasting Corporation of New Zealand v. Alex Harvey Industries Ltd.* [1980] 1 N.Z.L.R. 163.

³¹²He here cited *Science Research Council v. Nassé* [1980] A.C. 1028 (see paras. 4.61-4.62 above).

³¹³[1980] 3 W.L.R. 774, 827.

towards settling the strike. But there is no 'iniquity' here—no misconduct to be revealed. The courts³¹⁴ . . . had to form their opinion whether the strong public interest in favour of doing justice and against denying it, was outweighed by the perfectly real considerations that Granada put forward. I have reached the conclusion that it was not."³¹⁵

4.65 Apart from the broad issues already discussed, there were certain special arguments which Granada put forward as entitling them to refuse in the circumstances to disclose the source of their information. Although they are important in the context of the scope of an order for discovery, we deal only briefly with them in this report, as they do not necessarily have any connection with information obtained in confidence. These arguments were:

- (i) That proceedings for discovery have never hitherto been successfully brought against a newspaper (with which the position of Granada was comparable); the majority of the Law Lords³¹⁶ were agreed that, although historically correct, this provided no positive reason why discovery should not be ordered in the present case.
- (ii) That Granada were protected from having to disclose their source by the so-called "newspaper rule";³¹⁷ the majority³¹⁸ held that this rule only applied to discovery at the interlocutory stage of proceedings for libel.
- (iii) That if Granada disclosed their source it would tend to incriminate them; the majority³¹⁹ considered that merely to disclose the identity of their source would not appreciably increase whatever risk there was of criminal proceedings being taken against Granada.
- (iv) That discovery can only be ordered in aid of some existing proceedings, or at best in aid of intended proceedings, and that British Steel only intended to dismiss their employee and/or to deprive him of

³¹⁴He here referred to Lord Denning M.R.'s formulation in *Attorney-General v. Mulholland* [1963] 2 Q.B. 477 (see n. 277 above).

³¹⁵[1980] 3 W.L.R. 774, 827. With regard to the exercise of the court's discretion Viscount Dilhorne (*ibid.*, 836) emphasised the injustice which would be done to British Steel if an order for discovery were not made "where the taker of the documents had no right to take them, where he was clearly a wrongdoer and where Granada was involved in handling the documents and used them when it had no right to do so". Lord Fraser of Tullybelton (*ibid.*, 852-3) accepted that "there is a public interest in maintaining the free flow of information to the press, and therefore against obstructing informers" but also thought that there was "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", and held that in the present case the latter public interest should prevail. In this context and (with regard to nn. 316, 318 and 320 below) generally Lord Russell of Killowen agreed with the reasons of Lord Fraser of Tullybelton.

³¹⁶See Lord Fraser of Tullybelton (*ibid.*, 850) and Lord Wilberforce (*ibid.*, 824-6).

³¹⁷The original rule was that "in the case of newspapers there is an exception to the rule requiring a defendant to disclose the source of his information where he pleads either privilege or fair comment" in an action for libel (Bankes L.J. in *Lyle-Samuel v. Odhams Ltd.* [1920] 1 K.B. 135, 143). Since 1949 (see now R.S.C. O. 82, r. 6) this immunity extends to any defendant and not merely to a newspaper.

³¹⁸See Viscount Dilhorne (*ibid.*, 830-833); Lord Fraser of Tullybelton (*ibid.*, 848-850).

³¹⁹See e.g. Viscount Dilhorne (*ibid.*, 829-830), with whom on this point Lord Fraser of Tullybelton and Lord Russell of Killowen expressly agreed.

his pension. The majority held³²⁰ that it was sufficient for the purposes of discovery that there was an intention to assert legal rights whether by court action or otherwise.

4.66 Lord Salmon in his dissenting speech took the view that:

“in an action against the press for discovery, the plaintiff cannot and never could obtain, and never has obtained, from the defendant his source of information”.³²¹

*Clough's case*³²² and *Mulholland's case*³²³ had, in his view, nothing to do with discovery but arose out of the refusal of journalists to give to the Vassall tribunal set up under the Tribunals of Inquiry (Evidence) Act 1921 the name of their informant. They were ordered to give the name “because the security of the state required it”.³²⁴ Lord Salmon agreed³²⁵ with Lord Denning M.R.'s judgment in the Court of Appeal in the instant case in so far as the latter had accorded journalists a special immunity from disclosing their source, but he did not agree on the facts with Lord Denning that Granada had lost that immunity by a failure to act with a due sense of responsibility. Nor did he agree³²⁶ with other members of the Court of Appeal that this immunity only applied when the information whose source was sought concerned a plaintiff who had been “guilty of crime or fraud or misconduct which ought to be laid bare in the public interest”, and he gave examples³²⁷ of matters relating to the affairs of British Steel “which called aloud to be revealed in the public interest.” Lord Salmon emphasised that the immunity of journalists:

“has nothing to do with confidentiality—whether between the press and the source; or the source and his employer. It rests solely upon the authorities³²⁸ to which I have referred and the principle of justice that the public shall not be unreasonably deprived by a free press of information of great public importance.”³²⁹

4.67 Returning to the law relating to breach of confidence, as distinguished from the law governing the exercise of the inherent powers of the court, we repeat what we stated in paragraph 4.57 above, namely that it is a defence

³²⁰See Lord Wilberforce (*ibid.*, 826-7) and Lord Fraser of Tullybelton (*ibid.*, 850-1).

³²¹*Ibid.*, 840.

³²²See n. 277 above.

³²³*Ibid.*

³²⁴[1980] 3 W.L.R. 774, 842.

³²⁵*Ibid.*

³²⁶*Ibid.*, 843.

³²⁷We have (see para. 4.48 above) already referred in another context to the circumstances in the *British Steel* case which Lord Scarman considered it was in the public interest to be disclosed.

³²⁸It is not entirely clear to which authorities Lord Salmon was referring. He appears to have cited the English cases referred to in his speech chiefly to show that they did not negate a principle of immunity: he did not argue that they created it. He cited Dixon J. in the Australian High Court decision of *McGuinness v. Attorney-General of Victoria* (1940) 63 C.L.R. 73, 104 but only to the effect that there is a practice in libel actions of refusing to compel disclosure of the name of the writer of an article or of the writer's sources. He may have been referring to authorities which Templeman and Watkins L.JJ. in the Court of Appeal said established in principle a public interest in the immunity of the press (see [1980] 3 W.L.R. 774, 844). However, both Lords Justices in fact agreed that Granada should in the circumstances be ordered to reveal its source.

³²⁹[1980] 3 W.L.R. 774, 845.

that the disclosure allegedly in breach of confidence was made pursuant to such inherent powers.

4. The defence that observance of confidence would be contrary to an E.E.C. obligation

4.68 An obligation of confidence may arise out of an agreement which is contrary to Article 85³³⁰ of the E.E.C. Treaty. Such an agreement is by paragraph (2) of Article 85 automatically void and section 2 of the European Communities Act 1972³³¹ gives effect to this provision as part of the law of the United Kingdom. The effect of the 1972 Act has been therefore to provide a defence in certain circumstances to an action for breach of confidence. However, it does not follow that the protection given under English law against breach of confidence will necessarily conflict with European competition law. There have as yet been no decisions of the European Court on the validity of agreements relating to "know-how", although the Commission of the E.E.C. has on a number of occasions³³² taken the view that an agreement may infringe Article 85(1) if, after the expiry of the term for which a licence has been granted to use the know-how, its further use is banned.

5. Privilege

(a) Absolute Privilege

4.69 In Working Paper No. 58³³³ we raised the question whether in the law of breach of confidence there was a defence of absolute privilege equivalent to that defence in the law of defamation. We dealt with this issue, on which there does not appear to be any direct authority, as follows:

"The law of defamation recognises that on certain absolutely privileged occasions, such as proceedings in Parliament or judicial proceedings, the need for complete freedom of communication is of such paramount importance to society that it overrides the need to give protection to the individual against defamation; it is therefore a defence to prove that a statement complained of as being defamatory was made on an occasion

³³⁰Article 85, para. (1) reads as follows: "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which . . .". There follows a list of particular examples; in para. (2), a provision that agreements contrary to the Article are automatically void; and, in para. (3), provision for declaring para. (1) inapplicable to certain agreements which satisfy given criteria.

³³¹Section 2(1) of the Act reads as follows: "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies."

³³²The approach adopted by the E.E.C. Commission and their proposals in a draft Regulation of 1979 are set out in Appendix D to this report.

³³³Para. 89.

of absolute privilege, no matter how untrue the statement may be or how malicious the motive of the maker. It seems to us inevitable that a similar defence should be available to an action for breach of confidence. If the law gives protection on an occasion of absolute privilege to the making of a wholly false and malicious statement, it can hardly be right that it should refuse to give protection to a statement made on the same occasion which is true and made without malice."

(b) *Qualified Privilege*

4.70 Similarly, we are not aware of any authority on the question whether it is a defence to an action for breach of confidence that the disclosure of the information subject to the obligation of confidence took place in circumstances which in the law of defamation would be covered by qualified privilege. The question can now be considered in the light of the summary of the existing law, and of the recommendations for the extension of the occasions of qualified privilege, made in the Report of the Committee on Defamation.³³⁴ From this report it will be evident that, in most of the cases where in the law of defamation there is (or under the Committee's recommendations would be) a defence of qualified privilege, the initial question which would arise in an action for breach of confidence would be whether the information alleged to be subject to an obligation of confidence was in the public domain³³⁵ or, on a balance of the public interests involved,³³⁶ merited protection.³³⁷ Thus, as far as the law of defamation is concerned, if an employee in good faith incorrectly informs his employer that a fellow employee is stealing from the firm's till he may be able to claim that the communication enjoys qualified privilege. If, however, the employee is told in confidence by his fellow-employee that the latter has been so stealing and the information is passed on to the employer, the question from the standpoint of the law of breach of confidence will be whether, on a balance of the public interests involved, the information deserves

³³⁴(1975) Cmnd. 5909, Ch. 7.

³³⁵See paras. 4.15-4.31 above.

³³⁶See paras. 4.37-4.53 above.

³³⁷This is clearly demonstrated by the lists of statements provided by the Faulks Committee which: (a) enjoy qualified privilege under the existing law (see (1975) Cmnd. 5909, para. 184); and (b) should in the view of the Committee be added to the statements already enjoying such privilege (*ibid.*, para. 242(g) (ii) and (iii), (j), (k), (l) and (m)). In para. 184 the Faulks Committee summarize the existing occasions of qualified privilege as follows:

- "(a) statements made in pursuance of a duty, legal, social, or moral, to a person who has a corresponding duty or interest to receive them,
- (b) statements made for the protection or furtherance of an interest, to a person who has a common or corresponding duty or interest to receive them; such interest may be either private to the publisher, or public,
- (c) statements made in the protection of a common interest to a person sharing the same interest,
- (d) fair and accurate reports of judicial proceedings, howsoever published, and whether or not published contemporaneously with the proceedings,
- (e) statements which are privileged by virtue of the provisions of section 7 of, and the Schedule (Parts I and II) to, the Defamation Act 1952—
 - (i) without explanation or contradiction as listed in Part I of the Schedule,
 - (ii) subject to explanation or contradiction as listed in Part II of the Schedule."

protection from disclosure. We conclude that there is no defence of qualified privilege in the law of breach of confidence equivalent to the defence under that heading given in the law of defamation.

6. *Pre-existing and subsequently acquired information*

4.71 There would seem to be no direct authority as to the position where the person alleged to be under an obligation of confidence was, at the time when that obligation apparently arose, already in possession of the information. This situation might arise, for example, where the inventor of what appears to be a novel industrial process submits it to a large company in circumstances that would normally give rise to an obligation of confidence on the part of the company. However, unknown to those in the department of the company which received the information, the research department has already discovered the process in question.³³⁸ Since the basis of the law of confidence is that a person who has received information in confidence should not take *unfair* advantage of it,³³⁹ it would seem that the company would not be under an obligation of confidence in regard to the information.³⁴⁰

4.72 A similar problem arises in connection with information which, though originally received in confidence, is subsequently obtained by the recipient by independent means. Thus, to advert to the example in the preceding paragraph and with a slight alteration of its facts, the process might be subsequently discovered by the research department of the company.³⁴¹ It would seem that the obligation of confidence should cease to apply to the process from the date when the information thus came by independent means into the possession of the company.³⁴² There is, however, little direct authority on the point.³⁴³

³³⁸For the practical problems to which this kind of situation gives rise, see para. 5.3 below.

³³⁹See for example, *Seager v. Copydex Ltd.* [1967] R.P.C. 349, 368; [1967] 1 W.L.R. 923, 931 *per* Lord Denning M.R.

³⁴⁰We further consider the position concerning pre-existing information, in connection with our recommendations, in para. 6.102(a) and (b) below: the relevant recommendation appears in para. 6.103(ii)(a) and (b) below.

³⁴¹This situation, as well as that referred to in para. 4.71 above, gives rise to difficulties in practice: see para. 5.3 below.

³⁴²We further consider the position as to subsequently acquired information, in connection with our recommendations, in para. 6.102(c) and (d) below: the relevant recommendation is contained in para. 6.103(ii)(c) and (d) below.

³⁴³In *Estcourt v. Estcourt Hop Essence Co.* (1875) L.R. 10 Ch. App. 276 the plaintiffs alleged that E, who had been employed by them as an agent, had entered into an agreement ancillary to his main contract whereby he agreed not to disclose the plaintiffs' trade secret (a method of manufacturing a compound for use in conjunction with hops in the brewing of beer) if he should become acquainted with it. E subsequently obtained the information by analysing the compound, a packet of which he had procured from a brewer. Stating that the existence of the agreement was not established, Lord Cairns L.C. (at p. 279) explained that in any event nothing had come to E's knowledge by way of confidential communication from the plaintiffs, and that E was accordingly free to pass on the information. However, though concurring in the result on the ground that E had not been proved to have disclosed the information, Mellish L.J. observed that, if that fact had been established, he would "have had some doubt whether it was not a breach of [E's] agreement" (*ibid.*, 282).

I. The remedies for breach of confidence

1. Introduction

4.73 The remedies available in an action for breach of confidence have been greatly influenced in their development by the equitable origins of the action. The two main remedies of equitable origin are the discretionary ones of the declaration and the injunction in either its interlocutory or final form. It should be emphasised that the injunction is directed to the repetition of a past, or to an anticipated future, breach of confidence; it does not provide compensation. However, so far as the repetition of a past, or an anticipated future, breach of confidence is concerned, the court has been empowered since Lord Cairns' Act 1858³⁴⁴ to award damages in addition to or in substitution for an injunction; and additionally, the court may at its discretion grant the equitable remedy of an order to deliver up the material containing the confidential information.

4.74 In respect of past breaches of confidence the court has at its disposal the discretionary equitable remedy of an order for an account of profits, but it is not entirely clear in the present state of the law whether there is an independent right to damages for harm already suffered as the result of a breach of confidence.³⁴⁵ If there is such a right to damages, further questions arise, which we discuss below, as to how they should be assessed,³⁴⁶ whether they are awardable for mental distress³⁴⁷ and whether they can include an "exemplary" or "punitive" element.³⁴⁸

2. Remedies for damage already suffered

(a) The independent right to damages

4.75 In *Nichrotherm Electrical Co. Ltd. v. Percy*,³⁴⁹ which involved breach of confidence in respect of a machine for feeding pigs, Harman J., at first instance, having emphasised that breach of confidence did not require a contractual basis (which would, of course, give an undoubted right to damages), ordered an enquiry as to damages without invoking Lord Cairns' Act. In the Court of Appeal Lord Evershed chose to rely on the obligation of confidence springing in the circumstances from the contractual relationship of the parties and declined to speculate on whether damages could be claimed irrespective of any request for an injunction. In *Seager v. Copydex Ltd.*³⁵⁰ the defendants had successfully exploited information which the court held to have been entrusted to them in confidence by the plaintiff. The plaintiff sought, together

³⁴⁴Chancery Amendment Act 1858, s. 2. The substance of this provision was subsequently repealed and re-enacted: see n. 81 above. Where such damages are awarded in lieu of an injunction the result in effect is to bring about a sale of the information to the defendant under the auspices of the court. See paras. 4.99-4.101 below.

³⁴⁵See paras. 4.75-4.77 below.

³⁴⁶See para. 4.78 below.

³⁴⁷See paras. 4.79-4.82 below.

³⁴⁸See paras. 4.83-4.85 below.

³⁴⁹[1957] R.P.C. 207.

³⁵⁰[1967] R.P.C. 349; [1967] 1 W.L.R. 923. See for the facts of the case para. 4.3 above.

with other remedies, (1) an injunction and (2) an enquiry as to damages, or alternatively an account of profits.³⁵¹ The judgments in the Court of Appeal were mainly directed to the question whether the defendants had committed a breach of confidence, but, having found that a breach of confidence had taken place, the court ordered damages to be assessed, Lord Denning M.R. saying:

“It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him [the recipient of the confidential information] in saving him time and trouble.”

4.76 It is a reasonable inference from the decision in *Seager v. Copydex Ltd.* that damages are awardable for a past breach of confidence. On the other hand it can be argued that it is not clear from that case whether the damages which were ordered to be assessed were intended to include loss suffered in respect of the past breach of confidence or only to provide compensation in lieu of an injunction. The subsequent decision in *Seager v. Copydex Ltd. (No. 2)*,³⁵³ in which the Court of Appeal had to determine the basis of assessment for the damages ordered in the earlier case, has not clarified the position in this respect.³⁵⁴

4.77 In *English v. Dedham Vale Properties Ltd.*,³⁵⁵ which did not itself relate to a breach of confidence action, Slade J. said:

“I read [*Seager v. Copydex Ltd.*] as being an instance where the court granted damages in lieu of an injunction.”

And in *Malone v. Metropolitan Police Commissioner*³⁵⁶ Sir Robert Megarry V.-C. said, in reference to the right of confidentiality, that it was:

“... an equitable right which is still in course of development, and is usually protected by the grant of an injunction to prevent disclosure of the confidence. Under Lord Cairns' Act 1858 damages may be granted

³⁵¹This appears from [1967] 1 W.L.R. 923, 924.

³⁵²[1967] R.P.C. 349, 368; [1967] 1 W.L.R. 923, 932.

³⁵³[1969] R.P.C. 250; [1969] 1 W.L.R. 809. The case is discussed further in regard to the method of assessment of damages and to payment of damages in lieu of an injunction in para. 4.78 and paras. 4.99-4.101 below.

³⁵⁴In *Harrison v. Project & Design Co. (Redcar) Ltd.* [1978] F.S.R. 81, the plaintiff had supplied information concerning a home “stairlift” to the defendants in circumstances importing an obligation of confidence. In breach of that obligation the defendants made use of the information in manufacturing a stairlift of their own design. By a certain date, however, the information had subsequently ceased to be confidential, since, the stairlift having been widely distributed, the information had by then become generally available to engineers and others in that field. Graham J. accordingly refused a remedy in respect of the defendants' use of the information thereafter; but he commented (at p. 88) that this finding did not mean that the defendants were “not liable to pay an appropriate award of damages” for their use of the information prior to the relevant date. However, it is not clear whether an award of damages was in fact made, since he left open the question of the precise relief to which the plaintiff was entitled to further argument as to “the basis upon which damages should be assessed and whether or not an injunction should be granted” (*ibid.*, 90). See also *Maximilian Investments v. Ronen Amiran* [1976] C.L.Y. 1016.

³⁵⁵[1978] 1 W.L.R. 93, 111.

³⁵⁶[1979] Ch. 344, 360. The case is discussed in para. 4.9 above.

in substitution for an injunction; yet if there is no case for the grant of an injunction, as when the disclosure has already been made, the unsatisfactory result seems to be that no damages can be awarded under this head: see *Proctor v. Bayley* (1889) 42 Ch.D. 390. In such a case, where there is no breach of contract or other orthodox foundation for damages at common law, it seems doubtful whether there is any right to damages, as distinct from an account of profits. It may be, however, that a new tort is emerging. . . . Certainly the subject raises many questions that are so far unresolved. . . .³⁵⁷

(b) *Questions relating to damages on the assumption that they can be awarded for damage already suffered*

Commercial information

4.78 In *Seager v. Copydex Ltd. (No. 2)*³⁵⁸ the Court of Appeal considered the factors to be taken into account in assessing damages for breach of confidence regarding information of a commercial character. Lord Denning M.R. said:

“The value of the confidential information depends on the nature of it. If there was nothing very special about it, that is, if it involved no particular inventive step, but was the sort of information which could be obtained by employing any competent consultant, then the value of it was the fee which a consultant would charge for it: because in that case the defendants, by taking the information, would only have saved themselves the time and trouble of employing a consultant.³⁵⁹ But, on the other hand, 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 of it is much higher In these circumstances, if [the plaintiff] is right in saying that the confidential information was very special indeed, then it may well be right for the value to be assessed on the footing that in the usual way it would be remunerated by a royalty. The court, of course, cannot give a royalty by

³⁵⁷ As to *Proctor v. Bayley* see n. 450 below. In regard to the possibility of an emerging tort Megarry V.-C. referred to Goff & Jones, *The Law of Restitution*, 2nd ed. (1978), pp. 518, 519 and Gareth Jones (1970) 86 L.Q.R. 463, 491. He referred also to Street, *The Law of Torts*, 6th ed. (1976), p. 377, as doubting this possibility.

³⁵⁸ [1969] R.P.C. 250; [1969] 1 W.L.R. 809.

³⁵⁹ This was the approach adopted in the New South Wales case of *Interfirm Comparison (Australia) Pty. Ltd. v. Law Society of New South Wales* [1977] R.P.C. 137 where the plaintiff, who carried on a business of making inter-firm comparisons of costs, productivity and profits, sent a proposal and questionnaire for consideration by the defendants. The latter made a photostat copy of the questionnaire and in breach of confidence sent it to the University of New England (who were later employed by the defendants to make a survey) for use, but not to copy. Bowen C.J. found that the University did not in fact use the questionnaire but held that the plaintiffs were entitled to damages equivalent to a fee which they would have charged for preparing such a questionnaire for the defendants.

way of damages. But it could give an equivalent by a calculation based on a capitalisation of a royalty.³⁶⁰

Damages for mental distress in respect of the disclosure of personal information

4.79 If a breach of confidence relating to information of a personal kind has occurred, can damages (assuming that they are recoverable at all³⁶¹) be awarded not only for any material loss which the plaintiff may have suffered as a result of the breach³⁶² but also for the mental distress which the disclosure has caused him? On this question there is no direct guidance to be obtained from decisions on breach of confidence. In *Duchess of Argyll v. Duke of Argyll*³⁶³ in 1967 as in *Prince Albert v. Strange*³⁶⁴ more than a century earlier the remedy which was sought was an injunction. However, the concept of distress in the form of injury to feelings has received some statutory recognition in areas which bear some analogy to breach of confidence. Thus, in *Williams v. Settle*³⁶⁵ an award of £1,000 against a photographer was upheld in a copyright case, where the defendant, having taken a photograph at a wedding, two years later sold a copy to the press after the bride's father had been murdered. Sellers L.J., in discussing whether a claim would lie under section 17(3) of the Copyright Act 1956 for "such additional damages . . . as the court may consider appropriate in the circumstances" where there has been flagrant infringement or benefit to the defendant, said the benefit to the defendant had been meagre but took into account his "scandalous conduct" and the fact that it was "in total disregard not only of the legal rights of the plaintiff regarding copyright but of his feelings and his sense of family dignity and pride".³⁶⁶ Another analogy is provided by the Race Relations Act 1976. Where civil proceedings may be brought under the Act, section 57(4) of that Act declares that "for the avoidance of doubt . . . damages in respect of an unlawful act of discrimination may include compensation for injury to feelings whether or not they include compensation under any other head".³⁶⁷

³⁶⁰[1969] R.P.C. 250, 256; [1969] 1 W.L.R. 809, 813. Lord Denning immediately went on to deal with the effect of such payment of a capitalized sum in lieu of a royalty—i.e. "the confidential information would belong to the defendants in the same way as if they had bought and paid for it by an agreement of sale". This suggests that he had in mind the future use of the information. If, however, damages are awardable for the past use of information in breach of confidence (as to which see paras. 4.75–4.77 above), the passage set out in the text would seem equally applicable to the method of assessing damages for such past use. Thus, a person who, in breach of confidence, has exploited commercial information to his advantage for several years before the wrong is discovered might be liable in damages (whether on the basis of the capital value of a royalty which might have been charged for those years or on a fee basis, according to the nature of the information in question) whatever the court decides as regards the future use of the information.

³⁶¹See paras 4.75–4.77 above.

³⁶²As, for example, where a person, breaking a confidence, passes on information to the plaintiff's employers who, as a result, dismiss the plaintiff.

³⁶³[1967] Ch. 302. The facts are given in para. 4.2 above.

³⁶⁴(1849) 1 Mac. & G.25. The facts are given in para. 3.3 above.

³⁶⁵[1960] 1 W.L.R. 1072.

³⁶⁶*Ibid.*, 1082. Emphasis added.

³⁶⁷Emphasis added.

4.80 It has become established in recent years that in an action for breach of contract damages may be awarded in an appropriate case for injury to feelings. In *Jarvis v. Swans Tours Ltd.*³⁶⁸ for example, damages in respect of a disappointing holiday were awarded for what Lord Denning M.R. described as "the disappointment, the distress, the upset and frustration caused by the breach."³⁶⁹ However, such an award may only be made when both parties to the contract "contemplate that a failure . . . to perform the contract will foreseeably occasion vexation, frustration or distress".³⁷⁰ It would seem to follow that where a breach of confidence constitutes also a breach of contract compensation might be awarded in respect of this head of damage.

4.81 There has, however, been no comparable development in the law of tort, where the general rule is that damages are not recoverable for mental distress, such as feelings of fear or grief, which is unaccompanied by physical injury. On the other hand, a person who, as the result of nervous shock, suffers from a recognisable illness (including one of a psychiatric character) may in certain circumstances³⁷¹ recover damages in respect of that illness.³⁷² However, liability for nervous shock only arises³⁷³ if the defendant ought reasonably to have foreseen that shock would have been suffered by an ordinarily strong-nerved person.³⁷⁴ In relation, however, to a limited number of torts³⁷⁵ (including libel³⁷⁶) an award of damages may include an element for injury to feelings.

4.82 To sum up, there is no statutory basis for awarding damages in respect of mental distress caused by a breach of confidence. There is authority for the award of such damages in contract generally, where the distress was foreseeable by the parties, and it would seem that this would justify an award of damages under this head in respect of a contractual breach of confidence. So far as non-contractual breach of confidence is concerned, there is no authority to support an award of damages for mental distress.

³⁶⁸[1973] Q.B. 233 (C.A.). The case is discussed with other decisions in *McGregor on Damages*, 14th ed., (1980), paras. 70-73.

³⁶⁹[1973] Q.B. 233, 238. In the same case Stephenson L.J. (at p. 240) referred to the "frustration, annoyance, disappointment" experienced by the plaintiff, while Edmund Davies L.J. said (at p. 239) that it would be wrong "to say that [the plaintiff's] disappointment must find no reflection in the damages to be awarded".

³⁷⁰*Heywood v. Wellers* [1976] Q.B. 446, 461 (C.A.), per James L.J.

³⁷¹There is a substantial and complex body of case law concerning the comparatively limited circumstances in which liability for nervous shock will arise. A recent example is provided by a decision of the Court of Appeal in which a mother sustained injury in the nature of nervous shock on learning that members of her family had been killed and injured in consequence of the negligent driving of a motor vehicle. Her claim for damages was dismissed, notwithstanding that her injury was reasonably foreseeable, on the policy ground that she was not on or near the highway when the accident occurred: *McLoughlin v. O'Brian* [1981] 2 W.L.R. 1014.

³⁷²See, for example, *Hinz v. Berry* [1970] 2 Q.B. 40 (C.A.).

³⁷³Except where it has been caused deliberately or recklessly: *Wilkinson v. Downton* [1897] 2 Q.B. 57; *Janvier v. Sweeney* [1919] 2 K.B. 316 (C.A.).

³⁷⁴*Bourhill v. Young* [1943] A.C. 92, 110, per Lord Wright and 117 per Lord Porter. See *Clerk and Lindsell on Torts*, 14th ed., (1975), para. 876.

³⁷⁵In the former torts relating to the infringement of family relationships the injury to feelings constituted the principal loss. Those torts were, however, abolished by the Law Reform (Miscellaneous Provisions) Act 1970, ss. 4 and 5.

³⁷⁶See, for example, *Fielding v. Variety Incorporated* [1967] 2 Q.B. 841, 851 per Lord Denning M.R., 855 per Salmon L.J.

“Exemplary” or “punitive” damages

4.83 Damages of an “exemplary” or “punitive” kind (i.e. damages additional to compensation) can only be awarded³⁷⁷ in a breach of confidence action if, according to the general principles laid down in *Rookes v. Barnard*,³⁷⁸ they relate either to oppressive, arbitrary or unconstitutional action by servants of the government or to conduct by the defendant calculated to give him a profit likely to exceed the compensation payable to the plaintiff. The third situation in which, according to *Rookes v. Barnard*, such damages may be awarded—namely, when their award is expressly authorised by statute—is not at present relevant to an action for breach of confidence.

4.84 It should, however, be mentioned that in the somewhat analogous sphere of copyright section 17(3) of the Copyright Act 1956 provides:

“Where in an action under this section an infringement of copyright is proved or admitted, and the court, having regard (in addition to all other material considerations) to—

- (a) the flagrancy of the infringement, and
- (b) any benefit shown to have accrued to the defendant by reason of the infringement,

is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances.”

It will be noted that the section refers to “additional damages” rather than exemplary or punitive damages. We have already referred to *Williams v. Settle*³⁷⁹ in which the Court of Appeal held that this reference to “additional damages” justified an award of £1,000 against a photographer, referring among other factors to the “scandalous conduct” of the defendant. Whether this amounts to treating section 17(3) of the Copyright Act 1956 as admitting exemplary damages by way of the punishment of the defendant is, however, arguable; it may be said that what the Court of Appeal was concerned to compensate was the “additional” damage done to the plaintiff of which the “scandalous conduct” of the defendant was the cause. It is noteworthy that in *Rookes v. Barnard*³⁸⁰ Lord Devlin declined to express a view on whether the section authorised an award of exemplary, as distinct from aggravated, damages. In *Cassell & Co. Ltd. v. Broome*³⁸¹ Lord Kilbrandon expressed the opinion firmly that it did not.³⁸² *The Report of the Committee to consider the*

³⁷⁷ Assuming damages for a past breach to be recoverable at all: see paras. 4.75–4.77 above.

³⁷⁸ [1964] A.C. 1129, 1226–7.

³⁷⁹ [1960] 1 W.L.R. 1072. See para. 4.79 above.

³⁸⁰ [1964] A.C. 1129, 1225.

³⁸¹ [1972] A.C. 1027, 1134.

³⁸² Lord Kilbrandon further held that the express reference to exemplary damages in s. 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 (which is a rare example of such a reference in a statute) must be construed as a reference to aggravated damages, since it applies also to Scotland, and he could “hardly believe that this Act introduced for the first time, as it were by a side-wind, the doctrine of punitive damages into the law of Scotland”: [1972] A.C. 1027, 1133.

Law on Copyright and Designs (the Whitford Committee)³⁸³ treats the section, however, as authorising exemplary damages.

4.85 To revert to the question whether “exemplary” or “punitive” damages can be given in a breach of confidence action, the present position, as we have explained in paragraph 4.83 above, is governed by the principles laid down in *Rookes v. Barnard*.³⁸⁴

(c) *An account of profits*

4.86 In Working Paper No. 58³⁸⁵ we discussed the discretionary remedy of an account of profits. We think it will be sufficient for this report to set out the relevant passage:

“In contrast to damages, which seek to compensate the defendant for the loss he has suffered, an account of profits seeks to recover from the defendant the profit he has made. Where both remedies are available, they are always alternative, since if both were granted the plaintiff would receive a double benefit for the same wrong; but as one remedy may be more beneficial to the plaintiff than the other, it is at the plaintiff’s option (subject to the discretion of the court in granting the equitable remedy of an account) which remedy he will take. In practice, though, an account of profits is not generally a very satisfactory remedy as was pointed out as long ago as 1892 by Lindley L.J. in *Siddell v. Vickers*:³⁸⁶

‘... the difficulty of finding out how much profit is attributable to any one source is extremely great—so great that accounts in that form very seldom result in anything satisfactory to anybody. The litigation is enormous, the expense is great, and the time consumed is out of all proportion to the advantage ultimately attained; so much so that in partnership cases I confess I never knew an account in that form worked out with satisfaction to anybody. I believe in almost every case people get tired of it and get disgusted. Therefore, although the law is that a Patentee has a right to elect which course he will take, as a matter of business he would generally be inclined to take an inquiry as to damages, rather than launch upon an inquiry as to profits.’

For these reasons, an account of profits is rarely granted in actions for infringement of a patent and we envisage that it would seldom be resorted to in actions for breach of a statutory duty of confidence. But there are, nevertheless, cases in breach of confidence in which the calculation of profits is a relatively straightforward matter and where it is the remedy best fitted to do justice between the parties: an example is *Peter Pan*

³⁸³(1977) Cmnd. 6732. See para. 698 in which the Report refers to “a discretionary power” under s. 17(3) of the Copyright Act 1956 “to impose exemplary damages” and para. 704 where the view is taken that this power should “undoubtedly be retained”. A similar view is taken in Reform of the Law relating to Copyright, Designs and Performers’ Protection: A Consultative Document (1981), Cmnd. 8302, ch. 14, para. 3.

³⁸⁴[1964] A.C. 1129.

³⁸⁵Para. 123.

³⁸⁶(1892) 9 R.P.C. 152, 163.

*Manufacturing Corporation v. Corsets Silhouette Ltd.*³⁸⁷ where the defendants were ordered to account for the profits made by them in selling a particular type of brassière manufactured from designs used in breach of confidence. The availability of the remedy would also act as an effective deterrent to any person contemplating a breach of confidence who might otherwise calculate that the profits from his breach will exceed any liability he may incur in damages to the person to whom he owes a duty of confidence.”

3. Remedies against a feared future breach of confidence

(a) Interlocutory injunctions

4.87 An interlocutory injunction is in principle a temporary remedy, maintaining the status quo pending the final decision. It is, however, of the greatest practical importance, as a decision to grant or refuse the remedy will in many cases in effect put an end to the action. Thus, in a breach of confidence action, if the plaintiff fails to prevent by an interlocutory injunction the threatened disclosure of personal information relating to him, he may well consider it pointless to pursue the action once the information has been published.

4.88 The interlocutory injunction is a discretionary remedy. The principles on which that discretion should be exercised were laid down by Lord Diplock, with whom the other Law Lords agreed, in *American Cyanamid Co. v. Ethicon Ltd.*,³⁸⁸ which related to an interlocutory injunction sought in respect of a patent for certain surgical sutures. We deal first with Lord Diplock’s views on certain tests which had been previously applied in some cases; secondly, we set out the principles which he said should be applied—in essence that the court should exercise its discretion “on the balance of convenience”; thirdly, we refer to the qualifications or clarifications of these principles made in later cases.

4.89 Lord Diplock referred to some relatively old cases in which it had been variously stated to be necessary in order to obtain an interlocutory injunction to show “a probability that the plaintiffs are entitled to relief” or “a strong prima facie case that the right which [the plaintiff] seeks to protect in fact exists” or to satisfy the less onerous criterion that there is “certainly a case to be tried”.³⁸⁹ He explained that it had been attempted to “reconcile these apparently differing approaches to the exercise of the discretion by holding that the need to show a probability or a strong prima facie case applied only to the establishment by the plaintiff of his right, and that the lesser burden of showing an arguable case to be tried applied to the alleged

³⁸⁷[1963] R.P.C. 45, 60; [1964] 1 W.L.R. 96, 108. Another aspect of the case was discussed at para 4.25 above.

³⁸⁸[1975] A.C. 396.

³⁸⁹*Ibid.*, 406–407. At p. 407 Lord Diplock said that 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.”

violation of that right by the defendant. . . .";³⁹⁰ but he pointed out that this attempt had been rejected by the Court of Appeal in respect of entitlement to copyright in *Hubbard v. Vosper*.³⁹¹ He in turn emphatically repudiated the view taken at first instance and by the Court of Appeal in *Cyanamid* itself that before any question of "balance of convenience" arose for consideration the court must first be 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 injunction sought".³⁹² On this latter point Lord Diplock said: "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations".

4.90 From Lord Diplock's speech in *Cyanamid* it would appear that the principles applicable to the exercise of the discretion in an application for an interlocutory injunction are as follows:

- (a) The court "must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried".³⁹³
- (b) "If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."³⁹⁴
- (c) "If, on the other hand, damages would not provide an adequate remedy for the plaintiff³⁹⁵ in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages³⁹⁶ for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."³⁹⁷

³⁹⁰*Ibid.*, 407.

³⁹¹[1972] 2 Q.B. 84.

³⁹²[1975] A.C. 396, 407.

³⁹³*Ibid.*

³⁹⁴*Ibid.*, 408.

³⁹⁵Or, presumably, if the defendant would be unable to pay the damages.

³⁹⁶At p. 406 Lord Diplock had explained that "since the middle of the 19th century [relief by way of interlocutory injunction] has been made subject to [the plaintiff's] undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do".

³⁹⁷[1975] A.C. 396, 408.

- (d) If "there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, . . . the question of balance of convenience arises" for determination by the court.
- (e) In determining the balance of convenience, the relevant factors and the weight to be given to them will vary from case to case.
- (f) "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."³⁹⁸
- (g) "The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party."³⁹⁹
- (h) In addition to the matters mentioned above, "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."⁴⁰⁰

4.91 Questions have been raised in some cases subsequent to *Cyanamid* as to the interpretation and scope of the principles laid down in that decision. In *Fellowes & Son v. Fisher*⁴⁰¹ the plaintiffs, who were solicitors and former employers of the defendant, sought an interlocutory injunction to prevent the latter for a certain period from "being employed, interested or concerned in the legal profession" within a specified area. The defendant's new employers had been advised by counsel that the covenant imposing these restrictions was unenforceable as being in restraint of trade. The Court of Appeal refused an injunction. Browne L.J. and Sir John Pennycuik, referring to *Cyanamid*, held that there was a serious case to be tried and that, in the absence of evidence on the adequacy of damages, the balance of convenience favoured the defendant. In relation to *Cyanamid* generally they found difficulty, however, in the requirement that the respective chances of success of the

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*, 409.

⁴⁰⁰ *Ibid.*

⁴⁰¹ [1976] Q.B. 122.

parties could only be considered as a last resort.⁴⁰² Both pointed out the need for further guidance from the House of Lords.⁴⁰³ Lord Denning M.R. said⁴⁰⁴ first that he found it impossible to reconcile *Cyanamid* with the earlier statement of principle in *J. T. Stratford & Son Ltd. v. Lindley*.⁴⁰⁵ However, he went on to suggest that the cases might be reconciled on two grounds. First, he said that the reference by Lord Diplock to "many other special factors",⁴⁰⁶ covered individual cases which were "numerous and important."⁴⁰⁷ The common element in these cases was that there was an immediate need to assess the strength of each party's case and that "in 99 cases out of 100, the matter [went] no further". They included industrial disputes, covenants in restraint of trade, passing-off, many commercial cases and breaches of confidence; in regard to the last mentioned category he said:

"If the plaintiff has a strong case, an injunction should be granted: for to postpone it would be equivalent to denying it altogether. But, if the defendant has an available defence, it may be refused: *Fraser v. Evans*;⁴⁰⁸ *Hubbard v. Vosper*,⁴⁰⁹ and *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*⁴¹⁰ . . . were all decided on interlocutory applications and never came for trial."⁴¹¹

Secondly, he suggested⁴¹² that there were many cases in which either party might suffer great disadvantages which could not be adequately compensated by damages and where it was permissible to consider the relative strength of each party's case; in this connection he relied on Lord Diplock's recognition that there were certain circumstances⁴¹³ in which that factor could be taken into account, although Lord Diplock had in fact limited those circumstances to cases where "the extent of the uncompensatable disadvantage to each party would not differ widely" and where "the strength of one party's case is disproportionate to that of the other party".

4.92 Questions have arisen as to the applicability of the principles laid down in *Cyanamid* to trade dispute cases, particularly in the light of section 17(2) of the Trade Union and Labour Relations Act 1974, which subsequent to that case was added by the Employment Protection Act 1975,⁴¹⁴ and is as

⁴⁰²*Ibid.*, 138 per Browne L.J., 141 per Sir John Pennycuik.

⁴⁰³*Ibid.*, 138 per Browne L.J., 142 per Sir John Pennycuik.

⁴⁰⁴*Ibid.*, 131-2.

⁴⁰⁵[1965] A.C. 269. The case, which was not mentioned in *Cyanamid*, concerned an application for an interlocutory injunction in an action for inducing breach of contract. Lord Upjohn (at p. 338) and Lord Pearce (at p. 331) said that a party seeking an interlocutory injunction must first establish a prima facie case. Lord Reid, Viscount Radcliffe and Lord Donovan appear to have adopted a similar approach.

⁴⁰⁶See para 4.90(h) above.

⁴⁰⁷[1976] Q.B. 122, 133.

⁴⁰⁸[1969] 1 Q.B. 349. For the facts see para. 4.13 above.

⁴⁰⁹[1972] 2 Q.B. 84. For the facts see para. 4.39 above.

⁴¹⁰[1975] Q.B. 613. For the facts see para. 4.5 and n. 106 above.

⁴¹¹[1976] Q.B. 122, 133.

⁴¹²*Ibid.*, 134.

⁴¹³See para. 4.90(g) above.

⁴¹⁴Section 125(1) and Schedule 16, Part III, para. 6.

follows:

“It is hereby declared for the avoidance of doubt that where an application is made . . . for an interlocutory injunction and the party against whom the injunction is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party’s succeeding at the trial of the action in establishing the matter or matters which would, under any [of certain earlier provisions of the Act] afford a defence to the action.”

In *N.W.L. Ltd. v. Woods*,⁴¹⁵ in which interlocutory injunctions were sought to prevent trade union officials from issuing instructions “blacking” a ship, Lords Fraser of Tullybelton and Scarman treated section 17(2) as in effect a restoration of the law in regard to interlocutory injunctions which had obtained before *Cyanamid*⁴¹⁶ so far as trade dispute cases were concerned. Lord Diplock, however, regarded section 17(2) only as “a reminder addressed by Parliament to English judges” of the “practical realities” in cases involving industrial action.⁴¹⁷ By reason of the characteristic features of the latter they were in practice finally decided by the decision as to the interlocutory injunction.⁴¹⁸ *Cyanamid* “was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action”.⁴¹⁹ In such a case an “important additional element” is brought into the “balance of convenience”, namely “the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial”.⁴²⁰ Lord Diplock referred only to cases involving industrial action as introducing this additional element, but his remarks would appear to be of general application and, in particular, to apply to actions for breach of confidence in respect of the disclosure of personal information, where the decision as to the interlocutory injunction may in practice have the effect of concluding the case.

4.93 In *Cyanamid* the question whether an interlocutory injunction should be granted or withheld was discussed with reference to the respective positions of the parties. The extent, if any, to which the court should take into account considerations of public interest did not arise. In the patent case of *Roussel-Uclaf v. G. D. Searle & Co. Ltd.*⁴²¹ Graham J., having referred to the “balance of convenience” test laid down in *Cyanamid*, went on to discuss:

“the interesting and, I think novel point as to whether this court ought ever and, in particular, in this case to exercise its discretion to grant an

⁴¹⁵[1979] 1 W.L.R. 1294. In *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142 the House of Lords in another trade dispute case followed *N.W.L. Ltd. v. Woods* without referring to *Cyanamid*.

⁴¹⁶*Ibid.*, 1309 *per* Lord Fraser, 1314–1315 *per* Lord Scarman.

⁴¹⁷*Ibid.*, 1305.

⁴¹⁸*Ibid.*

⁴¹⁹*Ibid.*, 1306.

⁴²⁰*Ibid.*, 1306–1307.

⁴²¹[1977] F.S.R. 125.

injunction the effect of which will be, temporarily at any rate, to deprive members of the public of the benefit of a life-saving drug which may be prescribed for otherwise fatal heart diseases.”⁴²²

His conclusion was that in the exceptional case of a unique life-saving drug he could not think of any circumstances where the court ought to grant an injunction.⁴²³

4.94 The question of the extent to which considerations of the public interest may be relevant to the court’s discretion as to interlocutory injunctions has also arisen in regard to actions for defamation. There is a long established rule that the courts will not grant an interlocutory injunction in an action for defamation against a defendant who says he is going to justify.⁴²⁴ Prior to *Cyanamid*, Lord Denning M.R. had referred in *Fraser v. Evans*⁴²⁵ to this “salutary rule of law in libel” but said he was not prepared to rule that an analogous rule applied in every case to breach of confidence. However, in *Hubbard v. Vosper*⁴²⁶ he said:

“We never restrain a defendant in a libel action who says he is going to justify. So in copyright action, we ought not to restrain a defendant who has a reasonable defence of fair dealing. *Nor in an action for breach of confidence, if the defendant has a reasonable defence of public interest.* The reason is because the defendant, if he is right, is entitled to publish it: and the law will not intervene to suppress freedom of speech except where it is abused.” (emphasis added)

Shortly after *Cyanamid*, Oliver J. in *Bestobell Paints Ltd. v. Bigg*⁴²⁷ said that the rule as to interlocutory injunctions in libel “cut right across the House of Lords’ decision” in the former case; and, holding the rule applied as much to injurious falsehood (with which *Bestobell* was concerned) as to libel, refused an interlocutory injunction. In 1977 Lord Denning M.R. (with whom Roskill and Browne L.JJ. concurred) said in *J. Trevor & Sons v. Solomon*⁴²⁸ that the rule as to libel had not been altered by *Cyanamid* and that an injunction would not ordinarily be granted to prevent a man saying what he honestly believed to be true.

⁴²²*Ibid.*, 131. His observations were obiter, since he held that damages would be an adequate remedy.

⁴²³*Ibid.*, 132.

⁴²⁴See, for example, *Bonnard v. Perryman* [1891] 2 Ch. 269; *Quartz Hill Consolidated Gold Mining Co. v. Beall* (1882) 20 Ch.D. 501. The rule was more fully stated by the Faulks Committee on Defamation (1975) Cmnd. 5909, para. 375 as follows:

“An interlocutory injunction should not be granted in defamation actions if:—

(a) there is any doubt whether the words are defamatory, or
(b) the defendant says that he will plead justification, fair comment, qualified privilege, or any other defence, and it is not manifest that such a defence is bound to fail.”

The Committee explain the rationale of the rule as twofold; to protect free speech and not to usurp the function of the court of trial. They received no criticism of the principle and did not recommend any change.

⁴²⁵[1969] 1 Q.B. 349, 362. The facts are given in para. 4.13 above.

⁴²⁶[1972] 2 Q.B. 84, 96–97. The facts are briefly mentioned in para. 4.39 above.

⁴²⁷(1975) 119 S.J. 678.

⁴²⁸*The Times*, 16 December 1977.

4.95 We conclude our account of cases on interlocutory injunctions decided since *Cyanamid* by referring to four decisions which in fact involved breach of confidence. The first of these is *Woodward v. Hutchins*,⁴²⁹ to which we have already referred in paragraph 4.45 above in the context of the part played in general by considerations of public interest in relation to the action for breach of confidence. As we explained there, those considerations constituted one of the grounds on which Lord Denning M.R. held that an interlocutory injunction should not be granted. He went on to state, as a general principle, that, if there was a legitimate ground for supposing that it was in the public interest for the relevant information to be disclosed, an interlocutory injunction should not be granted in an action for breach of confidence.⁴³⁰ However, Lawton and Bridge L.JJ., the other members of the Court of Appeal, though concurring in the result, made no reference to the public interest, basing their reasoning upon the balance of convenience.⁴³¹ The second decision is *Dunford & Elliott Ltd. v. Johnson & Firth Brown Ltd.*⁴³² In that case confidential information about its affairs was given by the plaintiff company to its institutional shareholders, who held 43% of the issued capital and who, at a time when the company was in grave financial difficulty, were contemplating the underwriting of a new issue. They passed on the information to the defendants as potential fellow underwriters; thereupon the defendants, declining to join in the underwriting, announced that they would be making an offer to the shareholders in the plaintiff company. The latter sought an interlocutory injunction forbidding the use of confidential information by the defendants in their take-over bid for the company. Roskill L.J. applied *Cyanamid*, holding that the "balance of convenience" was against granting an injunction, bearing in mind that some of the directors, having such information, had earlier purchased shares in the company.⁴³³ The third case is *Potters-Balotini Ltd. v. Weston-Baker*⁴³⁴ in which ex-employees of, and a contractor formerly employed by, the plaintiffs set up a rival concern markedly similar in factory design to the plaintiffs' business. The plaintiffs sought an interlocutory injunction to prevent the defendants from continuing production at their rival plant which, it was alleged, had been built with the aid of confidential information wrongly used by the defendants. All the judges in the Court of Appeal said the case clearly fell within the principles laid down in *Cyanamid* and refused an injunction.⁴³⁵ Lord Denning M.R. emphasised that the case involved a number of difficult questions of fact and law which could not be decided at the interlocutory stage. He went on to discuss the question of the balance of convenience, and in this connection considered

⁴²⁹[1977] 1 W.L.R. 760. We have also considered this decision in connection with the "public domain": see para. 4.17 above, where the facts of the case are given.

⁴³⁰[1977] 1 W.L.R. 760, 764.

⁴³¹[1977] 1 W.L.R. 760, 765. Lawton L.J. stated that he found it impossible "to extricate the libel aspect from the confidentiality aspect", and Bridge L.J. observed that the plaintiffs could "only recover nominal damages for the breach of confidentiality, if there was one."

⁴³²[1977] 1 Lloyd's Rep. 505.

⁴³³Lawton L.J. said simply that "the broad justice of the case does not require this injunction at this stage" (*ibid.*, 515), but Lord Denning M.R. appeared to doubt whether, in view of the possible injustice done to the 57% of shareholders without information, there was any enforceable obligation of confidence at all.

⁴³⁴[1977] R.P.C. 202.

⁴³⁵*Ibid.*, 207, 210, 211.

that the potentially disastrous economic and social consequences of closing down the defendants' factory before these questions had been decided clearly tipped the balance against granting an interlocutory injunction. Scarman L.J.⁴³⁶ agreed, though he added that in the particular case another consideration to be taken into account in the balance of convenience was the difficulty of framing an interlocutory injunction limited to confidential information when how much of the information used by the defendants was confidential had not yet been determined. He also thought that, where the court is in doubt as to where the balance of convenience lies, it may take into account whether the plaintiff, if successful, would be likely to obtain a permanent injunction at the trial of the action.⁴³⁷

4.96 The fourth, and most recent, decision relating to the grant of interlocutory injunctions in breach of confidence cases since *Cyanamid* is that of the Court of Appeal in *Schering Chemicals Ltd. v. Falkman Ltd.*⁴³⁸ the facts of which appear in paragraph 4.21 above. The question of the part played by considerations of public interest in relation to the grant or refusal of an interlocutory injunction has been referred to above,⁴³⁹ in connection with the aspects of the *Schering Chemicals* case which concerned the factor of public interest in general in breach of confidence cases.

4.97 Apart from the question of public interest, we would add here that the majority (Shaw and Templeman L.JJ.) applied general principles in deciding to grant the injunction. Shaw L.J. pointed out that the plaintiff's remedy in damages would be inadequate since the injury to the plaintiff's interests resulting from publication of the information in question would be irreparable,⁴⁴⁰ and Templeman L.J. held that, as there were triable issues relating (broadly) to whether the second defendant knew of a promise of confidentiality made on his behalf by the first defendant, on that ground alone subject to the question of balance of convenience the plaintiff was entitled to an interlocutory injunction pursuant to the principles established by *Cyanamid*.⁴⁴¹ On the other hand Lord Denning M.R., in his dissenting judgment, expressly "put on one side" both the latter decision and *N.W.L. Ltd. v. Woods*⁴⁴² on the ground that an injunction against the press or television fell into a special category.⁴⁴³

4.98 It will be apparent from the foregoing analysis of the House of Lords, decision in *Cyanamid* and subsequent cases on interlocutory injunctions that

⁴³⁶*Ibid.*, 209.

⁴³⁷Scarman L.J. relied on Lord Diplock's discussion in *Cyanamid* (cited in para. 4.90(g) above) of the limited circumstances in which a court might take into account the relative strength of each party's case, although Sir John Pennycuik (at p. 211), while agreeing with Scarman L.J. that whether the plaintiff would be likely to obtain a permanent injunction could be taken into account, did not base his view on Lord Diplock's remarks but on the ground that "a matter of remedy rather than merit" was involved.

⁴³⁸[1981] 2 W.L.R. 848.

⁴³⁹Para. 4.49 in general; para. 4.50 (which relates to the dissenting judgment of Lord Denning M.R.); para. 4.51 (Shaw L.J.); and para. 4.52 (Templeman L.J.).

⁴⁴⁰[1981] 2 W.L.R. 848, 871.

⁴⁴¹*Ibid.*, 878.

⁴⁴²[1979] 1 W.L.R. 1294 (H.L.); see para. 4.92 above.

⁴⁴³[1981] 2 W.L.R. 848, 859.

it is hardly practicable to give a brief summary of the principles on which interlocutory injunctions are granted or withheld in breach of confidence cases. It seems that the approach laid down in *Cyanamid*, as explained in the later cases discussed above, applies to actions for breach of confidence. *Cyanamid* itself, however, did not involve any question of the public interest, but in a later patent case⁴⁴⁴ involving drugs the presence or absence of a public interest factor was stated to be a relevant, and in certain exceptional circumstances a decisive, factor in the granting or withholding of an interlocutory injunction. It is not clear to what extent the public interest in the disclosure of information (as distinguished from the public interest in the availability of drugs) would influence the court in that respect in a breach of confidence case. In one case⁴⁴⁵ before *Cyanamid* Lord Denning M.R. held, as we have seen,⁴⁴⁶ that, as in defamation where the defendant says he intends to justify, so in breach of confidence where he has "a reasonable defence of public interest", an interlocutory injunction will not be granted. Furthermore, since *Cyanamid* Lord Denning has stated that considerations of public interest are relevant in determining whether an interlocutory injunction should be granted,⁴⁴⁷ and it has been stated by the Court of Appeal⁴⁴⁸ and in a decision at first instance,⁴⁴⁹ that the special rule applying to interlocutory injunctions in defamation cases has not been affected by *Cyanamid*. However, although both before and after *Cyanamid* Lord Denning has indicated that a similar rule applies in breach of confidence (with the substitution of the defence of public interest for that of justification), it cannot be said with certainty that his approach represents the present law.

(b) *Final injunction, and damages in lieu of a final injunction*

4.99 The granting of a final injunction in a breach of confidence case lies, as it does in other contexts, within the discretion of the court. It may be refused where in the view of the court justice would be adequately done to the plaintiff and undue hardship to the defendant avoided by awarding the plaintiff appropriate compensation.⁴⁵⁰ Such compensation in the form of damages in lieu of an injunction has been awardable since 1858,⁴⁵¹ and the circumstances in which such an award may be made have been described by

⁴⁴⁴*Roussel-Uclaf v. G. D. Searle & Co. Ltd.* [1977] F.S.R. 125, referred to in para. 4.93 above.

⁴⁴⁵*Hubbard v. Vosper* [1972] 2 Q.B. 84, 96-97. See para. 4.39 above.

⁴⁴⁶See para. 4.94 above.

⁴⁴⁷In *Woodward v. Hutchins* [1977] 1 W.L.R. 760, the first of the decisions referred to in para. 4.95 above.

⁴⁴⁸*J. Trevor & Sons v. Solomon, The Times*, 16 December 1977. See para. 4.94 above.

⁴⁴⁹*Bestobell Paints Ltd. v. Bigg* (1975) 119 S.J. 678. See para. 4.94 above.

⁴⁵⁰This does not, however, mean that an injunction will be refused only when such compensation is awarded. There may be other reasons for refusing an injunction, at least on an indefinite basis, as when, for example, in a breach of confidence case the information is likely, within a short time, to enter the public domain; see paras. 4.15-4.31 above. And, as the injunction is an equitable remedy, it may be refused on the grounds that the plaintiff does not come to the court with "clean hands". This was a relevant consideration, having regard to the "deplorable means" employed by one of the plaintiffs (the Church of Scientology), in the refusal of an interlocutory injunction in *Hubbard v. Vosper* [1972] 2 Q.B. 84 (see para. 4.39 above). Further, an injunction will in any event not be granted if the wrong of which the plaintiff complains is not continuing and is unlikely to be repeated: *Proctor v. Bayley* (1889) 42 Ch.D. 390.

⁴⁵¹Chancery Amendment Act 1858, s. 2 (Lord Cairns' Act). The substance of this provision has been repealed and re-enacted, see n. 81 above.

A. L. Smith L.J. in *Shelfer v. City of London Electric Lighting Co.*⁴⁵² as follows:

“In my opinion, it may be stated as a good working rule that—

- (1.) If the injury to the plaintiff's legal rights is small,
 - (2.) And is one which is capable of being estimated in money,
 - (3.) And is one which can be adequately compensated by a small money payment,
 - (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction:—
- then damages in substitution for an injunction may be given.”

4.100 In a breach of confidence case the kind of information in issue may have an important bearing on whether or not damages in lieu of an injunction will be awarded. Information which may give rise to a possible future breach of confidence may be of a personal character, such as disclosures made by the plaintiff to a priest or to a psychiatrist. He may have no intention of exploiting the information himself. His complaint is not that the defendant is threatening to deprive him of that opportunity. His sole object is to prevent any disclosure of the information. In such circumstances the question could hardly arise of his being awarded damages in lieu of an injunction and the court would only be concerned with whether or not an injunction was appropriate. It should, however, be emphasised that the fact that information is personal does not *in itself* rule out the possibility of damages being awarded in lieu of an injunction against a future breach of confidence. It might, for example, be appropriate where the defendant has been put to great expense before he knew (actually or constructively) that the information was subject to an obligation of confidence in a case where the plaintiff seeks an injunction because he intends to publish that information himself in his autobiography.

4.101 In a breach of confidence case relating to information of a commercially exploitable character it is clear from *Seager v. Copydex Ltd. (No. 2)*⁴⁵³ that the damages which may be awarded in lieu of an injunction will not necessarily be the “small money payment” to which A. L. Smith L.J. referred in *Shelfer v. City of London Electric Lighting Co.*⁴⁵⁴ An award of damages in lieu of an injunction may, in effect, amount to sale of the information to the defendant under the auspices of the court. As Lord Denning M.R., having distinguished between payment of damages on a fee basis and payment on a capitalised royalty basis,⁴⁵⁵ said in *Seager v. Copydex Ltd. (No. 2)*:

“Once a lump sum is assessed and paid, then the confidential information would belong to the defendants in the same way as if they had bought and paid for it by an agreement of sale. The property, so far as there is property in it, would vest in them. They would have the right to use that confidential information for the manufacture of carpet grips and selling

⁴⁵²[1895] 1 Ch. 287, 322–323. In that case a wrong had already been committed against the future continuance of which the plaintiff was seeking an injunction. In *Leeds Industrial Co-operative Society Ltd. v. Slack* [1924] A.C. 851 the House of Lords held that damages in lieu of an injunction might also be obtained in respect of future tortious activity alone.

⁴⁵³[1969] R.P.C. 250; [1969] 1 W.L.R. 809.

⁴⁵⁴[1895] 1 Ch. 287. See para. 4.99 above.

⁴⁵⁵See para. 4.78 above.

of them. If it is patentable, they would be entitled to the benefit of the patent as if they had bought it. In other words, it would be regarded as a real outright purchase of the confidential information."⁴⁵⁶

(c) *Order for destruction or delivery up*

4.102 A further discretionary remedy in respect of a feared future breach of confidence is an order for the destruction or delivery up of the material thing containing the confidential information. In *Industrial Furnaces Ltd. v. Reaves*⁴⁵⁷ a breach of confidence had occurred in respect of data relating to industrial heaters, which was embodied in drawings and other documents made by the defendant from confidential information to which he had had access while in the employ of the plaintiffs. Graham J. said that where breach of confidence is involved "in the normal case the property in the information which has been stolen will remain in the plaintiff. Prima facie, therefore, if he wants it, the plaintiff should be entitled to delivery up."⁴⁵⁸ He also said that delivery up would not necessarily be refused even if the property in question contained other information belonging to the defendant and upon which he placed a value.⁴⁵⁹ However, it does not follow that the plaintiff in a successful breach of confidence action can even in a "normal"⁴⁶⁰ case always expect to obtain the material thing in which the confidential information was embodied. In granting an order for delivery up of the drawings and documents, Graham J. emphasised "the very important point . . . that the defendant was not reliable. In those circumstances, even if I would otherwise not make an order for delivery up, it seems to me that the court is in the position of not necessarily being able to rely on the oath of the defendant [to destroy the drawings and documents]."⁴⁶¹

4.103 It is important to emphasise that the order for destruction or delivery up as the remedy for breach of confidence is distinct from an order for the delivery of goods under section 3(2)(a) and (b) of the Torts (Interference with Goods) Act 1977; the latter is concerned with "goods", defined as including "all chattels personal other than things in action and money",⁴⁶² in which, broadly speaking, the plaintiff had an interest prior to the "wrongful interference" of which he complains. If, for example, an employee has memorised the information which he holds under an obligation of confidence and later recorded it in his own notebook, the employer will have to rely, if

⁴⁵⁶[1969] R.P.C. 250, 256; [1969] 1 W.L.R. 809, 813.

⁴⁵⁷[1970] R.P.C. 605, 627.

⁴⁵⁸*Ibid.*, 627.

⁴⁵⁹*Ibid.*, 628.

⁴⁶⁰The "abnormal" case, to which Graham J. was by implication also referring, was where an order, as in *Seager v. Copydex Ltd. (No. 2)* [1969] R.P.C. 250; [1969] 1 W.L.R. 809 (see para. 4.101 above), is made transferring the property in the information to the defendant against payment of damages.

⁴⁶¹[1970] R.P.C. 605, 627.

⁴⁶²See the Torts (Interference with Goods) Act 1977, s. 14(1). In the 18th Report of the Law Reform Committee (1971), Cmnd. 4774, "wrongful interference with personal property" and "wrongful interference with goods" were two of the four alternative ways they suggested the new tort they were recommending might be named: para. 28. In para. 29 they specifically excluded "trade secrets, know-how, and other intellectual property".

he wants the notebook to be delivered up or destroyed, not on the Torts (Interference with Goods) Act 1977 (as he has no "interest" in the notebook as such) but on the breach of confidence remedy. Circumstances may arise, however, when to order delivery of goods under the 1977 Act (as prima facie the court might be minded to order when the plaintiff had an interest in the goods) would be inconsistent with the remedy which the court proposed to grant in breach of confidence proceedings. Thus, a defendant may be in possession of drawings containing confidential information which belong to the plaintiff. If the case is an "abnormal" one, where the defendant is to be allowed to exploit the information in return for an appropriate payment to the plaintiff, the court may not wish to order the delivery up (still less the destruction) of the drawings. The resolution of this apparent conflict of remedies lies in the fact that they are both discretionary and that the courts have it in their power to grant or, as the case may be, to decline to grant them in a manner which will avoid any conflict and which will be appropriate in the circumstances.

4.104 The value of the order for destruction or delivery up in breach of confidence cases has recently been strikingly demonstrated on novel facts in the Australian case of *Franklin v. Giddins*,⁴⁶³ which we have already cited in another connection.⁴⁶⁴ In that case the plaintiff obtained an order for the destruction of all the trees which the defendant had grown as a result of the "genetic information" relating to a strain of nectarines contained in bindwood cuttings stolen by the defendant. An order by way of a remedy in tort for delivery up, limited to the original cuttings which were the property of the plaintiff, would have been either impossible to perform or, in any event, quite pointless from the plaintiff's point of view.

J. Death and the action for breach of confidence

4.105 By virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 all causes of action, except for defamation, subsisting against or vested in any person on his death survive against or, as the case may be, for the benefit of his estate. It follows, therefore, that, where A is in breach of an obligation of confidence which he owes to B and then dies before B has either started or concluded proceedings for breach of confidence, B may bring or, as the case may be, continue an action against A's personal representatives in respect of A's breach of confidence. And, where X is in breach of an obligation of confidence which he owes to Y and Y dies before he has started or concluded proceedings for breach of confidence, the personal representatives of Y may bring, or, as the case may be, continue an action for breach of confidence against X in respect of his breach of confidence vis-à-vis Y.

4.106 Suppose, however, that X, in the second example in the previous paragraph, is a doctor to whom Y, his patient, has in confidence given personal

⁴⁶³[1978] Qd. R. 72.

⁴⁶⁴See para. 4.8 above where we have referred to the case as supporting the view (not clear on English cases) that an obligation of confidence arises in respect of information "improperly obtained".

information about himself. If, as a result of X's breach of confidence, Y suffers distress but no actual pecuniary damage, and then dies, his personal representatives will have no basis for taking or continuing proceedings for an injunction, as opposed to damages,⁴⁶⁵ against X. On the other hand, if X is a manufacturer who in breach of confidence makes use of information about an invention given to him by Y, who subsequently dies, the latter's personal representatives may bring, or continue, proceedings to protect the confidentiality of the information, which is in effect an asset of the deceased's estate.

4.107 Death in relation to breach of confidence has also to be considered in two situations arising outside the scope of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934. First, there is the case where a person subject to an obligation of confidence dies without committing any breach of confidence. According to the general principles of the action,⁴⁶⁶ any third party, with actual or constructive knowledge of the confidential character of the information, will not be relieved of his responsibility to keep it confidential merely because the person who originally owed the duty of confidence has died. Thus, personal representatives of a doctor who on his death have come into possession of the doctor's confidential files on his patients are not free to publish them merely because of the doctor's death. Secondly, there is the situation in which a person who has imparted information in confidence to another dies before any breach of confidence has taken place. His personal representatives will have a right of action for any subsequent breach only if the information is of a "quasi-proprietary" character—such as information relating to "know-how"—which can be regarded as an asset of the deceased's estate. The personal representatives of a deceased patient cannot employ the action for breach of confidence to protect the relations or friends of the deceased from distress resulting from the doctor's disclosure of his deceased patient's confidences.

K. Trial of the action for breach of confidence

1. Mode of trial

4.108 The effect of Order 33, rules 2, 4 and 5 of the Rules of the Supreme Court is to confer discretion on the court to determine the mode of trial of any cause or matter, or any question or issue arising therein, and in particular, subject to section 6(1) of the Administration of Justice Act 1933,⁴⁶⁷ whether the trial is to be by a judge alone or by a judge with a jury. In practice, however, breach of confidence actions are tried without a jury.

⁴⁶⁵The general question whether damages, as distinguished from an injunction, may ever be awarded for mental distress has been considered at paras. 4.79–4.82 above.

⁴⁶⁶See as regards the position of third parties paras. 4.11–4.12 above.

⁴⁶⁷The Administration of Justice (Miscellaneous Provisions) Act 1933, s. 6(1) provides that, except for certain specific categories of action (including defamation but not breach of confidence), an order for trial with a jury in the Queen's Bench Division lies in the discretion of the court. In *Williams v. Beesley* [1973] 1 W.L.R. 1295 (H.L.), Lord Diplock referred (at p. 1298) to the "usual rule that cases, other than those in which a prima facie right to trial by jury is conferred by statute [into which exceptional category breach of confidence actions do not fall], should be tried by judge alone." And the Supreme Court Act 1981, s. 69(3), is to replace s. 6(1) of the 1933 Act (as from 1 January 1982) with the rule that actions in the Queen's Bench Division should (apart from the exceptional categories) be tried without a jury unless the court in its discretion orders otherwise.

2. Court of trial

4.109 Under the present practice actions for breach of confidence are commenced in the High Court and are commonly brought in the Chancery Division. In so far as the obligation of confidence is based on contract, the county court would have jurisdiction under section 39 of the County Courts Act 1959 if the damages claimed by reason of the breach did not exceed the current limit.⁴⁶⁸ But although under section 74 of that Act the county court has general ancillary jurisdiction, the plaintiff cannot obtain a declaration or an injunction alone; such relief must be ancillary to a money claim.⁴⁶⁹ As it frequently happens that the only remedy sought by the plaintiff in a breach of confidence action is an injunction or a declaration, this theoretical jurisdiction of the county court is at present of limited practical importance.⁴⁷⁰

3. The protection of the secrecy of the trial

4.110 It is obvious that in a case concerning breach of confidence publication in open court of the information which the plaintiff is seeking to keep confidential would defeat the very purpose of the proceedings. In *Badische Anilin und Soda Fabrik v. Levinstein*,⁴⁷¹ which was a patent case, the defendant was allowed to give evidence *in camera* of what he alleged to be his own secret process; and in *Scott v. Scott*⁴⁷² the House of Lords laid down the general principles applicable to hearings *in camera*. Thus Viscount Haldane L.C., in reference to litigation as to a secret process, said:

“[In such a case], where the effect of publicity would be to destroy the subject matter . . . it may well be that justice could not be done at all if

⁴⁶⁸£2,000 under the County Courts Jurisdiction Order 1977, S.I. 1977, No. 600. This limit will be raised to £5,000 from 1 October 1981 under the County Courts Jurisdiction Order 1981, S.I. 1981, No. 1123.

⁴⁶⁹See *De Vries v. Smallridge* [1928] 1 K.B. 482. In *Hatt & Co. (Bath) Ltd. v. Pearce* [1978] 1 W.L.R. 885 a more flexible attitude to the jurisdiction of the county court was shown by the Court of Appeal, an injunction granted by the county court judge being upheld although the plaintiff's claim for damages was limited to £1. Contrast the position under s. 14 of the Administration of Justice Act 1977 which gives the county court the same jurisdiction (subject to financial limits) as the High Court to grant an injunction or declaration in respect of, or relating to, any land, or the possession, occupation, use or enjoyment of any land, the net annual value for rating of which does not exceed the current limit on jurisdiction under s. 51 of the County Courts Act 1959.

⁴⁷⁰The power to award damages in lieu of, or in addition to, an injunction (originally introduced by Lord Cairns' Act: see para. 4.99 and n. 451 above) has not in terms been extended to county courts. However s. 74(1)(a) of the County Courts Act 1959 provides that, in respect of any case falling within the jurisdiction of a county court, the latter should grant relief to the same extent as the High Court. It would seem, therefore, that the statutory power to award damages in lieu of, or in addition to, an injunction is available to a county court in those cases where that court has jurisdiction to grant an injunction and that, at least in theory, there is no limit as to the amount of damages that may be awarded when that power is exercised. So far as an order for an account is concerned, county courts have jurisdiction in that regard but a claim for an account in respect of an action based on contract or tort is apparently subject to the limit of county court jurisdiction applicable to those heads (as the relevant rule—namely C.C.R. O.7, r. 2—seems to assume).

⁴⁷¹(1883) 24 Ch.D. 156.

⁴⁷²[1913] A.C. 417. The case concerned the hearing *in camera* of nullity proceedings which was held by the House of Lords not to be justified on the principles which they laid down. See now, however, s. 48(2) of the Matrimonial Causes Act 1973 (evidence of sexual incapacity in nullity proceedings to be heard *in camera* unless in the interests of justice the judge otherwise orders).

it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield."⁴⁷³

And in language which covered both trade secrets and private correspondence, Lord Halsbury said:

"It would be the height of absurdity as well as of injustice to allow a trial at law to protect [trade secrets or private correspondence] to be made the instrument of destroying the very thing it was intended to protect."⁴⁷⁴

4.111 Information which is openly revealed during a trial at which, in accordance with the general rule, the public may be present would appear in principle automatically to come within the public domain⁴⁷⁵ and so be incapable thenceforth of being the subject-matter of an obligation of confidence. But what is the position, so far as proceedings for breach of confidence are concerned,⁴⁷⁶ if someone discloses or uses out of court information which he has obtained in the course of a trial *in camera* or in chambers? Two possible situations must be distinguished. First, the information in question may before the trial took place have been subject to an obligation of confidence. In such a case the information does not cease to be subject to that obligation by reason only of the proceedings, which, being *in camera* or in chambers, will not have put it into the public domain. Any person therefore who knows or ought to know that the information is subject to an obligation of confidence and discloses or uses the information out of court will run the risk of being sued according to the general principles of the action.⁴⁷⁷ Secondly, a person may disclose or use out of court information revealed in the course of proceedings *in camera* or in chambers which was not previously subject to an obligation of confidence. There does not appear to be any authority covering this situation. In principle the position of a person who, being admitted to *in camera* proceedings or proceedings in chambers, discloses or uses information obtained in the course of those proceedings bears some analogy to that of the recipient of information under an order for discovery.⁴⁷⁸

PART V

THE MAIN UNCERTAINTIES AND POSSIBLE INADEQUACIES OF THE PRESENT LAW

5.1 In the light of our survey of the present law in Part IV above we now consider its main uncertainties and inadequacies, having regard to the comments received on our consultation on Working Paper No. 58. We should emphasise that we discuss in this Part only what appear to us to be major problems of the present law, concluding with a subject to which we have not

⁴⁷³*Ibid.*, 437-438.

⁴⁷⁴*Ibid.*, 443.

⁴⁷⁵See paras. 4.15-4.17 above.

⁴⁷⁶As distinguished from any proceedings which may be brought for contempt of court.

⁴⁷⁷See paras. 4.11-4.12 above.

⁴⁷⁸See *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.* [1975] Q.B. 613, referred to in para. 4.5 above.

so far referred, namely the position of information supplied to government and other public authorities.⁴⁷⁹ Other matters, which may call for some adjustment or reform, are dealt with at their appropriate place in Part VI in which we set out systematically our comprehensive conclusions and recommendations.

A. Uncertainty as to the fundamental principles on which the action for breach of confidence is based

5.2 We have described in Part III above how the action for breach of confidence emerged as an equitable remedy. But in the course of its development there has in the words of one writer been "great conceptual confusion"⁴⁸⁰ as to the basis on which protection is to be given to confidential information. As we said in Working Paper No. 58:⁴⁸¹

"Since *Saltman*'s case,⁴⁸² it has become clear that it is not based solely on contract and the modern tendency is to rely, in the main, on equitable principles to found the jurisdiction; but the courts do not hesitate on occasion to develop particular aspects of the action by reference to other branches of the law, such as the law of property with its remedies of actions for conversion and trespass to goods. The question of the basis of the jurisdiction is not any longer a matter of particular importance in establishing the existence of the jurisdiction; the cases themselves provide ample authority. But it remains a vital question in forecasting the future development of the law. No one can say with any assurance how a particular issue will be decided in the future if it is not certain, for instance, whether the courts will apply equitable or tort principles."⁴⁸³

The basis of the new statutory action for breach of confidence which we recommend in Part VI is explained in paragraphs 6.1–6.2 below.

B. Problems relating to the initial creation of an obligation of confidence

1. Should the creation of an obligation of confidence depend on the understanding of a reasonable recipient?

5.3 In paragraph 4.4 above, we referred to the judgment of Megarry J.

⁴⁷⁹See paras. 5.23–5.32 below.

⁴⁸⁰These words are taken from the passage in Gareth Jones, "Restitution of Benefits obtained in Breach of Another's Confidence", (1970) 86 L.Q.R. 463, cited in n. 35 above.

⁴⁸¹Para. 40.

⁴⁸²*Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203; [1963] 2 All E.R. 413. See paras. 3.10–3.11 above.

⁴⁸³See, for example, the question discussed in para. 4.12 above as to the liability of a person who gives value for information which he neither knew nor ought to have known was subject to an obligation of confidence. If the information is to be treated as a form of equitable property it might be thought that he should be free to continue to use the information, even if later he is informed of the existence of that obligation. On the other hand, if an analogy were to be drawn from the tortious misuse of goods, he might be liable for the use of the information without actual or constructive knowledge of its confidential character and whether or not he had paid for it. Another example is whether there is an independent right to damages for loss suffered by reason of a breach of confidence which would follow if the breach were to be treated as a tort but which is not clearly established in the present law (see paras. 4.75–4.77 above).

in *Coco v. A. N. Clark (Engineers) Ltd.*⁴⁸⁴ in which he said:

“It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence”.

On the assumption that the test formulated in *Coco's* case represents the present law, a number of commentators on Working Paper No. 58 (in particular The Law Society, the Chartered Institute of Patent Agents, the Birmingham Chamber of Industry, the National Coal Board and the Trade Marks, Patents and Designs Federation) were concerned that firms receiving unsolicited information, which is marked “confidential” or which it is alleged should from its nature and the circumstances of its transmission be treated as confidential, may find it very difficult to rebut allegations of plagiarism, if in fact they exploit ideas in the same area as the unsolicited information. The difficulty, it is said, may be all the greater since in the light of *Seager v. Copydex Ltd.*⁴⁸⁵ the courts will hold defendants liable even if they plagiarised unconsciously. Furthermore, it has been pointed out that in order to avoid the risk of an action for breach of confidence, the recipients of unsolicited information, which they already possess or can obtain from other sources, are sometimes forced to take elaborate preventive measures. The Trade Marks, Patents and Designs Federation made enquiries of seven of its larger members regarding the practices they had adopted for dealing with unsolicited information; they also ascertained through the Confederation of British Industry, the Institute of Practitioners in Advertising and the Incorporated Society of British Advertisers how advertising agents dealt with unsolicited copy. The results of these enquiries suggest that at least the larger firms take considerable precautions to prevent any obligation of confidence arising contrary to their intention.⁴⁸⁶ Some firms require the person submitting the information to sign a form recognising that no obligation of confidence exists in respect of the information, the person submitting the information being limited to such rights (if any) as he may have in respect of any patent or registered design protection for which he may have applied. Other firms are content to ensure that the person submitting unsolicited information appreciates that the recipients will remain free to exploit the ideas involved if they have already been or are in the future independently discovered by the recipients, or if they are in the public domain.

5.4 We may sum up the problem relating to the creation of an initial obligation of confidence in three questions:

⁴⁸⁴[1969] R.P.C. 41, 48.

⁴⁸⁵[1967] R.P.C. 349; [1967] 1 W.L.R. 923. See para. 4.3 above.

⁴⁸⁶The Law Society in their comments on Working Paper No. 58 pointed out that in the U.S.A. the precautions taken to avoid any obligation of confidence arising in respect of unsolicited information are frequently even more elaborate. Apart from requiring the person submitting the information to sign a document repudiating any obligation of confidence regarding it, the recipient firm will often arrange for all unsolicited information to be sent in the first instance to a non-technical department where it will remain until the sender has relinquished any claim of confidence regarding it.

- (1) Is the test for the initial creation of an obligation of confidence formulated by Megarry J. in *Coco's* case satisfactory?
- (2) In particular, is it likely to cause undue hardship to the recipient of unsolicited information?
- (3) Would it be preferable to require that the recipient of information becomes subject to an obligation of confidence in regard to it only if, realising that the information is intended to be treated as confidential, he undertakes, expressly or by inference, so to treat it?⁴⁸⁷

We give our answers to these questions in paragraphs 6.6–6.14 below.

2. The lack of protection of the confidentiality of information improperly taken by another

5.5 It is a glaring inadequacy of the present law that, as we have already explained,⁴⁸⁸ the confidentiality of information improperly obtained, rather than confidentially entrusted by one person to another, may be unprotected. It is to this inadequacy that the second limb of our terms of reference⁴⁸⁹ is specifically directed, in requiring us:

“to consider and advise what remedies, if any, should be provided in the law of England and Wales for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained and in what circumstances such remedies should be available.”

5.6 It is not difficult to reach the conclusion that, for example, a person who steals a document containing information should be not only criminally liable for the theft of the document but should also be under an obligation to keep the information confidential, at least to the extent that he would have been so liable if the information had in fact been entrusted to him in confidence. The real difficulty is to decide to what methods of obtaining information falling short of crime such protection of confidentiality should be extended. Should it, for example, extend to the eavesdropper on a conversation at another table in a restaurant or in a train? And if not, how can those kinds of unauthorised methods of obtaining information which ought to give rise to an obligation of confidence (whether or not they involve the commission of a criminal offence) be distinguished from those which ought not? We discuss this in paragraphs 6.28–6.46 below.

C. Doubts as to the position of the person who has acquired information without actual or constructive knowledge of its confidential character

5.7 We have explained⁴⁹⁰ that a person who acquires information without actual or constructive knowledge of its confidential character is free to disclose or use it, but that once he is informed of an obligation of confidence affecting

⁴⁸⁷This approach was suggested in Working Paper No. 58, para. 70(i). It was widely welcomed by commentators on the paper.

⁴⁸⁸See paras. 4.7–4.10 above.

⁴⁸⁹See para. 1.1 above.

⁴⁹⁰See paras. 4.11–4.12 above.

it he becomes subject to that obligation. There remains, however, some doubt as to whether the innocent acquirer of the information in the latter case who gave value for it remains free to disclose or use it even after he has been informed that it is subject to an obligation of confidence.

5.8 Whether or not the innocent acquirer of information has paid for it, there is a further problem affecting his position to which the law at present does not provide any very satisfactory solution. Suppose that the acquirer of the information, while still ignorant of its confidential character, has incurred substantial expenditure, such as by paying for the information or by investing in special plant or machinery to exploit it, or in both ways. If the original holder of the information, having informed the innocent acquirer that the information is subject to an obligation of confidence, is to be granted an injunction, should the court be able to require him to make some allowance to the acquirer for his wasted outlay, at least to the extent of what is fair and equitable between these "competing innocents"? And where an injunction is not granted but in lieu thereof the acquirer is required to pay a certain sum to the plaintiff,⁴⁹¹ should the court in calculating that sum be able to take into account what the acquirer has already spent before he realised that the information was subject to an obligation of confidence? There is also a corresponding problem whether in certain circumstances allowance should be made for the wasted expenditure incurred by a plaintiff who fails to obtain an injunction against the acquirer and is only awarded damages in lieu thereof. We advert more fully to these questions in paragraphs 5.21 and 5.22 below in discussing the limitations of the present remedies available for breach of confidence.

D. Should the category of persons who can sue for breach of confidence be widened?

5.9 At least since *Fraser v. Evans*⁴⁹² it is clear that the person who is able to sue for breach of confidence is the one who initially gave the information in confidence, or on whose behalf the information was received,⁴⁹³ and that the mere fact that a person has an interest in the secrecy of information does not of itself give that person a right to sue. The question arises whether in this respect the present law is inadequate. In Working Paper No. 58⁴⁹⁴ we illustrated this question as follows:

"Suppose that a newspaper commissioned a journalist to write a candid assessment of a man's life on the understanding that it would be kept confidential until after the man's death and that the journalist furnished an article to the newspaper exposing details of the man's life which were true but likely to cause him distress, or even pecuniary loss; if the article was in fact published by the newspaper before the man's death in breach of their duty of confidence to the journalist, should the man also have a

⁴⁹¹See paras. 4.99–4.101 above.

⁴⁹²[1969] 1 Q.B. 349. See para. 4.13 above.

⁴⁹³As when an employer does not actually give information in confidence to his employee but requires that employee to treat as confidential certain information coming to the employee in the course of his work.

⁴⁹⁴Para. 75.

right of action against the newspaper based on their breach of confidence? It is arguable that in this situation the wrong to the man is far greater than that to the journalist and that he should be entitled to recover damages accordingly.”

However, we remain of the view that, as we suggested in Working Paper No. 58, the subject of the premature obituary:

“has a complaint not because his confidence has been abused but because his privacy has been infringed and . . . to admit an action by him for breach of confidence would amount to using the law of confidence merely as a peg on which to hang a right of privacy in his favour.”⁴⁹⁵

E. The information capable of protection by the action for breach of confidence

1. Information in the public domain

5.10 In the light of the decision in *Schering Chemicals Ltd. v. Falkman Ltd.*⁴⁹⁶ it is an important question whether it is satisfactory that an obligation of confidence (although not arising from contract) should be, or should continue to be, binding notwithstanding that the information to which it relates was already in, or subsequently comes into, the public domain. We examine this issue in paragraph 6.67 below.

5.11 We have given⁴⁹⁷ grounds for believing that the so-called “spring-board doctrine”, when considered in the light of the full judgment in the case⁴⁹⁸ in which it was originally formulated, is a qualification (although only to a limited and legitimate extent) of the principle of the law of breach of confidence that information to enjoy protection must not be in the public domain. Nevertheless the scope of the doctrine remains to some extent obscure and would benefit by clarification.

5.12 There is a further questionable aspect of the principle that information which is in the public domain may not be capable of protection by the action for breach of confidence. Personal information may, for example, have been given by a patient in confidence to his doctor. The latter in breach of that confidence reveals the information to a newspaper which, with knowledge of its confidential origin, nevertheless publishes it. The newspaper may be a local one with a small circulation, but once the information is thus revealed and is regarded as thereby having been put into the public domain the information may be republished by a national newspaper, with the result that the pecuniary loss or distress (or risk of it) to the plaintiff is greatly increased. If the latter is denied protection in damages or by way of an injunction against the national newspaper because the information is now in the public domain, many people might regard it as unjust to him. Nevertheless, that newspaper

⁴⁹⁵ *Ibid.* We have explained this distinction more fully in para. 2.4 above.

⁴⁹⁶ [1981] 2 W.L.R. 848. See paras. 4.21–4.23 above.

⁴⁹⁷ See paras. 4.24–4.31 and, in particular, para. 4.31 above.

⁴⁹⁸ *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.* [1967] R.P.C. 375. See paras. 4.24–4.26 above.

ought not to be liable for breach of confidence, since it has done no more than disseminate information which was already in the public domain and accordingly no longer subject to an obligation of confidence. The patient's real complaint is based, not on considerations of confidentiality, but on the ground that his medical history is a private matter that should be protected by a right of privacy.⁴⁹⁹

5.13 Our recommendations regarding the scope of the public domain are explained in paragraphs 6.67-6.74 below.

2. The effect of considerations of the public interest on information alleged to be subject to an obligation of confidence

5.14 In paragraph 4.44 above we have drawn attention to the potential importance of the judgment of Lord Widgery C.J. in *Attorney-General v. Jonathan Cape Ltd.*⁵⁰⁰ for the future development of the law. We said that the limitations on freedom of speech and the exploitation of ideas in the commercial and industrial sphere which the action for breach of confidence involves might be more acceptable if it were clear that, in the case of all kinds of information (and not merely the particular kind with which *Cape's* case was concerned⁵⁰¹), the public interest in the protection of confidence had to be balanced against the public interest in the disclosure or use of the information in question. At present it is doubtful, particularly having regard to the observations of the majority of the Law Lords in *British Steel Corporation v. Granada Television Ltd.*,⁵⁰² whether (1) a public interest may be found in the disclosure of information to be weighed against the public interest in the protection of confidence, without any limitation as to the kind of information in question, or (2) a public interest in disclosure is capable of existing only in respect of information revealing "iniquity" in a broad sense. The general application of the test formulated in *Cape's* case would go a long way towards solving a problem which much concerned us in Working Paper No. 58,⁵⁰³ namely that the action for breach of confidence, particularly in the commercial

⁴⁹⁹As to the distinction between privacy and confidence, see paras. 2.1-2.7 above.

⁵⁰⁰[1976] Q.B. 752.

⁵⁰¹I.e. Cabinet discussions, advice to Ministers by civil servants and observations by Ministers on the latter's capacity and suitability for specific appointments.

⁵⁰²[1980] 3 W.L.R. 774. See paras. 4.46-4.48 above.

⁵⁰³In paras. 50-51 of Working Paper No. 58 we said:

"It is a paradox of the present law of breach of confidence that the best way to protect information may be to reveal it voluntarily in confidence to the very person from whom protection is desired, thereby putting that person under an obligation of confidence not to use the information or reveal it to others. The consequences of this are far reaching, particularly if the information is of a patentable nature. There is little doubt that an inventor who wishes to protect his invention has today a choice between using the patent law or the law of breach of confidence for the purpose and that if his invention is in a highly specialised field where the persons able to make use of his idea are readily identifiable an obligation of confidence on their part may give him better, or at any rate longer lasting, protection than he would get from a patent. . . . Sometimes it is possible to combine the advantages of both laws. Thus an inventor may, by taking out a patent on his idea, obtain protection against the world; and by arranging for the persons who are most likely to be able to use it to receive additional details essential to the exploitation of his invention, he may ensure that his protection against them continues long after the statutory time limits under the patent laws have run out, and perhaps for ever."

and industrial spheres, might be used to restrict the free circulation of ideas whose protection in the analogous field of patents is subject to a time-limit of twenty years and to the possibility of compulsory licensing.

5.15 We examine the role of the public interest in actions for breach of confidence in paragraphs 6.77–6.84 below.

F. The remedies for breach of confidence

5.16 In paragraphs 4.73–4.104 above we have described the existing remedies for breach of confidence and emphasised that they have been largely moulded by the equitable origins of the action which, owing to the discretionary character of all equitable remedies, has given the remedies for breach of confidence a valuable measure of flexibility. On the other hand the requirements of the action as it has now developed have resulted in some uncertainties or inadequacies in those remedies.

5.17 We think that there are three main problem areas so far as the remedies for a past breach of confidence are concerned. First, there is the question whether there is or ought to be an independent right to damages for a breach of confidence which has actually taken place, as distinguished from an award of damages in substitution for an injunction against future breaches.⁵⁰⁴ Secondly, if damages can be awarded for a past breach of confidence, the question arises whether they ought to be recoverable for any mental distress which has resulted from a wrongful disclosure of information.⁵⁰⁵ Thirdly, there is the question of the extent to which damages for a past breach of confidence, if recoverable at all, should ever include an “exemplary” or “punitive” element.⁵⁰⁶

5.18 So far as remedies against a feared future breach of confidence are concerned, there are two main problem areas. The first relates to the interlocutory injunction, which is of great importance in the action for breach of confidence since the grant or refusal of an interlocutory injunction in practice frequently puts an end to the proceedings. The central question is whether the principles relating to interlocutory injunctions laid down by the House of Lords in the *Cyanamid* case,⁵⁰⁷ as explained in later cases,⁵⁰⁸ are satisfactory when applied to breach of confidence actions or whether they require, as in defamation,⁵⁰⁹ to be qualified in respect of breach of confidence by special rules.

5.19 The second problem area in respect of remedies against a feared future breach of confidence concerns the nature and scope of an award of damages in lieu of an injunction, as in *Seger v. Copydex Ltd. (No. 2)*.⁵¹⁰ This

⁵⁰⁴See paras. 4.75–4.77 above.

⁵⁰⁵See paras. 4.79–4.82 above.

⁵⁰⁶See paras. 4.83–4.85 above.

⁵⁰⁷[1975] A.C. 396. See paras. 4.88–4.90 above.

⁵⁰⁸See paras. 4.91–4.98 above.

⁵⁰⁹See para. 4.94 above.

⁵¹⁰[1969] R.P.C. 250; [1969] 1 W.L.R. 809. See para. 4.101 above.

is a valuable discretionary remedy where the court decides that an injunction would in the circumstances be inexpedient. The question which arises is whether this remedy could be usefully developed and refined.

5.20 We have cited Lord Denning M.R. in *Seager v. Copydex Ltd. (No. 2)*⁵¹¹ to the effect that where the court makes an award of damages in lieu of an injunction the defendant is henceforward to be treated as if he had purchased the "property" in the information, "so far as there is property in it". But, as Lord Denning recognises, property in confidential information is only analogous to, rather than identical with, physical property, and a somewhat more flexible remedy seems to be needed to take account of the peculiar character of information. For example, although a defendant may be allowed to exploit information originally held by the plaintiff, the latter is not thereby actually deprived of that information. It may or may not be appropriate in the circumstances for the plaintiff to retain the right to exploit it for his advantage or to be free to pass it on to others. And even where the defendant gains freedom to exploit the plaintiff's confidential information against payment of a certain sum of money, it does not necessarily follow that he should have the right to pass the information on to others for exploitation. Again, better justice might be done between the parties by limiting the period during which the defendant is to be allowed to use the information against payment of a royalty. This raises the further question whether the courts should be given the power, which, as Lord Denning M.R. pointed out in *Seager v. Copydex Ltd. (No. 2)*,⁵¹² they do not now possess, to order a royalty to be paid by way of compensation.

5.21 Another sphere in which it is arguable that the power of the court to award damages in lieu of an injunction might be usefully developed relates to circumstances in which a person has acquired information without actual or constructive knowledge of an obligation of confidence to which it is already subject. We have explained that he is bound by that obligation immediately he acquires such knowledge, although there is some doubt as to whether he is so bound if he innocently acquired the information for value.⁵¹³ We have also raised the question⁵¹⁴ whether the innocent acquirer of information against whom an injunction is subsequently granted should be compensated for expenditure incurred before he knew or ought to have known of its confidential character; and further, whether an innocent acquirer who is required to pay damages in lieu of an injunction should be given credit for expenditure incurred before he had actual or constructive knowledge of the obligation of confidence. Should the remedies available for breach of confidence be sufficiently flexible to take these factors into account?

5.22 It is not only the defendant who might benefit from an extension of the court's equitable powers of adjustment. Suppose that an injunction is not granted but the defendant is ordered to pay damages in lieu of an injunction. Such damages may, according to the nature of the information, be either the

⁵¹¹ *Ibid.*, 256 and 813 respectively. See para. 4.101 above.

⁵¹² *Ibid.* See the concluding words of the quotation in para. 4.78 above.

⁵¹³ See paras. 4.11-4.12 above.

⁵¹⁴ See para. 5.8 above.

equivalent of the fee a competent consultant would charge for providing the information or its market value calculated on the basis of a capitalised royalty.⁵¹⁵ The plaintiff, however, may have himself incurred expenditure in exploiting the information which will be wasted if he cannot obtain an injunction and he will not be recouped for this expenditure simply by receiving the value of the information. Of course the fact that the plaintiff has already incurred such expenditure may in the circumstances be a reason for the court's granting an injunction instead of awarding damages. Where, however, for other reasons⁵¹⁶ the court declines to grant an injunction and orders the defendant to pay a sum of money to the plaintiff, the court does not appear to have power under the present law to include in such sum an allowance for the plaintiff's wasted expenditure.

G. Information supplied to governmental and other public authorities

5.23 The position of information supplied to governmental and public authorities was not specifically dealt with in Working Paper No. 58. In the light of comments made in the course of our consultation, however, we now think it requires to be separately considered. The fate of information supplied in confidence to public authorities is a matter of concern for two reasons. In the first place there is an obvious possibility that the information may be misused for personal gain by an individual official who has access to it. Secondly, whether the information is misused in this way or not, there is a risk in the absence of proper safeguards that it will find its way back into the private sector and in due course reach the original informant's principal competitors. In this situation it is not an answer to point to the availability of criminal sanctions to punish corrupt or careless officials. The crucial question, from the point of view of the original informant, is whether adequate civil remedies exist to protect the secrecy of his information against others in the private sector.

5.24 The legal protection of information in the hands of public authorities was considered by the Franks Committee,⁵¹⁷ although primarily where officers of such authorities were Crown servants.⁵¹⁸ The particular concern of the Committee was with the extent to which it would be desirable to protect information in the hands of the government by new criminal sanctions if section 2 of the Official Secrets Act 1911 were to be repealed. They emphasised, however, that their own recommendations with regard to information entrusted to the government were additional to any protection for

⁵¹⁵See para. 4.78 above.

⁵¹⁶One of the factors which persuaded the court not to grant an interlocutory injunction in *Potters-Ballotini v. Weston-Baker* [1977] R.P.C. 202 (see para. 4.95 above), namely that the defendants were already giving employment to a number of workmen, could be an even more serious consideration if in the period before trial the defendants had expanded their business.

⁵¹⁷See Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911 (1972), Cmnd. 5104.

⁵¹⁸The Committee said (*ibid.*, para. 206) that "it can be argued that, with a reform of the system by which official information is protected, an extension of the criminal law to the local government field should be considered", but that "this . . . would require a wide-ranging enquiry outside the scope of our Committee".

such information which was, or might be, made available by the action for breach of confidence, saying in this connection:

“A citizen or firm suffering damage as a result of an unauthorised disclosure of confidential information entrusted to the Government should certainly be entitled to pursue any civil remedies the law may provide, if he has the desire and the means to do so. We thus welcome the [Younger] Committee’s proposal that the Law Commissions should review the law on breach of confidence”.⁵¹⁹

5.25 Although the objectives of the Franks Committee were thus different from our own we think it will be helpful to cite from the Committee’s report some of the examples which strikingly illustrate the wide range of information in the possession of the government:

“193. Information about individuals in the possession of the Government includes the following:— that collected by the Registrars General in the course of the registration of births, marriages and deaths, some of which is kept confidential and is not available for public inspection or publication; census information and other similar information from surveys; information in tax returns; information acquired by social security offices in the course of dealing with claims for benefit of all kinds; information about immigrants and those seeking naturalisation; information about prisoners and other criminals, or suspected criminals; information about those seeking the exercise of the Royal Prerogative of Mercy or complaining against the police; information about National Health Service patients; information about those holding, or considered for, judicial office, a great variety of other Crown or Government appointments and honours; the personal particulars of teachers; information about qualifications, job record, etc., given to the employment services; and a variety of other similar kinds of information.

194. Information about organisations in the possession of the Government includes the following:— information about industrial, commercial, agricultural and fishing undertakings of all kinds relating to such things as their financial and trading position; plans, policies, new projects and mergers; share of the market, pricing policies, imports and exports; wages, conditions of work and internal relations; and products and manufacturing processes. This information may come to the Government in statutory returns, e.g. under the legislation on taxation and on statistics of trade; and in connection with the administration of Customs and Excise, application for grants, for planning permission and for other permissions, and tenders for Government contracts. Apart from information of this kind, related directly to the execution of specific government functions, the Government also receives a considerable amount of information in the course of consultations with business and industry, which are intended to help the Government to formulate economic policy and to take specific decisions. Apart from the fact that this information is confidential, its publication or disclosure, e.g. to competitors, could in many instances be seriously damaging to the undertakings concerned.”

⁵¹⁹*Ibid.*, para. 199. See para. 1.2 of this report.

And dealing with the ways in which such information comes into the hands of the Government, the Committee go on to say in paragraph 195:

“Some is given in response to express statutory requirements, such as the requirements to fill in census forms and to make tax returns. Some is given by persons and firms making applications or claiming benefits of various kinds. Some is given, particularly by firms and undertakings, in the course of consultations of the kind mentioned in the previous paragraph. Some is provided by third parties making reports of various kinds, e.g. police or medical reports. Often factual information of this kind is inextricably mixed up with assessments and opinions, favourable and unfavourable.”

5.26 At the outset it should be emphasised that much information is given to public authorities on a voluntary basis. Where in the circumstances it is clear that the information is supplied in confidence, as for example where enquiries are made by a government department as to the suitability of a particular candidate for a public post, there seems no reason to believe that the government and the official concerned are not bound by an obligation of confidence to the same extent as a private person.⁵²⁰

5.27 Information in the possession of public authorities is, however, frequently obtained by them by or under statutory powers,⁵²¹ or is supplied to them under compulsion in the sense that, if the information were not given, the person failing to supply it would be either unable⁵²² or unlikely⁵²³ to obtain some benefit or permission provided by or under statute. In such circumstances it might be argued that no obligation of confidence binding on the recipient of the information can arise. It might be difficult to assert that the giver of the information would never have supplied it without an express or implied acceptance by the recipient of an obligation of confidence. Nor is it certain that the application of Megarry J.'s test in the *Coco* case⁵²⁴ of the reasonable man (or as we should say here the reasonable official) would suggest that the recipient ought to have realised that the information was being given in confidence. He might not unreasonably say that all he knew was that the information was being given because of the sanctions attaching to refusal to give it or because the giver wished to obtain the statutory benefit in question.

5.28 It is true that in many cases where information is supplied by or under statutory powers it is a specific criminal offence (apart from any criminal liability under the Official Secrets Act 1911) to disclose the information so

⁵²⁰This is subject to the provision (s. 21) of the Crown Proceedings Act 1947 which precludes the granting of an injunction against the Crown or against an officer of the Crown where the effect of an injunction would be to give relief against the Crown which could not have been obtained in proceedings against the Crown.

⁵²¹For example, under s. 8(1) of the Census Act 1920 it is an offence to refuse to give, or to give a false, answer to questions presented in regulations made under the Act.

⁵²²For example, s. 87(1) of the Road Traffic Act 1972 (as amended) provides that an applicant for a driving licence must make a declaration as to his freedom from certain physical disabilities.

⁵²³For example, an applicant for planning permission may think it advisable to supply to the planning authority much background information incidental to his application.

⁵²⁴See paras. 4.4 and 5.3-5.4 above.

obtained, except in certain circumstances which are described with varying degrees of particularity.⁵²⁵ In an Appendix to the Report of the Franks Committee⁵²⁶ 61 such statutes⁵²⁷ between 1920 (Census Act, section 8(2)) and 1971 (Highways Act, section 67(4)) are listed, although the list does not claim to be comprehensive.⁵²⁸ It was suggested to us by one commentator on Working Paper No. 58 that in view of these special provisions against disclosure with their attaching criminal sanctions, and the additional possibility that in some cases at least⁵²⁹ the courts might spell out a civil remedy in damages, any action for breach of confidence should be excluded. We have, however, in an earlier report⁵³⁰ drawn attention to the difficulty of predicting with any certainty whether in reference to a particular statutory duty the courts will decide that a civil remedy is available. "The courts" we said "have endeavoured to isolate the factors by reference to which they decide whether civil liability arises, but it is difficult to ascertain from the cases what measure of authority they enjoy and what is the respective weight to be attached to them".⁵³¹ It is of course open to Parliament to state in terms that a breach of a particular statutory duty is to give rise to a civil action, but this is

⁵²⁵In Appendix V, para. 5, of the Report of the Franks Committee (see n. 517 above) the circumstances are summarised as follows: "One group of statutes permit communications by an officer in the performance of his duty. A few provisions allow communication of the information with the authority of the Minister or in accordance with Ministerial directions. Most of the rest use a more complicated formula, which sets out in greater detail the circumstances in which disclosure is permitted, and which thus restricts the discretion of the authority concerned to disclose the information. For instance, some provisions allow disclosure to be made only in the form of statistics which reveal nothing about particular individuals or undertakings. Some of these provisions, however, which contain strict limitations on disclosure, also allow information to be disclosed with the consent of the person to whom it relates".

⁵²⁶(1972) Cmnd. 5104, Appendix V, para. 8.

⁵²⁷One statute (Post Office Act 1969, s. 65) created an offence of disclosure in respect of information not given under legal compulsion. The 1969 Act, s. 65, has now been repealed and replaced by the British Telecommunications Act 1981, s. 50.

⁵²⁸(1972) Cmnd. 5104, Appendix V, para. 7(c). Another example would be s. 41 of the Restrictive Trade Practices Act 1976 (as slightly amended) which makes it an offence to disclose information concerning a particular business which has been obtained under or by virtue of the provisions of that Act without the consent of the person for the time being carrying on that business, except for certain specified purposes (such as for those of legal proceedings under the Act).

⁵²⁹See, for example, A. L. Smith L.J. in *Groves v. Lord Wimborne* [1898] 2 Q.B. 402, 407 expressing the view that a cause of action is to be implied "unless it appears from the whole 'purview' of the Act... that it was the intention of the Legislature that the only remedy for breach of the statutory duty should be by proceeding for the fine". It is also sometimes said that the test is whether the Act was passed for the benefit of a defined class of persons, in which event it should be inferred that a civil remedy was intended, or for the protection of the public at large when a civil remedy in favour of affected individuals should not be read into the statute: see e.g. Birkett L.J. in *Solomons v. R. Gertzenstein Ltd.* [1954] 2 Q.B. 243, 260-261.

⁵³⁰See *The Interpretation of Statutes*, (1969) Law Com. No. 21, para. 38.

⁵³¹We refer in particular to the difficulty of reconciling the decision of the House of Lords in *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398 with the *ratio* of such cases as those mentioned in n. 529 above. See also Lord Denning M.R. in *Ex parte Island Records* [1978] Ch. 122, 134-135: "The courts have discussed on many occasions whether or not the breach of a statute (which prescribes only criminal penalties) also gives a civil action for damages... The truth is that in many of these statutes the legislature has left the point open. It has ignored the plea of Lord du Parcq in *Cutler's* case [1949] A.C. 398, 410 [that it should expressly state whether or not there is a right of civil action]. So it has left the courts with a guess-work puzzle. The dividing line between the pro-cases and the contra-cases is so blurred and so ill-defined that you might as well toss a coin to decide it".

comparatively unusual and, in regard to breach of a statutory duty not to disclose information, very rare.⁵³²

5.29 Apart from the undesirability of relying on a principle of such uncertain application, the civil action for breach of a statutory duty not to disclose information would be a very different remedy from the action for breach of confidence. In the first place, the former would not, like the latter,⁵³³ give a remedy to the person whose confidence has been abused but rather to the person who has suffered damage as a result of the disclosure; and the two are not necessarily the same. Secondly, the action for breach of confidence extends in certain circumstances⁵³⁴ to cover those into whose hands the information has come, even though they were not involved in the original creation of a relationship of confidence, whereas a civil remedy for breach of statutory duty extends only to those who are made subject to the duty. Thirdly, most statutory duties in respect of information relate only to the duty of non-disclosure,⁵³⁵ whereas the action for breach of confidence is more far-reaching and covers, for example, the use of information in breach of confidence, whether or not such use involves the disclosure of the information.

5.30 Where the disclosure of information constitutes an offence, it has been suggested that a further possible remedy may be available to an affected individual, apart from any civil right of action for breach of statutory duty. In *Ex parte Island Records*⁵³⁶ Lord Denning M.R. summarised the result of the decision of the House of Lords in *Gouriet v. Union of Post Office Workers*⁵³⁷ in the following terms:

“When a statute creates a criminal offence—prescribing a penalty for the breach of it but not giving any civil remedy—the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by damages. It must be left to the Attorney-General to bring an action, either of his own motion or at the instance of a member of the public who ‘relates’ the facts to him.

“But there is an exception to this rule in any case where the criminal act is not only an offence against the public at large, but also causes or threatens to cause special damage to a private individual. If a private individual can show that he has a private right which is being interfered with by the criminal act—thus causing or threatening to cause him special damage over and above the generality of the public—then he can come to the court as a private individual and ask that his private right be

⁵³²A fairly recent example of such a provision is s. 79(6) of the Control of Pollution Act 1974 which provides a civil remedy in respect of the duty under the Act not to disclose information obtained by a local authority under this section when it relates to trade secrets.

⁵³³See para. 4.13 above.

⁵³⁴See paras. 4.11–4.12 above.

⁵³⁵Thus, the Franks Committee pointed out ((1972), Cmnd. 5104, para. 204) that “A Crown servant who, contrary to his official duty, uses information obtained by him in the course of his work for his own financial advantage does not now commit an offence under section 2 [of the Official Secrets Act] or any other branch of the law”. They proposed (para. 205) offences under a new Official Information Act to cover this gap in the criminal law.

⁵³⁶[1978] Ch. 122.

⁵³⁷[1978] A.C. 435.

protected. . . .⁵³⁸ The court can, in those circumstances, grant an injunction to restrain the offender from continuing or repeating his criminal act. . . .

“The exception depends, however, on the private individual having a private right which he is entitled to have protected. . . .

“The question, therefore, becomes this: has the plaintiff a particular right which he is entitled to have protected?”⁵³⁹

Lord Denning, having cited a number of cases to illustrate the kind of rights which enjoyed this protection, went on to say:

“This principle is capable of extension so as to apply not only to rights of property or rights in the nature of it, but to other rights or interests, such as the right of a man to his good name and reputation: see *Argyll (Duchess) v. Argyll (Duke)* [1967] Ch. 302, 344”.⁵⁴⁰

On the particular facts of the *Island Records* case (which concerned a criminal offence under section 1 of the Dramatic and Musical Performers' Protection Act 1958 of making an unauthorised record of a live performance) Waller L.J. concurred with Lord Denning in the granting of an injunction to the plaintiffs. He did so, however, on the more restricted ground that the court had jurisdiction to grant an injunction in respect of special damage caused by a crime to a property interest, which the plaintiffs in this case had suffered, in so far as their record companies had an exclusive right under contract to the performance and their performers had lost royalties on the pirate records.⁵⁴¹ Shaw L.J., who dissented, thought that the interest of the plaintiffs was “too nebulous and amorphous to carry the aspect of a right susceptible of legal protection”.⁵⁴²

5.31 However, the suggestion made by the majority⁵⁴³ in the *Island Records* case that a civil remedy might be available to a private individual who has suffered special damage by reason of a criminal act, has now been rejected by the House of Lords in *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)*.⁵⁴⁴ Lord Diplock, in a speech with which the other Law Lords agreed,⁵⁴⁵ was unable to accept that Lord Denning had correctly stated the

⁵³⁸At this point Lord Denning referred to observations in *Gouriet's* case by Viscount Dilhorne ([1977] 3 W.L.R. 300, 324F); by Lord Diplock (*ibid.*, 331B-E); by Lord Edmund-Davies (*ibid.*, 337D and 343G); and by Lord Fraser of Tullybelton (*ibid.*, 348D). These references by Lord Denning appear in [1978] 3 W.L.R. 23, 30C; the relevant passage in [1978] Ch. 122, 135E would appear to contain inaccuracies.

⁵³⁹[1978] Ch. 122, 135-136. On the general question of injunctions and the criminal law see David Feldman, “Injunctions and the Criminal Law”, (1979) 42 M.L.R. 369.

⁵⁴⁰*Ibid.*, 137.

⁵⁴¹*Ibid.*, 144-145.

⁵⁴²*Ibid.*, 141.

⁵⁴³*Duchess of Argyll v. Duke of Argyll* (cited by Lord Denning in the passage quoted in para. 5.30 above) is in this connection of limited significance, as there was there held to be in any event an obligation of confidence in respect of marital communications breach of which, on the ordinary principles of the action for breach of confidence, gives grounds for an injunction. See para. 4.2 above.

⁵⁴⁴[1981] 3 W.L.R. 33.

⁵⁴⁵*Ibid.*, 40; see Lord Edmund-Davies, Lord Keith of Kinkel, Lord Scarman and Lord Bridge of Harwich (*ibid.*, 43).

law, and he pointed out that in the *Lonrho* case itself Lord Denning in the Court of Appeal appeared to have recognised that a civil remedy in favour of an individual arising from an offence under a statute or statutory order must depend on whether the legislative instrument was passed for the protection of such an interest.

5.32 To sum up the position of information supplied to public authorities:

- (a) It would seem that there is no reason why the principles governing the action for breach of confidence should not be applied in an appropriate case to information voluntarily given to a public authority.
- (b) Where the information is not given voluntarily, either because it was acquired by or under statute or to the extent that it was given in order to receive a benefit or permission by or under statutory powers, it is not clear that the courts would spell out an obligation of confidence on the part of the recipient.
- (c) In cases where there is a statutory duty not to disclose information, there is no civil remedy except in a very few cases, and even in those cases it does not serve the purposes which can be achieved by the action for breach of confidence.
- (d) The House of Lords has rejected a principle of somewhat uncertain scope, which was formulated in the Court of Appeal, whereby a person who has suffered or is threatened with special damage arising from the commission of a statutory crime might obtain an injunction against the offender. Even if this principle were applicable to offences relating to the disclosure of information by public authorities, it would be open to the same objections, in any comparison with an action for breach of confidence, as apply to a civil action for breach of statutory duty.

We return to the problem of information supplied to public authorities in paragraphs 6.47–6.51 below.

PART VI

CONCLUSIONS AND RECOMMENDATIONS

A. The general character of the recommendations

1. *Is there a need for statutory reformulation and reform of the law of breach of confidence?*

6.1 In the light of Parts IV and V of this report the first and the basic question which we have to consider is whether the law on breach of confidence should be left to be worked out by the courts, or whether the present state of the law is such as to make it desirable to provide at least a statutory framework laying down its main principles. In Working Paper No. 58 we suggested that there was a need for legislation to clarify and reform the law and this view was generally confirmed in our consultation, although the Senate of the Inns of Court and the Bar feared that legislation might introduce an element of rigidity into the law and would have preferred the law to be left

to the courts to mould to any set of circumstances which may arise in the future. We think, however, that the survey of the present law and of its uncertainties and inadequacies, which we have given in this report, shows that there are many problem areas which it would be most unsatisfactory, both in the interests of the individual and of the general structure of the law, to leave to be resolved (if at all) by piecemeal litigation. Furthermore, a number of these problems raise issues of policy on which the courts may rightly expect broad guidance from Parliament. In this connection we may refer, by way of example, to such matters as the dividing line between the protection of confidence and the protection of privacy;⁵⁴⁶ the extent to which information obtained from another by means which the latter has not authorised should be treated as if it had been obtained by the acquirer under an obligation of confidence;⁵⁴⁷ and the present limitations on the remedies available for breach of confidence, in particular where there has been a breach of confidence in respect of personal information giving rise to mental distress.⁵⁴⁸ We have therefore reached the conclusion that the present law on breach of confidence, whether it be based on principles of equity or of common law, should be abolished and replaced with a new statutory action for breach of confidence. However, we should emphasise that the legislative framework which we envisage would allow the courts wide scope in applying its principles to differing situations and changing social circumstances. Furthermore, the obligations of confidence arising under the new statutory action for breach of confidence would extend, as under the present law, to include such usual confidences as those arising between doctor and patient, between priest and parishioner, between married couples and in any case where an obligation of confidence can be inferred from the circumstances.⁵⁴⁹

2. *The general character of a new statutory action*

6.2 If it is accepted that the law on breach of confidence requires broad reformulation on a statutory basis, the next question is as to what should be the general character of the new remedy. The present status of the action for breach of confidence is not entirely clear, particularly with respect to the remedies which it offers.⁵⁵⁰ In Working Paper No. 58 we provisionally suggested that the time had come to base the action on tort and that a new tort of breach of a statutory duty should be created. This proposal was widely accepted on consultation and we recommend its adoption. Such a new tort of breach of a statutory duty of confidence will attract the normal incidents

⁵⁴⁶See paras. 2.1-2.7 above. See also Sir Robert Megarry V.-C. in *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, 380 where he referred to the desirability of defining and regulating by statute privacy and confidentiality "at least to some extent . . . , rather than [leaving them] for slow and expensive evolution in individual cases brought at the expense of litigants and the legal aid fund", although he admitted that "the difficulty of the subject matter is liable to discourage legislative zeal".

⁵⁴⁷See paras. 5.5-5.6 above. This was the question to which our attention was specifically directed by the second limb of our terms of reference (see para. 1.1 above).

⁵⁴⁸See paras. 5.16-5.22 and, in connection particularly with distress, paras. 4.79-4.82 and 5.17 above.

⁵⁴⁹See paras. 6.6-6.14 below.

⁵⁵⁰See paras. 5.16-5.22 above; see also paras. 4.75-4.77 above where the question whether the action for breach of confidence carries with it an independent right to damages is separately discussed.

attaching to any case of a breach of duty in tort and we do not consider it necessary to include detailed proposals on such general matters of tort law as causation, remoteness of damage, joint liability, capacity or vicarious liability.⁵⁵¹ We would emphasise, however, that the specific incidents of this statutory tort, recommended later in this report, will preserve (and in certain respects develop) the valuable element of flexibility which the action owes to the equitable influences which moulded its development. There is often, under the present law of breach of confidence, a close relationship with the law of contract in that, for example, the obligation of confidence on an employee will usually be imposed by his contract of employment. With one exception relating to the important factor of public interest which we discuss in paragraphs 6.77-6.84 below, we do not intend our proposals on the law of confidence to affect contractual rights to enforce contractual obligations of confidence.⁵⁵² We consider more fully in paragraphs 6.127-6.134 below the relationship between contractual obligations of confidence and the new statutory tort which we recommend.

3. The kinds of information to be covered by the new statutory action

6.3 In Working Paper No. 58 we proposed that, to take account of the differing requirements of an action for breach of confidence, relating on the one hand to commercial or technical information and on the other to personal information, the action should be divided into three categories, each with some common and some special incidents.⁵⁵³ This proposal was criticised on consultation as being unnecessarily complex. We think that this criticism was justified, and the new statutory tort which we now recommend has been designed to apply to every category of information. Adjustment of the single action to deal with its differing requirements when relating on the one hand to commercial or technical information and on the other to personal information can in our view be effected by flexibility of the available remedies.

4. Information obtained by certain reprehensible means

6.4 In Working Paper No. 58 we proposed that a specific tort, analogous to but separate from the general tort of breach of confidence, should be created to cover the protection of confidence in respect of information acquired by certain reprehensible means.⁵⁵⁴ In the light of our consultation we now

⁵⁵¹Certain specific defences in relation to our proposed new statutory cause of action are considered in paras. 6.91-6.103 below.

⁵⁵²Nor do we intend that our proposals should affect the law relating to proceedings for contempt of court; see, particularly, paras. 6.21-6.27 below.

⁵⁵³Paras 61-68. The three categories, specified in para. 63, were:

Category I—The disclosure or use of information which would, in whole or in part, deprive the person to whom a duty of confidence is owed of the opportunity himself to obtain pecuniary advantage by the publication or use of such information.

Category II—The disclosure of information relating to the person to whom a duty of confidence is owed (the plaintiff) which the person subject to the duty (the defendant) knew, or ought to have known, would cause the plaintiff pecuniary loss and which in fact causes the plaintiff pecuniary loss.

Category III—The disclosure of information relating to the person to whom a duty of confidence is owed which would be likely to cause distress to a reasonable person in his position and which in fact causes him distress.

⁵⁵⁴I.e. in response to the second limb of our terms of reference. See para. 1.1 above.

think that such liability where it arises⁵⁵⁵ can be satisfactorily included within the framework of a general statutory action for breach of confidence.

5. The basic policy: our recommendation

6.5 We recommend that the present action for breach of confidence should be abolished and replaced by a new statutory tort of breach of confidence, the incidents of which would be those attaching to any case of breach of a duty in tort except to the extent that they are specifically provided for in the ensuing recommendations.

B. The requirements of a statutory tort of breach of confidence

1. The initial creation of an obligation of confidence

(a) General Principles: undertakings of confidence

6.6 In paragraphs 5.3–5.4 above, we have referred, with particular reference to comments made on consultation, to the question whether, as some remarks of Megarry J. in *Coco's* case⁵⁵⁶ would seem to suggest, the test of when an initial obligation comes into existence is: would a reasonable man in the position of the recipient of the information have realised that it was given to him in confidence? We went on to ask, assuming that this accurately represented the present law, whether it would not be preferable to base the test on an express or inferred⁵⁵⁷ acceptance by the recipient of an obligation of confidence. We had particularly in mind the support given by various commentators to the latter test and the evidence which they produced of the elaborate precautions which, in view of the uncertainty as to when an obligation comes into existence, some recipients of information feel obliged to take in order to ensure that they are not subject to an obligation of confidence in respect of information of which they are the involuntary recipients.

6.7 Although our primary concern at this stage of the report is to make recommendations as to what ought to be the law, rather than to determine its present state, we would point out that the remarks by Megarry J. in *Coco's* case, mentioned above, have to be read in the wider context of his judgment as a whole.⁵⁵⁸ From that context it is clear that on the facts of the case Megarry J. took the view that, if there had been a contract between the parties, he would have been able to imply a term as to the confidentiality of the information,⁵⁵⁹ and that *a fortiori* he would imply an equitable obligation. In *Coco's*

⁵⁵⁵See paras. 6.28–6.46 below.

⁵⁵⁶[1969] R.P.C. 41, 48. See para. 4.4 above.

⁵⁵⁷We prefer to speak of an acceptance or undertaking which is expressly given or is to be “inferred”, rather than “implied”, in order to avoid any suggestion that acceptance might have to be implied by law, as in relation to contracts, rather than inferred from the circumstances of the particular case.

⁵⁵⁸See para. 4.4 above.

⁵⁵⁹The test of whether a term could prima facie be implied into a contract was whether an “officious bystander”, had he asked the parties at the time of contracting whether they should not expressly include a particular term, would have been met with the reply, “Oh, of course, that is already included”: see [1969] R.P.C. 41, 50–51.

case, therefore, it seems that it was not in fact necessary for him to apply the test of the viewpoint of the reasonable man in the position of the recipient of the information, as he could on the facts imply an acceptance of an obligation of confidence. He left open, saying it was unnecessary for him to attempt to resolve "the degree of less compelling circumstances which would suffice to establish that obligation".⁵⁶⁰

6.8 Viewed from the standpoint of law reform, we think that in many cases it would make little difference in practice whether the test of the reasonable man suggested by Megarry J. or one based on express or inferred acceptance were to be adopted. For example, doctors normally receive confidential information from their patients in the course of their practice without anything being said about confidence. There can be no doubt that a doctor would be bound to treat such information as confidential whether his conduct in dealing with the information were judged by reference to what a reasonable man in his position would do or whether, in the light of the relationship between a doctor and his patient, an obligation of confidence were to be inferred. Similarly, in a purely commercial context, the surrounding circumstances in which information is acquired (as in a pre-contract stage of business negotiations⁵⁶¹) may enable the court to infer the undertaking of an obligation of confidence in respect of information passing between them; but the same result might well be achieved if the court were to ask whether a reasonable man in the position of the recipient would regard the information as subject to such an obligation.

6.9 The two tests may, however, lead to different results as where, for example, information is sent unsolicited by one person to another with whom the sender has no previous connection. Thus an inventor may send particulars of his invention to a manufacturer, who has had no previous dealings with him, in the hope that the manufacturer will be interested in purchasing his idea. Provided that he made it clear in his communication that he wished the manufacturer to treat the information given as confidential, the "reasonable man" test might well require the manufacturer to treat the information as confidential, even if after receiving it he immediately writes to the inventor disclaiming any such obligation; but, if the manufacturer is only to be bound by an obligation of confidence if he has expressly or by inference accepted it, his disclaimer will preclude any inference of his acceptance.

6.10 If the recipient of the information is only to become subject to an obligation of confidence if he has expressly or by inference accepted it,⁵⁶² it may be argued that the protection given to those in possession of information which they wish to keep secret would be inadequate. Thus, an unsophisticated inventor who does not take the precaution of obtaining an undertaking that his secret will be treated as confidential before he imparts it to another may

⁵⁶⁰[1969] R.P.C. 41, 51.

⁵⁶¹See, for example, as well as *Coco's case*, *Seager v. Copydex Ltd.* [1967] R.P.C. 349; [1967] 1 W.L.R. 923, the facts of which are given in para. 4.3 above.

⁵⁶²Although the undertaking of confidence may be contractually binding, this fact should not affect the creation of a statutory obligation of confidence; nor should the latter deprive the plaintiff of his contractual remedies, see paras. 6.127-6.129 below.

run the risk of its exploitation by the latter without payment to him, or at least without such payment as the invention warrants. On the other hand, we think that there could be serious practical difficulties in accepting a test which might impose an obligation of confidence on the involuntary recipient of information even when he has sought expressly to repudiate such an obligation. First, if the recipient could not rely on his express repudiation of an obligation of confidence, he might feel compelled (as indeed under the present somewhat uncertain state of the law, some recipients feel compelled⁵⁶³) to take elaborate precautions to rebut any allegation of conscious, or even unconscious,⁵⁶⁴ plagiarism. Secondly, as we pointed out in Working Paper No. 58:

“there is some danger of persons communicating ideas in confidence with the sole object of laying the foundation for a future claim if the recipient of the information happens to use a similar idea; the recipient would, on using the similar idea, have great difficulty in proving that it was arrived at independently of the idea originally communicated to him”⁵⁶⁵

Such misuse of the action for breach of confidence to obtain a de facto monopoly for the exploitation of an idea without the safeguards of the patent system might be a real danger unless it was open to an involuntary recipient of information to disclaim any obligation of confidence regarding it.⁵⁶⁶

6.11 In principle, we think that the initial creation of an obligation of confidence should rest on the proposition that “he who has received information in confidence should not take unfair advantage of it”.⁵⁶⁷ We believe, as it has been said,⁵⁶⁸ that “it is implicit in this principle that any confidant must agree to treat the information as confidential.” It would, in our view, extend the idea of breach of confidence too far to cover situations where the potential defendant has not expressly or by inference accepted an obligation of confidence in respect of information which has come into his possession. If there were to be a remedy, it would have to be sought under a different principle of law—namely, liability for unjust enrichment, of which the essential principle is that the recipient has obtained a benefit which in the circumstances

⁵⁶³See para. 5.3 above, as to information obtained in our consultation about the practices of a number of larger firms in regard to unsolicited information received by them.

⁵⁶⁴See *Seager v. Copydex Ltd.* [1967] R.P.C. 349; [1967] 1 W.L.R. 923, discussed in para. 4.3 above.

⁵⁶⁵Para. 53.

⁵⁶⁶In Working Paper No. 58, paras. 109–112, we raised for consideration the question whether this danger should be met by a specific defence of lack of good faith in imparting the information. There was little support in consultation for this suggestion and we now think it would involve many difficulties in determining what amounted to “good faith”. We do not therefore include such a defence among our present recommendations.

⁵⁶⁷Per Lord Denning M.R. in *Seager v. Copydex Ltd.* [1967] R.P.C. 349, 368; [1967] 1 W.L.R. 926, 931.

⁵⁶⁸Goff and Jones, *The Law of Restitution*, 2nd ed. (1978), p. 514. See also the comment on section 757 of the *American Restatement of the Law of Torts* (1939) in vol. IV, pp. 13–14, (Liability for disclosure or use of another’s trade secret if “... (b) his disclosure or use constitutes a breach of confidence reposed in him by [the giver of the information] in disclosing the secret to him”): “A cannot impose a confidence on B without B’s consent. If A discloses the secret to B despite B’s protest that he does not wish to hold it in confidence and will not so hold it if it is disclosed, the confidence requisite for liability under the rule stated in Clause (b) does not arise.” An equivalent to section 757 has not been included in the *Restatement, Second, Torts* (1979).

it would be unfair for him to retain; this principle has no necessary connection with the idea that confidence has been reposed by one person in another.⁵⁶⁹

6.12 There is a further point of principle which emerges in the light of our later recommendation⁵⁷⁰ that liability for breach of confidence should include cases where the defendant has failed to take reasonable care to prevent unauthorised disclosure of the information in question. On this basis, the "reasonable man" test of when an obligation of confidence arises might have the effect of imposing on the defendant what we consider would be an unduly onerous duty to take positive steps to prevent the disclosure or use of information which had been thrust upon him and in respect of which he might even have purported to disclaim any responsibility.

6.13 We might mention, finally, two points of detail. It is often the case that a person who undertakes to keep information confidential does so in relation to a whole body of information, rather than just in relation to individual items. We think it is right that an obligation of confidence should arise in relation to a particular item of information whether the undertaking was given in respect of that specific item or of a description of information within which it falls. The second point is that an undertaking, whether express or to be inferred, to keep information confidential may not always be given contemporaneously with the acquiring of the information. We propose that the person who acquires information and undertakes to keep it confidential should be under an obligation to do so whether he gave the undertaking before or after or at the time when he acquired the information.

6.14 *We therefore recommend that:*

- (i) *an obligation of confidence should come into existence where the recipient of the information has expressly given an undertaking to the giver of the information to keep confidential that information, or a description within which it falls, or where such an undertaking is, in the absence of any indication to the contrary on the part of the recipient, to be inferred from the relationship between the giver and the recipient or from the latter's conduct;*
- (ii) *an obligation of confidence should arise whether the undertaking was given before, after or at the time when the information was acquired.*

6.15 The recommendation in the preceding paragraph is admittedly incomplete. Although a relationship, in the light of which an obligation of confidence may be inferred, will frequently be between the giver and the

⁵⁶⁹It is thus noteworthy that the *Restatement of the Law of Torts*, (1939), section 757(d), makes special provision for the case of trade secrets which have been given to another by mistake, where the liability of the recipient for their disclosure or use depends on notice of its secret character and of the fact that disclosure was made to him by mistake. There does not appear to be any direct authority in English law on the extent (if any) to which the courts would be prepared to treat information given under a mistake in the same way as they treat money so given. In para. 2.9 we have already referred to the case of the finder of a trade secret and pointed out that if there is to be some remedy in respect of his disclosure or use of the information, it would properly belong to a sphere other than the law of confidence.

⁵⁷⁰See para. 6.59 below.

recipient of the information, it may also be between the person who comes into possession of the information and another, on whose behalf the former has acquired it. For example, it may be inferred from the relationship of an employee and his employer that information coming to him in the course of his work, whether from a third party or otherwise (as when he himself makes a discovery), is subject to an obligation of confidence in favour of the employer. Similarly, the relationship of doctor and patient may give rise to an obligation of confidence owed by the doctor to the patient in respect of information in a report made to the doctor by a consultant to whom the doctor has referred the patient.⁵⁷¹

6.16 There is a further situation which must be considered, namely, where the person who receives the information is or ought to be aware, at that time, that the person from whom he receives it is acting on behalf of a third person. Thus, for example, A, a senior company executive, might approach an agent who specialises in finding posts for high-level personnel, with a view to changing his job. If the agent then supplies in confidence to another company, B, information concerning A's present work and remuneration, B would be regarded as having acquired such information not only from the agent but also from A on whose behalf the information was supplied, provided that—as would of course almost invariably be the case in that kind of situation—B was, or ought to have been, aware that the agent was supplying that information on A's behalf. On the other hand, although the information would also relate to A's employer, there would be no obligation of confidence owed to the latter because the information was not being supplied on his behalf.

6.17 *We therefore make the following further recommendations, supplementary to the recommendation in paragraph 6.14 above, that:*

- (i) *an obligation of confidence may arise (whether by way of express undertaking or by inference) between the acquirer of information and the person on whose behalf he has acquired it;*
- (ii) *a person, who acquires information from another and knows or ought to know that that other person is supplying the information on behalf of a third party, shall be treated as having acquired the information not only from that other person but also from the third party.*

(b) *Information required to be disclosed for the purpose of legal proceedings*

6.18 In paragraph 4.5 above we have drawn attention to Talbot J.'s decision in *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*⁵⁷² From that case it appears that, apart from any potential liability to proceedings for contempt of court, the recipient of information which has been disclosed to him on discovery is under an obligation of confidence not to use it otherwise than for the purposes for which discovery has been made. We think that this principle should be applicable not merely to information obtained on normal discovery but whenever, for the purposes of legal proceedings, a person is

⁵⁷¹The doctor may also be under a separate obligation of confidence to the consultant in respect of the report.

⁵⁷²[1975] Q.B. 613.

required to provide information under the inherent powers of the court,⁵⁷³ or under rules of court. Thus we think that answers given in response to interrogatories should be impressed with an obligation of confidence. Similarly, such an obligation should cover information supplied by one person to another for the purposes of litigation in which the first person is not involved, whether under the inherent powers of the court as exemplified by the decision of the House of Lords in *Norwich Pharmacal Co. v. Customs and Excise Commissioners*⁵⁷⁴ or under statute and the rules of court made thereunder.⁵⁷⁵ There may be circumstances in which the information in question is supplied to one person who receives it on behalf of another. In such cases, we think that both should be under an obligation of confidence.⁵⁷⁶

6.19 It should, however, be emphasised that the obligation of confidence arising in the circumstances described in the preceding paragraph is not intended to apply to evidence given in open court, which clearly lies within the public domain and is not therefore capable of forming the subject of an obligation of confidence.⁵⁷⁷

6.20 *We recommend that information (other than evidence given in open court) which, for the purposes of legal proceedings, is required to be given under the inherent powers of the court or under rules of court, should be impressed with an obligation of confidence not to disclose or use it otherwise than for the purposes for which it was required to be given. This obligation should be imposed on the person to whom the information is required to be disclosed and also, where the information is received by one person on behalf of another, on that other person.*

(c) *Information disclosed in proceedings held in camera or in chambers*

Information subject to a pre-existing obligation of confidence.

6.21 In paragraph 4.111 above we have referred to two situations concerning court proceedings held *in camera*⁵⁷⁸ where the question arises whether information revealed in those proceedings is, in respect of its future disclosure or use, protected by an obligation of confidence. The first situation, which

⁵⁷³“Court” should be given the broad meaning that it has under the Administration of Justice Act 1960, s. 12(3); see n. 590 below.

⁵⁷⁴[1974] A.C. 133. See n. 282 above.

⁵⁷⁵See Administration of Justice Act 1970, s. 32(1) (which will be replaced (as from 1 January 1982), with slight amendments, by s. 34(1) and (2) of the Supreme Court Act 1981) and R.S.C. O. 24, r. 7A, relating to actions in respect of personal injuries or death.

⁵⁷⁶We discuss in para. 6.64 below the persons to whom the obligation is owed.

⁵⁷⁷See paras. 6.71–6.72 below.

⁵⁷⁸For the general principles at common law governing the circumstances in which a court may sit *in camera* see para. 4.110 above. *In camera* proceedings are also provided for under certain statutes—e.g., under the Matrimonial Causes Act 1973, s. 48(2), which provides that evidence on the question of sexual capacity in proceedings for nullity of marriage shall be held *in camera* unless the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court.

arises also with regard to proceedings in chambers, is where the information is covered by a pre-existing obligation of confidence. The person who reveals the information in the proceedings will of course have a good defence to an action for breach of confidence on the grounds that his communication of the information in those proceedings is covered by absolute privilege.⁵⁷⁹ But anyone who knows or ought to know that the information is subject to an obligation of confidence and who subsequently discloses or uses it out of court will commit a breach of confidence,⁵⁸⁰ since the information, being only revealed in proceedings held in private (whether *in camera* or in chambers), will not have been put into the public domain.⁵⁸¹

Information disclosed in proceedings in camera which is not subject to a previous obligation of confidence

6.22 The second situation arises where a person discloses out of court information, revealed in the course of proceedings *in camera*, which was not previously subject to an obligation of confidence. For example, it may be necessary for a defendant to explain to the court the details of his own secret process in order to show that he has not made improper use of the plaintiff's process. We have stated⁵⁸² that there does not appear to be any authority which would make a person liable for breach of confidence (as distinguished in particular from contempt of court referred to in para. 6.24 below) for disclosing or using after the court proceedings information which he had obtained in the course of those proceedings. We have suggested,⁵⁸³ however, that the position of the person who obtains the information in the course of *in camera* proceedings bears some analogy to that of the recipient of information under an order for discovery, which information would, in accordance with our recommendation in paragraph 6.20 above, be impressed with an obligation of confidence. We therefore consider that any information which is revealed in proceedings *in camera* should also be impressed with an obligation of confidence so as to prevent its disclosure or use thereafter. We have not provided that an obligation should be owed by someone⁵⁸⁴ on whose behalf the information has been acquired.⁵⁸⁵ The obligation can only be owed by the person who actually acquired the information during the *in camera* proceedings.⁵⁸⁶ However, if he passes the information on to someone else, that third party recipient may then come under an obligation of confidence.⁵⁸⁷ Some disclosures of this kind may of course be made for the purposes of the particular legal proceedings during which the information was originally revealed and we recommend that the acquirer of such information should be free to use it for those purposes.⁵⁸⁸

⁵⁷⁹See paras. 4.69 above and 6.93 below.

⁵⁸⁰In accordance with the principle of liability affecting third parties; see paras. 6.52-6.55 below.

⁵⁸¹See para. 6.73 below.

⁵⁸²See end of paragraph 4.111 above.

⁵⁸³*Ibid.*

⁵⁸⁴We discuss in para. 6.64 below the persons to whom the obligations should be owed.

⁵⁸⁵Contrast para. 6.18 above.

⁵⁸⁶We recommend that "court" should be given the broad meaning that it has under the Administration of Justice Act 1960, s. 12(3) (see n. 590 below) both for the purposes of the proposals in this paragraph and those in para. 6.26 relating to proceedings in chambers.

⁵⁸⁷See paras. 6.52-6.55 below.

⁵⁸⁸See para. 6.58 below.

Information disclosed in proceedings in chambers which is not subject to a previous obligation of confidence

6.23 The third situation arises where a person discloses or uses, out of court, information which was revealed in the course of proceedings held in chambers but was not previously subject to an obligation of confidence. However, before considering that situation in relation to an action for breach of confidence, it is necessary to refer to the law relating to contempt of court for the purpose of explaining the background against which we have been constrained to consider and formulate our recommendations relating to information disclosed in chambers.⁵⁸⁹ We would emphasise, however, that we are not proposing any changes in the law relating to contempt of court.

6.24 Section 12(1) of the Administration of Justice Act 1960 provides that, as a general rule, the publication of information relating to proceedings "before any court sitting in private"⁵⁹⁰ should not of itself⁵⁹¹ constitute contempt. The subsection goes on to exclude from the scope of this general rule information falling within one of five cases—namely those:

- “(a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;
- (b) where the proceedings are brought under Part VIII of the Mental Health Act 1959, or under any provision of that Act authorising an application or reference to be made to a Mental Health Review Tribunal or to a county court;
- (c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;
- (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

⁵⁸⁹ Apart from the law of contempt, in some cases where the publication of certain details of court proceedings constitutes a criminal offence a civil remedy is available to a person for the protection of whose interests the criminal penalty was at least in part imposed. Thus, the publication of evidence not referred to in the judgment in proceedings for (among other matters) dissolution of marriage was made unlawful by the Judicial Proceedings (Regulation of Reports) Act 1926, s. 1(1); and it is a criminal offence under s. 1(2) of that Act for "a proprietor, editor, master printer or publisher" to publish such information. In *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302 it was held that an interlocutory injunction could be granted to a party to divorce proceedings to restrain the publication of information in contravention of the Act (*ibid.*, 338–347). Similarly, it may be possible, for example, that a civil remedy is available to individuals who suffer damage by reason of the publication of certain technical information revealed in the course of court proceedings, if the court under the Defence Contracts Act 1958, s. 4(3), has prohibited such publication "in the public interest or in the interests of any parties to the proceedings".

⁵⁹⁰ This expression is specifically defined to include hearings *in camera* and those in chambers, and the term "court" includes a judge and a tribunal, and any person exercising the functions of a court, a judge or a tribunal: s. 12(3).

⁵⁹¹ The phrase "of itself" would appear to signify that any report of such proceedings must be fair and accurate if it is to fall outside the ambit of the law of contempt.

- (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.”⁵⁹²

Proceedings for contempt are normally brought by the Attorney-General, to whom, however, an approach may be made by anyone complaining of a publication; but there is nothing to prevent a private individual from instituting proceedings if he is minded so to do.⁵⁹³

6.25 The problem of information disclosed in proceedings in chambers falls, in our view, to be resolved in a manner different from that which we have recommended with regard to proceedings before a court sitting *in camera*. Although it might perhaps be argued, at least theoretically, that an obligation of confidence should attach to information revealed in chambers on the ground that, as in the case of *in camera* hearings, the public are excluded or, in other words, that the proceedings are essentially private, we consider that a “blanket” provision covering all proceedings in chambers would be inappropriate. Apart from any other objection to such a proposal we have borne in mind that in section 12(1) of the Administration of Justice Act 1960⁵⁹⁴ Parliament has laid down a general rule that a “publication” of such proceedings shall not of itself constitute contempt of court.⁵⁹⁵ In our view it would be unjustifiable to provide that the more extensive prohibition upon a subsequent “use or disclosure” should apply by way of the law of confidence. We have also borne in mind that, in relation to information disclosed in proceedings held *in camera* and to the five exceptional but important categories of proceedings in chambers referred to in the preceding paragraph, a sanction is available to anyone who might be adversely affected by such publication, in the form of proceedings for contempt which, as we have pointed out there, he may request the Attorney-General to institute or which he may

⁵⁹²By s. 12(2) the publication of the text or a summary of an order made by a court sitting in private does not of itself constitute contempt unless “the court (having power to do so) expressly prohibits the publication”.

⁵⁹³The present practice was explained and considered by the Phillimore Committee on Contempt of Court at paras. 183–187 of their Report (1974), Cmnd. 5794. They recommended that private individuals should continue to have the right to institute proceedings for contempt, without prejudice to the power of the Attorney-General to take proceedings at his own instance should he consider it proper to do so in the public interest; but that in proceedings which a private individual sought to institute, other than those for the enforcement of a court order made in his favour, he should be required to serve notice of those proceedings on the Attorney-General (*ibid.*, para. 216(26) and (27)). The phrase “enforcement of a court order made in his favour” would presumably include the enforcement of the implied undertaking given on discovery. Under the Contempt of Court Act 1981, s. 7, proceedings for contempt of court under the “strict liability” rule laid down in that Act (which rule is not relevant in the present context) can only be instituted by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with it.

⁵⁹⁴See para. 6.24 above.

⁵⁹⁵We appreciate that the same general rule is applied by that provision to *in camera* proceedings; but in the case of such proceedings the five exceptional cases specified by the subsection (see para. 6.24 above) substantially cover most of the varied situations in which the court would wish to sit *in camera*. One important case not covered by the specific exceptions is proceedings within the Matrimonial Causes Act 1973, s. 48(2), referred to in n. 578 above. This situation, however, is covered by the Judicial Proceedings (Regulation of Reports) Act 1926, s. 1, to which we have referred in n. 589 above.

himself initiate. In any event a great deal of business is conducted in chambers which does not involve any question of secrecy. We therefore do not propose that, in general, any obligation of confidence should attach to information simply because it has been disclosed in proceedings in chambers.

6.26 Exceptionally, however, there are cases where a person may rely upon the fact that proceedings in chambers are private in giving information which he would be unwilling to reveal if he believed that anyone would subsequently be free to disclose or use the information. We believe that there are two specific categories of case to which this consideration applies—namely, (i) that of material information in an action for breach of confidence and (ii) that of material information in proceedings⁵⁹⁶ relating to a secret process, know-how, discovery or invention. Apart from these two specific cases which should be protected by the law of breach of confidence,⁵⁹⁷ we have formed the view that what is required is a flexible discretionary power⁵⁹⁸ for a court to determine that all, or any specific part of, the information revealed in chambers should be protected by an obligation of confidence.⁵⁹⁹ Such an order should be capable of being made on the application of a witness as well as on that of a party to the proceedings.

Recommendations

6.27 *Our recommendations in respect of information revealed in the course of proceedings in camera or in chambers are as follows:*

- (i) *A person who acquires information in the course of the proceedings of a court or tribunal sitting in camera should be subject to an obligation of confidence in respect of the information so acquired;*
- (ii) *A person who acquires information in the course of the proceedings of a court or tribunal sitting in chambers should be subject to an obligation of confidence in respect of the information so acquired if:*
 - (a) *the proceedings are for breach of an obligation of confidence constituting a tort under our proposed legislation or a breach of contract, and the information is material to the proceedings; or*
 - (b) *the proceedings relate to a secret process, know-how, discovery or invention and the information is material to the proceedings; or*

⁵⁹⁶This second case is based on the exception specified in s. 12(1)(d) of the Administration of Justice Act 1960 (set out in para. 6.24 above). However, we think that the information covered by this head should not, for the purposes of breach of confidence, be limited to information actually "in issue" in the relevant proceedings and we also think that the matters listed in s. 12(1)(d) should, for our purposes, be extended to include "know-how".

⁵⁹⁷The law of contempt of court will continue to apply to the publication of information relating to proceedings in chambers within the terms of s. 12 of the Administration of Justice Act 1960; see para. 6.24 above.

⁵⁹⁸The court would no doubt readily exercise the power in respect, for example, of certain kinds of information disclosed in proceedings concerning family matters.

⁵⁹⁹We discuss in para. 6.64 below the persons to whom such an obligation should be owed. We think that the obligation should be owed only by the person who acquired the information and not by anyone on whose behalf it has been acquired; see para. 6.22 above.

(c) *the court thinks fit to order that the information in question should be treated as subject to an obligation of confidence.*

(d) *Information improperly taken from another*
General

6.28 In paragraph 5.5 above we referred to the “glaring inadequacy” of the present law that confidential information which has been improperly taken from another (as, for example, when a document containing the information is stolen, or borrowed, read and then returned) is less securely protected from unauthorised disclosure or use than when information is given to a person who accepts an obligation to keep it confidential. This is the problem area of the law to which we were directed in the second limb of our terms of reference.⁶⁰⁰ We ought, however, to emphasise at the outset of our consideration of this topic that it is not concerned with “leaks” of information by, for example, an employee who takes or copies his employer’s documents and then hands the documents or copies of them to a third party.⁶⁰¹ Such an employee will be in breach of the undertaking of confidence given by him to his employer,⁶⁰² irrespective of the means by which he acquires the information.

6.29 We think it may also be helpful to point out that one aspect of the term “information” has particular relevance in this context—namely, that people’s behaviour may of itself constitute information, whether because it may be news or for some other reason. If, for example, the leaders of two political parties were to meet for talks, in circumstances where they clearly wished the meeting to remain a secret, the fact of the meeting, quite apart from what might be said during it, may itself be information which is relevant to an obligation of confidence if it is obtained by improper means.⁶⁰³

6.30 In Working Paper No. 58 we envisaged a separate tort analogous to breach of confidence which would cover disclosing or using information obtained by what we treated as “unlawful means” for the purposes of the second limb of our terms of reference. In this report, however, we treat the problems raised by such information as an aspect of a single new action for breach of confidence, namely a particular group of situations involving the acquisition of information in which the information is *treated* as being impressed with an obligation of confidence. There is undoubtedly a considerable difference in nature between on the one hand the obligation imposed on a person for breaking an undertaking to another to keep information confidential and, on the other, an obligation imposed on a person as a result of his having used improper means to gain information which may, indeed, be so secret that the plaintiff has never entrusted it to anyone, not even in confidence. Nevertheless, we believe that it is possible to encompass both

⁶⁰⁰“To consider and advise what remedies, if any, should be provided in the law of England and Wales for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained and in what circumstances such remedies should be available”; see para. 1.1 above.

⁶⁰¹E.g., *British Steel Corporation v. Granada Television Ltd.* [1980] 3 W.L.R. 774.

⁶⁰²See paras. 6.6–6.14 above.

⁶⁰³And see *Woodward v. Hutchins* [1977] 1 W.L.R. 760, the facts of which are given in para. 4.17 above.

forms of behaviour within the framework of our new statutory tort.⁶⁰⁴ The common feature of those situations is that the receiver of the information is in a position where it is reasonable to impose on him an obligation of confidence. It was with this basic principle in mind that in Working Paper No. 58⁶⁰⁵ we tentatively put forward the suggestion that an obligation of confidence should arise where the person from whom the information has been obtained without his authority could reasonably expect that the information would not be so obtained, and where the acquirer of the information knows or ought to know that in receiving it he is defeating the reasonable expectations of the original holder. We now think, however, that to rely on this test alone would leave the law unacceptably vague until its actual content had become clear through decisions of the courts. We have preferred therefore to specify a number of situations which will in fact cover the most important circumstances in which in our view the acquirer of information should, by reason of the way in which he has acquired it, be *treated* as subject to an obligation of confidence in respect of it, as contrasted with those cases where the receiver of the information has expressly or by inference undertaken such an obligation.

Unauthorised taking

6.31 One of the most common ways in which information may be obtained without the authority of the person holding that information is by acquiring it from a document or other material thing in which it is contained. So obtaining the information does not necessarily involve taking the thing in circumstances which would amount to theft. A document may be borrowed to read or copy it and then returned. It is clear therefore that it would not be satisfactory to make the creation of an obligation of confidence in respect of the unauthorised acquisition of information dependent on the commission of theft. What seems to be required is that the acquirer without proper authority has taken, handled or otherwise interfered with a thing⁶⁰⁶ and thereby obtained the information which by reason of acquisition in this manner should be subject to an obligation of confidence. Indeed, liability ought in our view to extend beyond interference with a document, or other thing containing information such as records or models, and include also interference with anything in which the matter containing the information is stored. Acquisition of information contained in a document should be improper either if the document is taken or handled or if the desk or filing cabinet in which it is kept is interfered with, without actual interference with the document itself. It should be emphasised that many people regularly acquire information from the incidental handling of documents and other materials containing information and that such acquisition will only be improper if it has occurred without express or implied

⁶⁰⁴It is also possible to include within the same framework the misuse or disclosure of information obtained in or for the purpose of legal proceedings, discussed in paras. 6.18-6.27 above.

⁶⁰⁵Para. 139.

⁶⁰⁶Unauthorised interception of mail provides an example of such misconduct. The circumstances as to when it is lawful to intercept mail were examined in *The Interception of Communications in Great Britain*, (1980), Cmnd. 7873; and see the debates on the Bill which became the British Telecommunications Act 1981: *Hansard* (H.C.), 1 April 1981, vol. 2, cols. 321-372; (H.L.), 19 May 1981, vol. 420, cols. 898-901; 18 June 1981, vol. 421, cols. 762-774.

authority. It will therefore be necessary to consider not only whether the acquirer had no authority to handle a document but also whether he was only permitted to deal with the document in a particular way or for a particular purpose. If he exceeded any authority that he had been given, then he is to be taken as having acted without authority.

Computers

6.32 Information may be contained in a computer or similar machine in which data is stored. It may be possible by what may loosely be called "deceiving" a machine to obtain information from it to which the acquirer is not entitled.⁶⁰⁷ But, as it is doubtful whether, at least for the purposes of criminal liability, it is possible to deceive a machine,⁶⁰⁸ it would seem desirable to make special provision for the obtaining of information by the unauthorised⁶⁰⁹ use of a computer or any device in which information is stored.

Violence, threats or deception

6.33 Information may also be obtained by the application of violence or threats to the person holding the information, or by a deception (as, for example, by the acquirer falsely pretending that he is the person authorised to receive the information). The first two cases may involve the commission of a crime,⁶¹⁰ but that will not of itself protect the secrecy of the information so obtained. So far as the obtaining of information by deception is concerned, this is not at present a crime at all.⁶¹¹ We think that the obtaining of

⁶⁰⁷Take, for example, the case of a customer of a bank who is assigned a secret number which, when keyed into a machine into which he has inserted his personal card, will produce at his option either a certain sum in cash or information about the state of his bank account. Suppose someone secretly watches the customer keying in his number and memorizes it. Later he obtains the customer's card and, thus equipped, is able to ascertain the amount of the customer's account. Banks vary in their practices. With some machines, the information is flashed on a screen; others produce it on a slip of paper; whilst others provide both a visual display and a slip of paper. To cover this kind of case separate provision for the "deceiving" of machines seems necessary.

⁶⁰⁸Smith and Hogan, *Criminal Law*, 4th ed. (1978), pp. 539-540, point out that on the authorities deception requires some person to be deceived. They consider that this provides the best ground for the decision in *Davies v. Flackett* [1973] R.T.R. 8, where (they explain) the court left open "whether an offence could be committed without a human mind". In that case the defendant, on leaving a car park where 5p had to be inserted into a machine to raise the exit barrier, drove off without paying when he saw the barrier being held open by a stranger, and it was held that he was not guilty of any offence. (On similar facts, the defendant might today be guilty of the offence under the Theft Act 1978, s. 3, of dishonestly making off without payment for a "service done": see Smith, *The Law of Theft*, 4th ed. (1979), para. 243.)

⁶⁰⁹The requirement that the acquisition be without authority, express or implied, is considered in para. 6.31 above.

⁶¹⁰There is a very limited number of circumstances where it may be lawful to use force to obtain information, as in the taking of finger prints: see the Magistrates' Courts Act 1980, s. 49.

⁶¹¹We tentatively proposed in *Conspiracy to Defraud* (1974), Working Paper No. 56, paras. 74-77, that the obtaining of information by deception should of itself be a crime. The obtaining of information by deception may amount to a conspiracy but only where the person deceived was holding a public office or was a public authority—see *Director of Public Prosecutions v. Withers* [1975] A.C. 842. We pointed out in our Report on Conspiracy and Criminal Law Reform, Law Com. No. 76 (1976), para. 4.7 that reform of the law relating to conspiracy to defraud was dependent on proposals for reform of the law relating to the complex substantive offences in the field of fraud. We are not yet in a position to make such proposals: see our Fifteenth Annual Report 1979-1980, Law Com. No. 107, para. 2.13.

information in any of these ways should subject the acquirer to an obligation of confidence covering the information so obtained.⁶¹²

Unauthorised presence in a particular place

6.34 There are circumstances not so far covered where we think that a person acquiring information without the authority of the holder of the information should become subject to an obligation of confidence in respect of it. One such case is where the acquirer of the information is at the time of the acquisition in any place where he has no authority to be. Authority to be in a particular place may be express or implied and, indeed, in many cases will in fact be implied. The person who is impliedly licensed to enter premises, as might be exemplified by a postman or milkman, will not be held improperly to have acquired information if he sees it through the window whilst delivering the letters or the milk. We considered whether this head of improper acquisition should be tied to the law of trespass but decided against that in favour of the more general terminology of acquiring the information "while somewhere where one has no express or implied authority to be". In that way we would hope to avoid importing into this head of tortious liability all the detailed complexities of the law of trespass. Our proposal is not to make the person who acquires information, when in a place where he has no authority to be, liable for that improper acquisition as such. That would be to render the acquisition of the information unlawful. Consistently with our general approach, we think that someone who acquires information in such circumstances should come under an obligation not to use or disclose it. Thus, an industrial spy who enters a factory without permission and there picks up important information about secret processes; or, in relation to personal information, a reporter who, uninvited, enters a house where a private gathering is taking place and there acquires intimate family secrets, should both only be liable if they use or disclose the information which they have improperly acquired.

Surveillance devices

6.35 Another way of acquiring information which caused particular concern to the Younger Committee on Privacy,⁶¹³ is by means of a technical device which the Committee described as falling into "two well-defined categories: electronic or optical extensions of the human senses".⁶¹⁴ The Committee recommended the creation of a criminal offence of "surreptitious

⁶¹²We have not included bribery as one of the improper modes of acquisition because bribery will only be relevant where there is already an existing obligation of confidence on the part of the person bribed. The briber will therefore be liable under our main breach of confidence proposals as someone who receives information knowing of the obligation of confidence attaching to it, see paras. 6.52-6.55 below.

⁶¹³(1972) Cmnd. 5012.

⁶¹⁴*Ibid.*, para. 503. The technical possibilities for visual or aural surveillance in 1972 were surveyed in some detail by the Younger Committee in para. 505 of their report. It is obvious that the possibilities will have much increased since that date.

surveillance by means of a technical device".⁶¹⁵ As we have emphasised,⁶¹⁶ it is not our task in this report to consider the creation of criminal offences.⁶¹⁷ We are however concerned with the implications for the civil law of confidence of the acquisition of information by such technical devices as the Committee had in mind. We think that, where a device is clearly designed or adapted solely or primarily for the surreptitious surveillance⁶¹⁸ of persons, their activities, communications or property, then anyone who obtains information by using it⁶¹⁹ should be subject without qualification to an obligation of confidence in respect of the information so obtained. Thus, information obtained by tapping a telephone would automatically become subject to such an obligation⁶²⁰ and Sir Robert Megarry V.-C.'s suggestion in *Malone's* case⁶²¹ that a person who uses the telephone must accept the risk of being overheard by tapping or otherwise would be negated. We do not think that in a civilised society a law abiding citizen using the telephone should have to expect that it may be tapped.

6.36 It might be argued that the use of any form of surveillance device, whether or not designed primarily for that purpose, should be wrongful. However, to give a remedy merely because information is acquired by one of these means would amount to the creation of a right of privacy—a right, for example, not to be photographed even if the photographs were later never published;⁶²² we have indicated already that the creation of a general right of privacy is beyond the scope of even an expanded law of breach of confidence. Liability, in the case of a surveillance device, must be based on the use or

⁶¹⁵See (1972) Cmnd. 5012, para. 563, where the offence is envisaged as comprising the following elements:

- (a) a technical device i.e. an electronic or optical extension of the human senses;
- (b) its surreptitious use;
- (c) a person who is, or whose possessions are, the object of such surveillance;
- (d) circumstances justifying that person, were it not for the use of the device, in believing he is protected from such surveillance;
- (e) an intention by the user of the device to render those circumstances ineffective against surveillance by overhearing or observation;
- (f) absence of consent by the victim.

⁶¹⁶See para. 2.7 above.

⁶¹⁷It is, for example, already a criminal offence under the Wireless Telegraphy Act 1949, s. 1(1), to use any apparatus for wireless telegraphy without a licence. For further discussion of the existing criminal offences, see the Younger Committee Report (1972), Cmnd. 5012, para. 521, and Appendix I, paras. 35–37. As we have already indicated, in para. 2.7 above, the proposals of the Younger Committee for the creation of a new criminal offence of "surreptitious surveillance by means of a technical device" have not been implemented.

⁶¹⁸E.g. (to take examples given by the Younger Committee), a microphone hidden in a cocktail olive, a cuff-link, a tie pin or a dart shot into a wall. Other examples would be a device for tapping a telephone, whether by metallic contact or by the use of induction, or for overhearing conversations by means of radar or laser beams.

⁶¹⁹Provided that the information would not, in the circumstances, have been acquired without the use of the device.

⁶²⁰This is subject to a special qualification applicable to the obtaining of information by any of the means dealt with in paras. 6.31–6.34 above if the police or security services are concerned; see paras. 6.40–6.45 below. In any event it should be borne in mind that even where information is subject to an obligation of confidence it is open to the defendant to raise the issue of whether on balance the disclosure or use of information obtained by any of these means is in the public interest—see paras. 6.77–6.84 below.

⁶²¹[1979] Ch. 344, 376. See para. 4.9 above.

⁶²²See, e.g., *Bernstein of Leigh (Baron) v. Skyviews & General Ltd.* [1978] Q.B. 479.

disclosure of information obtained by such a device. We must emphasise in this connection that, even where information has been acquired by the use of such a device, liability for the subsequent disclosure or use of the information should arise only if the information would not have been acquired without the use of the device in question. Thus if, for example, a guest at a private party surreptitiously uses a camera to take pictures of the people there, when he later publishes a list of those who were present he cannot be liable for breach of confidence merely on the ground that he acquired knowledge of who attended by means of surveillance: clearly it was not the camera which enabled him to acquire that information; the photograph will merely represent a permanent record of it which may serve to refresh his memory at a later date.

6.37 To turn now to the principles which in our view should govern the imposition of an obligation of confidence upon someone who obtains information by means of a surveillance device, we believe that a distinction must be made between (i) devices which are primarily designed *for the purpose of surveillance*⁶²³ and (ii) the wide range of devices which are not in themselves designed or adapted solely or primarily for that purpose, although they are *capable of being so used*. Examples of devices falling within the second category are ordinary binoculars, and an ordinary tape-recorder which may be used to record the conversation of participants at a meeting, either openly or secretly by hiding it under the table. There may be situations when surveillance devices of the latter kind are used to which those subject to that surveillance should not reasonably take exception, if they are or ought reasonably to be aware of it and if they could without undue inconvenience take precautions to avoid the surveillance in question. Thus, on the one hand, it may be thought that two people, who meet secretly in a secluded corner of a large railway station throughout which clear notices are displayed that television cameras are being used to detect criminal activities (such as malicious damage), cannot reasonably expect the fact of their meeting to be treated as confidential. On the other hand, it may well be that the use of an ordinary camera with a telephoto lens to obtain from the street a picture of a confidential document lying on a desk in a private house would go far beyond the reasonable expectations of the person who left it there, and that the taker of the picture should be subject to an obligation of confidence in respect of the information so obtained.

6.38 We can summarise our views on the use of surveillance devices as follows. We think that an obligation of confidence should cover information obtained by the use of *any* surveillance device, provided that such information would not have been acquired without the use of that device. However, in the case of devices which, though not designed or adapted primarily for surreptitious surveillance, enable information to be obtained which would not otherwise have been acquired,⁶²⁴ liability for the subsequent disclosure or use of that information should arise only if the person from whom the information has been obtained was not or ought not reasonably to have been aware of the use of the device, and ought not reasonably to have taken

⁶²³The acquisition of information by such devices is discussed in para. 6.35 above.

⁶²⁴We would specifically exempt spectacles and hearing aids designed to bring vision or hearing so far as possible up to a normal standard.

precautions to prevent the information from being acquired in the way in question.

Joint participators

6.39 We have assumed so far that the person who acquires the information as the result of the use of any of the improper means which we have canvassed in the previous paragraphs is the person who has himself acted improperly. However, this may not always be the case. For example, one person may extract information from a victim by violence for the benefit of a listener who himself commits no violent act. In our view an obligation of confidence should be owed by all who jointly participate in the improper acquisition of information. A person whose own acquisition was not in fact made by improper means should owe an obligation of confidence if he personally acquired the information from the person against whom the improper means were used and if he is, or ought to be, aware of the use of improper means by a person who participated with him in the acquisition of the information.

The position of the police, security services and those acting under statutory authority

6.40 Some of the methods of acquiring information discussed in paragraphs 6.31–6.38 above are unlawful in that they involve, under the existing law, criminal or civil liability, or both, on the part of those who employ such methods. For example, the use of violence to obtain information will itself amount to a crime and a tort. Where the method of obtaining information is in this sense unlawful, we do not think that the information so obtained should be exempt from the obligation of confidence impressed on the information by reason of the particular method of acquisition which has been used merely because the information has been so obtained by the police or security services for the purposes of their work. However, it should be emphasised that, if the police or security authorities use an unlawful method to obtain information, they would, in any particular case which may be brought against them in respect of their use or disclosure of such information, always be able to raise before a court an issue as to whether the balance of public interest lies on the side of using the information for police or security purposes rather than in protecting confidentiality.⁶²⁵

6.41 On the other hand, some of the methods of acquiring information discussed in paragraphs 6.31–6.38 above are not unlawful. For example, a microphone and tape-recorder may be secretly placed under a table at a private meeting without necessarily involving trespass. There are two possible approaches which we might adopt in respect of information obtained by one of the methods discussed in paragraphs 6.31–6.38 above, where the method

⁶²⁵It is noteworthy that in *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, 376–378, Sir Robert Megarry V.-C. was clearly of the view that the phone-tapping in that case, even if the information so obtained was subject to a duty of confidence, could be justified on the ground of public interest. It may be, moreover, that information so obtained will be admissible as evidence, notwithstanding the way in which it has been obtained. See Cross, *Evidence*, 5th ed., (1979), pp. 324–326.

is not in itself unlawful and the information has been obtained by the police or security services for the purposes of their work. First, we could define and recommend a statutory statement of the circumstances in which information obtained by the police or security services by the use of any of the specified methods should not be impressed with an obligation of confidence. We do not think, however, that it would be appropriate for us to undertake such a task, which would merely be incidental to our basic concern with the civil law on breach of confidence and would involve us in detailed consideration of the acceptable extent of the powers of the police and security services, a matter which raises fundamental issues going far beyond even the widest interpretation of our terms of reference. Our difficulty in these respects is all the greater in that we have not had the advantage of any policy which might have emerged if the recommendations of the Younger Committee for a criminal offence of surreptitious surveillance by a device⁶²⁶ had been implemented, since we should in that event have been able to take note of whatever exempting provisions for the police or security services were included in that legislation. Furthermore, the extent of the powers of the police and security services in this field is a matter which has recently been debated in Parliament in the context of telephone tapping⁶²⁷ and the interception of mail, and the suggestion that such conduct should be regulated by statute was rejected.⁶²⁸ The control of such activity is at the moment primarily to be found in the fact that a warrant from the Home Secretary is required for the tapping of a telephone, and this practice is at present subject to regular monitoring by a senior member of the judiciary.⁶²⁹ If the police tap a telephone or use another form of surveillance device without a warrant, this will not in itself constitute a criminal offence, and control must be sought through appropriate police disciplinary procedures, now that Parliament has rejected a criminal sanction.

6.42 We turn to our second, and in the circumstances preferred, alternative. This is to regard a member of the police or security services as under exactly the same duty in relation to the use or disclosure of improperly acquired information as any member of the general public except in so far as the information has been acquired within the course of the lawful exercise by him of his official functions. We believe that the use or disclosure by the police or security services of information obtained by the various methods listed in paragraphs 6.31–6.38 can be justified if the person acquiring the information was acting in the course of the exercise of his official functions (a matter which it will ultimately be for the court to determine) and if the person in question was acting lawfully. The latter qualification is important. As we have already said, we do not believe that information should be regarded as having been properly acquired by a police officer who acquired it by means of a crime or a tort. Accordingly, in our view the use or disclosure of information obtained by the police or security services by any of the methods

⁶²⁶See n. 615 above.

⁶²⁷For an account of the present procedures, see *The Interception of Communications in Great Britain* (1980), Cmnd. 7873.

⁶²⁸See the debates on the Bill which became the British Telecommunications Act 1981: *Hansard* (H.C.), 1 April 1981, vol. 2, cols. 321–372; (H.L.), 19 May 1981, vol. 420, cols. 848–869, 898–901; 18 June 1981, vol. 421, cols. 762–774.

⁶²⁹Lord Diplock; see *The Interception of Communications in Great Britain*, Report by Lord Diplock, (1981), Cmnd. 8191.

discussed in paragraphs 6.31–6.38 should only be permitted if two criteria are satisfied. First, if the officer in question had been acting in the course of the lawful exercise of an official function to acquire information for the purposes of protecting the security of the State or of preventing, detecting or investigating crime. Secondly, he would then be entitled to use or disclose the information but only for those purposes or related legal proceedings. Thus if he acquired personal information not connected with his enquiry he would not be entitled to use or disclose it; nor would he be entitled to disclose information which was relevant to his enquiry to anyone other than those concerned with the purposes for which he acquired it.

6.43 We should however emphasise that in adopting this second alternative we are not in any way ruling out the possibility that the methods which the police or security services may use to obtain information should be defined by statute,⁶³⁰ in which event it would be for consideration whether information obtained by methods which were not permitted should be made subject to an obligation of confidence. Nor do we imply any view on our part as to the desirability, if the police and security services' powers of surreptitious surveillance are not, or not wholly, controlled by statute, of subjecting the use of such powers to specific administrative and political control. However all these are matters which lie beyond the scope of this report.

6.44 In considering our position on these issues we have examined a third possibility, as an alternative to the approaches discussed in paragraphs 6.41–6.42 above, namely that an obligation of confidence should arise in respect of all the ways of acquiring information listed in paragraphs 6.31–6.38 above. It might then be argued that, in the same way as it was argued in paragraph 6.40 in relation to the use of methods of obtaining information which are unlawful, any necessary limitation on the liability of the police and the security services would be to a sufficient extent built into the incidents of the law on breach of confidence as we are proposing to formulate it. That is to say, if the police or security services became subject to an obligation of confidence in respect of information which they had obtained by, for example, telephone-tapping,⁶³¹ they could in proceedings for breach of confidence seek to rely on the inability of the plaintiff to prove that the balance of public interest did not lie on the side of their using the information. We have decided not to adopt this approach for a number of reasons. To subject the police and security services without more to the test of balancing the public interest would mean that they would have to reveal, for the purposes of justifying their use, methods of obtaining information which were not in themselves unlawful. Moreover, they are methods whose effectiveness necessarily depends upon their secrecy and which play a vital part in the detection of serious crime. Furthermore, if the use of methods of obtaining information which can be used lawfully by the police and security services are to be made the basis on which liability for breach of confidence can arise, we think that such a decision should more appropriately be made by the legislature in laying down the proper limits of

⁶³⁰As the Royal Commission on Criminal Procedure (1981), Cmnd. 8092, para. 3.57, recommended in respect of information obtained by the police by surreptitious surveillance.

⁶³¹As was pointed out in *Malone* [1979] Ch. 344, discussed in para. 4.9 above, the tapping of a telephone is not, as such, either a crime or a tort.

the activities of such authorities (a matter which we have already indicated⁶³² is beyond the scope of this report) than by the courts in assessing the balance of public interest in individual cases.

6.45 We ought finally to mention that the acquisition of information by some of the methods listed in paragraphs 6.31–6.38 above may be authorised by statute and that these statutory powers apply to a wider range of persons than the police or security services. We must clearly cover these in our recommendations. For example, immigration officials have a statutory power to take “all such steps as may be reasonably necessary for photographing, measuring or otherwise identifying” a detained person;⁶³³ and Post Office officials are, by statute,⁶³⁴ exempted from criminal liability for interception of the mail if they act under the authority of the Post Office Act 1953 or a Secretary of State’s warrant. It is not for us to examine here the whole range of statutory powers to acquire information. However, in order to deal with such cases we recommend that acquisition of information by means which would otherwise be improper within our recommendations shall not impose an obligation of confidence if the information was acquired in pursuance of any statutory provision, provided that its disclosure or use was also for a purpose expressly or impliedly authorised by that, or any other, statutory provision.

Recommendations

6.46 *Our recommendations in respect of information⁶³⁵ improperly obtained are as follows:*

- (i) A person should owe an obligation of confidence in respect of information acquired in the following circumstances:*
 - (a) by unauthorised taking, handling or interfering with anything containing the information;*
 - (b) by unauthorised taking, handling or interfering with anything in which the matter containing the information is for the time being kept;*
 - (c) by unauthorised use of or interference with a computer or similar device in which data is stored;*
 - (d) by violence, menace or deception;*
 - (e) while he is in a place where he has no authority to be;*
 - (f) by a device made or adapted solely or primarily for the purpose of surreptitious surveillance where the user would not without the use of the device have obtained the information;*

⁶³²See paras. 6.41, 6.43 above.

⁶³³Immigration Act 1971, Sched. 2, para. 18(2).

⁶³⁴Post Office Act 1953, s. 58(1) (as amended); and see the Post Office Act 1969, Sched. 5, para. 1(1).

⁶³⁵It should be borne in mind that “information” is used here, as elsewhere in Part VI of this report, to mean information which is not in the public domain, see paras. 4.15–4.31 above and paras. 6.67–6.74 below.

- (g) *by any other device (excluding ordinary spectacles and hearing aids) where he would not without using it have obtained the information, provided that the person from whom the information is obtained was not or ought not reasonably to have been aware of the use of the device and ought not reasonably to have taken precautions to prevent the information being so acquired.*
- (ii) *An obligation of confidence shall be imposed on a person who jointly participates in the acquisition of information if, though he did not use any of the improper means listed in paragraph (i) above, he personally acquired the information and he is, or ought to be, aware that the information was acquired by the use of any such improper means by his fellow participator.*
- (iii) *An obligation of confidence should not arise in accordance with paragraph (i) above where the information has been obtained by a person in the course of the lawful exercise of an official function in regard to the security of the State or the prevention, investigation or prosecution of crime or by a person acting in pursuance of any statutory provision so far as the information has been disclosed or used for those purposes or for any purpose expressly or impliedly authorised by a statutory provision.*

(e) *Information given to public authorities*

6.47 In paragraphs 5.23–5.32 we have described the position of information which is supplied to public authorities. We have emphasised in paragraph 5.26 that where information is supplied to public authorities on an entirely voluntary basis such authorities, including the Crown, can by reason of their express or inferred acceptance of that obligation become subject to an obligation of confidence in respect of the information they have been given.⁶³⁶ However, we also pointed out⁶³⁷ that there may be difficulty in inferring an obligation of confidence on the part of recipients of information who have acquired it by or under statutory powers or where it has been given to obtain some benefit or permission provided by or under statute. We further explained⁶³⁸ that where in such cases there was a statutory duty not to disclose the information it was unlikely that a civil action could be based upon it, and in any event such a civil action would not fully serve the purposes of an action for breach of confidence.⁶³⁹

⁶³⁶Subject, where the Crown is concerned, to the limitations on injunctions against the Crown laid down in the Crown Proceedings Act 1947. See n. 520 above. It is also clear from *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752, discussed in paras. 4.41–4.44 above, that the law of breach of confidence can apply to “public secrets”; and see also *Commonwealth of Australia v. John Fairfax and Sons Ltd.* (1980) 55 A.L.J.R. 45.

⁶³⁷See para. 5.27 above.

⁶³⁸See paras. 5.28–5.29 above.

⁶³⁹See paras. 5.30–5.31 above for discussion of the suggestion that a person who has suffered or is threatened with special damage ensuing from the commission of a statutory crime might obtain an injunction against the offender.

6.48 In our consultations the Confederation of British Industry have drawn our attention to the uncertainty which exists as to the confidentiality of information supplied to government and other public authorities. They were particularly concerned as to the practical remedies available to their members if confidential information supplied to such authorities comes into the hands of trade competitors. We can understand these misgivings so far as they relate to information acquired by or under statutory powers or given to obtain a benefit or permission provided by or under statute. We think that it would be helpful in removing the uncertainty which attaches to information obtained in such circumstances to provide that the fact that the information has been so obtained should not of itself rule out an inference that the information was accepted in confidence, whether or not the relevant statute affords any remedy, such as a criminal sanction, against unauthorised disclosure.

6.49 We have, however, considered whether we should go further and recommend that whenever information is supplied to the government or to other public authorities, whether voluntarily or in order to obtain a benefit or permission under a statute, or under statutory powers of compulsion, an obligation of confidence should attach to it. In our view, it would not be right for us to make such a recommendation. The imposition of such a wide ranging obligation would involve major inroads into the idea of free and open government. If all information given to public authorities was subject to an obligation of confidence, it would necessarily inhibit the ability of the general public to be informed about the processes of government. This would, in our view, be a retrograde step. The safeguarding of the confidence of information in the hands of public officials is already provided for in appropriate circumstances through the medium of the criminal law,⁶⁴⁰ and it seems to us that this is the appropriate way in which to deal with the situation where no undertaking of confidence is given by the public authority recipient of the information. Indeed, even if such an obligation were to be imposed on public authorities under an extended law of confidence it would only provide a remedy to the person who supplied the information and not to the person to whom it related.

6.50 Although we reject the idea of *imposing* an obligation of confidence in the case of information given to public authorities, we would repeat what we said earlier, namely that our general proposal as to liability arising from an undertaking of confidence whether express or to be inferred should apply equally to the public sector.⁶⁴¹ If a public official gives an undertaking of confidence, he should be liable for use or disclosure of the information thereby obtained, just as if he was a private individual. The one qualification of that liability to which we would draw attention is that where an undertaking of

⁶⁴⁰See para. 5.28 above.

⁶⁴¹One consequence of this conclusion is that the draft Bill embodying our recommendation (see Appendix A, Draft Bill, Clause 22) has been drafted so as to bind the Crown but only to the same extent as the Crown is made liable in tort by the Crown Proceedings Act 1947.

confidence is given in relation to information supplied pursuant to a statutory provision, the public official who receives the information should be free to use or disclose the information to the extent that he is expressly or impliedly authorised to do so either by reason of the provision under which he secured it or under any other statutory provision.⁶⁴²

6.51 *We recommend that the fact that information is required to be supplied by or by virtue of any statutory provision or is supplied in connection with an application, under any statutory provision, for the grant of any benefit or permission should not of itself prevent an obligation of confidence ensuing on the part of the recipient of the information. He should, however, be free to use or disclose it to the extent that he is expressly or impliedly authorised to do so by or by virtue of any statutory provision.*

2. The position of third parties receiving information already subject to an obligation of confidence

6.52 From the account of the existing law given in paragraphs 4.11–4.12 above it will have been seen that a person who comes into the possession of information which is already impressed with an obligation of confidence, himself becomes subject to such an obligation as soon as he knows, or ought to know, that the information is so impressed. There is, however, some doubt as to whether such liability is affected by the fact that the information was originally acquired for value, without actual or constructive knowledge of any obligation of confidence.⁶⁴³ And even if such liability is not, and should not be, affected by the original acquisition for value in good faith, there is the further question whether some equitable adjustment of remedies ought to be possible to take account of the position of the innocent acquirer.⁶⁴⁴

6.53 On this aspect of the law of breach of confidence, the reformer can obtain little assistance by analogy drawn from the rules governing other forms of intellectual property, to which no uniform rules apply.⁶⁴⁵ In Working Paper

⁶⁴²See, e.g., Social Security Act 1975, s. 164.

⁶⁴³See para. 4.12 above.

⁶⁴⁴See para. 5.8 above.

⁶⁴⁵Under the Patents Act 1977, s. 62(1), damages for infringement of a patent cannot be awarded if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for supposing that the patent existed, nor can an order for an account of profits be made in such circumstances. In the case of trade marks, knowledge or lack of knowledge does not affect the right to damages; but an account of profits is not normally given when the defendant had no knowledge of the plaintiff's mark (see *Kerly's Law of Trade Marks and Trade Names*, 10th ed., (1972), para. 15–78). *Direct* infringement of copyright (i.e. broadly speaking, reproducing, publishing, performing or broadcasting a copyright work) involves liability of the innocent infringer but only to an account of profits; as regards *indirect* infringement, importing, selling or hiring, or offering for sale or hire or exhibiting for trade the copyright material does not give rise to liability if the defendant had no knowledge that the material was subject to copyright; and permitting public performance of a copyright work also does not give rise to liability if the defendant did not know *and had no reasonable grounds for suspecting* that the performance would involve a breach of copyright. (See Copyright Act 1956, ss. 2(5), 5, 17(2) and 18(2).)

No. 58⁶⁴⁶ we provisionally proposed, on the pattern provided by the American Law Institute's *Restatement of the Law of Torts*, (1939),⁶⁴⁷ that it should be a defence to an action for breach of confidence relating to trade secrets and other commercially exploitable information that the defendant originally acquired the information for value without actual or constructive knowledge of the obligation of confidence affecting it. However, the proposal was not generally favoured in our consultation. Commentators thought that a firm rule in favour of a bona fide purchaser was undesirable and that, especially in trade secrets cases, a better balance between the interests of the parties would be struck if the court was free to decide according to the circumstances of each case whether or not to grant an injunction or damages in lieu thereof. We now take the view that a third party should be liable as soon as he knew or ought to have known of the obligation of confidence affecting the information, whether the information was of a commercially exploitable character or was of a purely personal kind, even if he gave value for the information. Furthermore, we think that a third party should be under such an obligation whether the original obligation of confidence was one voluntarily undertaken by the person from whom he received the information,⁶⁴⁸ or was created as a result of the latter's improper acquisition of the information⁶⁴⁹ or related to information given for the purpose of legal proceedings⁶⁵⁰ or disclosed during the course of such proceedings held in private.⁶⁵¹ The requirement of knowledge may vary according to the way in which the original obligation of confidence was created. If, for example, the obligation is one undertaken by the person from whom the third party received the information, then knowledge, actual or constructive, by the third party of the fact that the information is subject to such an undertaking will be required. If, on the other hand, the obligation arose as a result of improper acquisition, then actual or constructive knowledge of the circumstances giving rise to the obligation, or otherwise that the obligation has arisen, would be required. Liability should, however, only attach as from such time as the third party has both acquired the information and has the requisite knowledge of the obligation of confidence attaching to it.

6.54 However the fact that a third party has given value for information and was at the time of its acquisition without actual or constructive knowledge of any obligation of confidence affecting it is of considerable significance and is, in our view, one of the matters of which the court should be able to take

⁶⁴⁶Para. 84.

⁶⁴⁷S. 758 of which provides:

"One who learns another's trade secret from a third person without notice that it is secret and that the third person's disclosure is a breach of his duty to the other, or who learns the secret through a mistake without notice of the secrecy and the mistake,

(a)

(b) is liable to the other for a disclosure or use of the secret after the receipt of such notice, unless prior thereto he has in good faith paid value for the secret. . . ."

There is no equivalent to section 758 in the *Restatement, Second, Torts* (1979).

⁶⁴⁸See paras. 6.6–6.17 above.

⁶⁴⁹See paras. 6.28–6.46 above.

⁶⁵⁰See paras. 6.18–6.20 above.

⁶⁵¹See paras. 6.21–6.27 above.

account in determining the appropriate remedies against the third party.⁶⁵² Our recommendations in this latter respect are dealt with in paras. 6.104–6.114 below.

6.55 *We recommend that a person who acquires information already impressed with an obligation of confidence, however created, should become subject to that obligation as soon as he has both acquired the information and knows or ought to know that the information is so impressed.*

3. Conduct amounting to breach of confidence

6.56 It is one of the characteristics of information that it is capable of dissemination in a variety of ways. In the context of the law of breach of confidence, it is, therefore, not possible to provide a definition of the different kinds of misuse of information impressed with an obligation of confidence which should attract liability. In our view, liability should attach to any disclosure or use of information subject to an obligation of confidence, save to the extent that the holder of the information is expressly or impliedly authorised to do so by the person to whom the obligation is owed.⁶⁵³ This duty should attach to all obligations of confidence, however created, e.g. whether by undertaking or by improper acquisition. It seems necessary to us to put the duty in terms of “use or disclosure” because of the nature of information. In some cases the breach will be constituted by wrongful disclosure, as where information subject to the obligation is passed to a trade rival or published in a paper. The duty should, however, be broader and prevent, for example, a company which has received information in confidence during the course of licensing negotiations from turning that information to its own use, though without disclosing it further.⁶⁵⁴

6.57 In paragraph 4.14 above we have referred to the question whether a person who would be liable for disclosure or use of information should also be liable where such disclosure or use comes about as a result of his negligent handling of the information. *Weld-Blundell v. Stephens*⁶⁵⁵ is authority for saying that liability arises where there is a contractual nexus between plaintiff and defendant. We think that, provided the defendant would be liable if he had himself disclosed the information (which liability may exist independently of contract⁶⁵⁶), he should be equally liable if the disclosure or

⁶⁵²Of course the third party who has innocently paid for information which he has acquired from someone who was under an obligation of confidence not to disclose it will have a remedy against that person for breach of contract, although in many cases the supplier of the information may be a man of straw and the remedy without practical value.

⁶⁵³A bank's implied authority to reveal a customer's confidential information when giving a reference was considered in *Tournier v. National Provincial and Union Bank of England* [1924] K.B. 461, 473 *per* Bankes L.J., 486 *per* Atkin L.J. See also the Younger Committee Report (1972), Cmnd. 5012, para 305 and the Report of the Committee on Data Protection (1978), Cmnd. 7341, para. 13.37.

⁶⁵⁴A recent example of misuse of a confidential list of names and addresses is provided by *General Nutrition Ltd. v. Yates*, *The Times*, 6 June 1981. A further example of misuse of information acquired in confidence is to be seen in *Maximilian Investments v. Ronen Amiran* [1976] C.L.Y. 1016.

⁶⁵⁵[1920] A.C. 956. See para. 4.14 above.

⁶⁵⁶See *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd* (1948) 65 R.P.C. 203; [1963] 3 All E.R. 413 and para. 3.10 above.

use results from his negligence. The proviso is important so as to make clear that a person does not have a duty of reasonable care thrust upon him in respect of the handling of unsolicited information.⁶⁵⁷

6.58 We have indicated in paragraph 6.56 above that the duty imposed on the acquirer of information subject to an obligation of confidence is limited to the extent that the person to whom the obligation is owed authorises the use or disclosure of the information. There are a number of other particular instances of authorisation to which we ought to draw attention. It has been made clear earlier⁶⁵⁸ that we see no reason to prevent an obligation of confidence arising if an undertaking of confidence is given by the acquirer, even though the latter is entitled to demand the information under some statutory provision, or where the giver of the information supplies it in connection with an application for a benefit, the granting of the benefit being governed by statute. In such cases, however, the recipient of such information must clearly be free to use or disclose it to the extent that he is authorised by statute to do so. If, for example, an undertaking of confidence is given by a tax inspector, that should not limit his statutory power⁶⁵⁹ to disclose the confidential information to the Department of Health and Social Security. Again, if an obligation of confidence arises from the disclosure of information under the discovery process,⁶⁶⁰ or during court proceedings in private,⁶⁶¹ the recipient of the information ought to be free to use it for the purposes of the legal proceedings in relation to which he has received it. Finally, it might be added that the third party recipient of information subject to an obligation of confidence ought to be free to use or disclose the information to the same extent as the person from whom he received it is free to do so.

6.59 *We therefore recommend:*

- (i) *that the duty owed by a person who is under an obligation of confidence, however created, in respect of information in his possession should be under a duty not to disclose or use it except to the extent that the disclosure or use is authorised by the person to whom the duty is owed; and that a person who is under such a duty should also be under a duty to take reasonable care to ensure that unauthorised disclosure or use does not take place;*
- (ii) *that, where a person owes an obligation of confidence in relation to information which is supplied under or by virtue of a statutory provision (see paragraph 6.51 above), the recipient should be free to use or disclose it to the extent that he is expressly or impliedly authorised to do so by or by virtue of that or any other statutory provision;*
- (iii) *that, where an obligation of confidence is owed in respect of information disclosed in or for the purpose of legal proceedings in private (see*

⁶⁵⁷ As was the fear of some of our commentators.

⁶⁵⁸ See paras. 6.47–6.51 above.

⁶⁵⁹ Under the Social Security Act 1975, s.164.

⁶⁶⁰ See paras. 6.18–6.20 above.

⁶⁶¹ See paras. 6.21–6.27 above.

paragraph 6.27 above), the recipient should be free to use it for the purposes of those proceedings;

- (iv) that, where a person acquires information already subject to an obligation of confidence (see paragraph 6.55 above), he should be free to use or disclose it to the same extent as the person from whom he received it is free to do so.

4. The person to whom an obligation of confidence is owed

6.60 In paragraph 5.9 above we have made what we think is a distinction of fundamental importance between the protection of information because it is subject to an obligation of confidence and protection given by virtue of the nature of the information in question, as, for example, because of its private character. It is of the essence of an action for breach of an obligation of confidence, whether actual or prospective, that the complainant should be someone to whom the obligation is owed. The position would be very different if a remedy was being proposed to protect the privacy of certain kinds of information; in that case it would be natural to expect that the appropriate plaintiff would be any person who had a recognised concern with the privacy of the information. However, as we have explained in Part II of this report,⁶⁶² this report does not purport to deal with the protection of privacy as such, although clearly, as the Younger Committee recognised,⁶⁶³ the action for breach of confidence is, within its limits, one of the ways in which intrusions on privacy may be discouraged.

6.61 We therefore recommend that:

- (i) the person to whom an obligation of confidence is owed should be the person who has given information to another person under an obligation of confidence expressly or by inference undertaken by that other person;
- (ii) a person who acquires information on behalf of another, having given that other an undertaking of confidence, express or to be inferred, should owe an obligation of confidence to that other;
- (iii) where a person acquires information from another, having given to that other an undertaking of confidence, express or to be inferred, and knows or ought to know that that other person is supplying the information on behalf of a third person, obligations of confidence should be owed both to the person from whom the information is acquired and to the third person on whose behalf it is supplied.⁶⁶⁴

6.62 The above recommendation does not provide adequate guidance where, if our earlier recommendations are implemented, an obligation of confidence will arise in circumstances other than those where an undertaking of confidence, express or to be inferred, has been given. The first of these to be examined here is the obligation of confidence in respect of information

⁶⁶²See paras. 2.1–2.7 above.

⁶⁶³See para. 1.2 above.

⁶⁶⁴See paras. 4.6, 6.14, 6.17 above.

obtained by various improper means.⁶⁶⁵ We recognise that the conclusion reached in the preceding paragraphs requires further refinement. If, for example, a letter written by A, and containing information which he wishes to keep confidential, is stolen by B while it is in postal transit, the Post Office, or the postman from whom the letter is actually stolen, may have little incentive for bringing proceedings for breach of confidence if B discloses or uses the information.⁶⁶⁶ It is rather A, *on whose behalf* the Post Office was holding the information, who is likely to have an interest in its confidentiality and whose expectations have been upset by B's theft of the letter. Suppose again A, a guest in a hotel, entrusts confidential papers to the hotel proprietor for safe keeping; B, a trespasser in the hotel, reads the papers while they are lying on the hotel desk, before they have been put into the safe. A, *on whose behalf* the hotel is holding the information, should in our view have the right to bring an action for breach of confidence against B. On the other hand, we do not think that the immediate holder of information who is holding it on behalf of another should be precluded from bringing an action, although he will in many cases have little practical reason for doing so and may well be unable to show damage.⁶⁶⁷

6.63 Another refinement of the conclusion reached in paragraph 6.61 above would seem necessary to define the appropriate plaintiff when, in accordance with the recommendation in paragraph 6.46(i)(c) above, an obligation of confidence arises in respect of information obtained "by unauthorised use of or interference with a computer or similar device in which data is stored". In such a case it might be argued that it is from the machine or device itself, rather than from any person, that the information was obtained. To deal with this difficulty, we think that the person who should be treated as the one from whom the information has been obtained is the supplier of the information to the machine and also the person on whose behalf the information was so supplied.

6.64 Where, under our earlier proposals,⁶⁶⁸ an obligation of confidence arises from the acquisition of information which has been disclosed in or for the purpose of legal proceedings, it is necessary to determine the person to whom the obligation is owed. With regard to information disclosed during the course of court proceedings in private, the person to whom the obligation is owed will normally be the person making the disclosure of the information. However, there may be cases where a witness, for example, makes a disclosure on behalf of some other person, such as his employer. In those cases, we think that the obligation of confidence should be owed both to the person

⁶⁶⁵See paras. 6.28-6.46 above.

⁶⁶⁶The Post Office can bring civil proceedings for the taking of the letter—e.g., for conversion, as in *The Winkfield* [1902] P. 42; though, in the case of theft, resort may well be had to the criminal law.

⁶⁶⁷It may, for example, be desirable for a bank, holding papers containing information which have been deposited for safe keeping by a customer who is abroad and not easily reached, to bring proceedings to protect the confidentiality of the information in the absence of the depositor of the papers. Furthermore, the person from whom the information is taken may be liable in respect of that taking to the person on whose behalf he was holding the information, in which event he in turn ought to have an action against the taker.

⁶⁶⁸See paras. 6.18-6.27 above.

making the disclosure and to the person on whose behalf it is made, provided of course that the defendant is, or ought to be, aware that the second person is making the disclosure on behalf of the first person. And we believe that a similar rule should apply to cases where information is required to be disclosed for the purposes of legal proceedings, as under the discovery process or where documents are produced under subpoena.

6.65 We might add, for the sake of completeness, that where information which is already subject to an obligation of confidence is acquired by a third party with knowledge, actual or constructive, of that obligation,⁶⁶⁹ the third party's obligation of confidence which is thereby created will be owed to the same person as the original obligation was owed.

6.66 We therefore recommend, in addition to our recommendation in paragraph 6.61 above, that:

- (i) *Where an obligation of confidence arises in respect of information obtained by the improper means specified in paragraph 6.46 above the persons to whom the obligation of confidence is owed should be:*
 - (a) *the person from whom the information has been obtained and*
 - (b) *the person on whose behalf the person from whom the information was obtained was holding that information.*
- (ii) *For the purposes of our recommendation in paragraph 6.46(i)(c) above, (information obtained by unauthorised use or interference with a computer or similar device in which data is stored) the person who supplies information to a computer or similar device and any person on whose behalf it is so supplied should be treated as the person from whom the information has been obtained.*
- (iii) *Where an obligation of confidence arises from the disclosure of information in legal proceedings at a time when the court is sitting in private, the obligation is owed both to the person making the disclosure and to any person on whose behalf the disclosure is made provided that the defendant is, or ought to be, aware that the former person is so acting.*
- (iv) *Where an obligation of confidence arises from the acquisition of information which has been required to be disclosed for the purpose of legal proceedings, the obligation of confidence is owed both to the person who was required to disclose the information for the purpose of those proceedings and to any person on whose behalf the disclosure was made provided that the defendant is, or ought to be, aware that the former person is so acting.*
- (v) *Where information subject to an obligation of confidence is acquired by a third party with knowledge of that obligation, the person to whom the obligation of confidence is owed by the third party should be the person to whom the original obligation of confidence was owed.*

⁶⁶⁹See paras. 6.52–6.55 above.

5. *The information capable of protection by the action for breach of confidence*

(a) *The information must be secret—i.e. not in the public domain*

The rule as to “public domain”

6.67 In paragraphs 4.15–4.31 above we have outlined the existing law concerning the need for information to be secret, or in the negative form which has been widely used, information not in the “public domain”, if it is to be protected by the action for breach of confidence; and in paragraphs 5.10–5.12 we have reviewed the problems to which this requirement gives rise. The first problem is a broad one, namely whether, as a general principle, the obligation arising under the law of breach of confidence should only attach to information which is not in the public domain. As we have indicated already,⁶⁷⁰ the present law relating to breach of confidence does not appear to provide protection against the use or disclosure of information which is already in the public domain. If such a restriction in the use or disclosure of information is sought, then it must be by means of a contractual obligation of confidence.⁶⁷¹ However, an inroad into this fundamental principle appears to have been made recently by the majority of the Court of Appeal in *Schering Chemicals Ltd. v. Falkman Ltd.*⁶⁷² where the application to information in the public domain of the law of breach of confidence produced what was, in our view, an unfortunate and paradoxical result. It was held in that case that the use or disclosure of information obtained by the defendant should be restrained by an injunction on the ground that, because the information was already available from another public source (and was accordingly in the public domain), no public interest justified its publication. This approach seems to us to be unacceptable, since, taken to its logical conclusion, it would mean that information once acquired in confidence could not be used by the acquirer even though the information was, at the time of acquisition, or had later come, into the public domain. Anyone in the world could use it except the particular acquirer in question. We have little doubt that such a restriction on the use of information generally available to the public should only be provided, if at all, by the law of contract⁶⁷³ and not by our new proposed statutory tort of breach of confidence. We conclude, therefore, that information which is in the public domain should, in general, fall outside the protection of the law of breach of confidence. There are, however, two further particular problems relating to the public domain principle, namely its appropriateness where personal information is concerned and the “springboard doctrine”, which we must now examine.

Personal information

6.68 The first of these particular problems relates to the possibly inappropriate character of the public domain principle where personal information is in issue. Thus in Working Paper No. 58⁶⁷⁴ we said:

⁶⁷⁰See paras. 4.15–4.20 above.

⁶⁷¹See para. 4.15 and n. 141 above.

⁶⁷²[1981] 2 W.L.R. 848, see paras. 4.21–4.23 above.

⁶⁷³See para. 6.129 below.

⁶⁷⁴Para. 102.

“The back files of a local newspaper may, if properly and assiduously searched, yield a good deal of information not generally known about a person who spent his early life in the area—his family and educational background, his business connections, his political beliefs and his personal and social problems. Perhaps they show that he was at the centre of an unfortunate affair at his school, that he attempted to take his own life, that he took part in a political demonstration in favour of an unpopular cause, that he associated in his business or private life with someone later convicted of grave crimes against society or even that he ‘helped the police’ with their inquiries into an offence with which he was never charged. These facts will, of course, be known to and remembered by those who were directly involved, but if the publication took place a long time ago it is quite possible that nobody now knows or remembers them solely by reason of the publication in the local newspaper. If the person concerned subsequently discloses any of these facts in confidence to another in the course of a relationship in which absolute frankness is essential, is it right that the person who accepts the confidence should be able, solely on the ground that the facts are technically accessible to the public, to disclose them to others in breach of his duty of confidence?”

In the working paper⁶⁷⁵ we suggested that, where purely personal information, as contrasted with information of a commercially exploitable character, was concerned, information should not be treated as being in the public domain, unless:

- “(i) the information can be ascertained by recourse to any register kept in pursuance of any Act of Parliament which is open to inspection by the public or to any other document which is required by the law of any part of the United Kingdom to be open to inspection by the public; or
- (ii) the information was disclosed in the course of any proceedings, judicial or otherwise, which the public were by the law of any part of the United Kingdom entitled to attend.”

6.69 In the light of our consultation and our own reconsideration of the matter, our main conclusion, in which we depart from the provisional view we expressed in Working Paper No. 58, is that in any statutory framework for the action for breach of confidence the requirement that the information is not in the public domain should be stated in broad terms, leaving the courts to decide in the circumstances of the individual case whether the information at the time of the alleged breach of confidence was “relatively secret”⁶⁷⁶ or “available to the public”⁶⁷⁷. We do not now think that it would be practical or desirable to impose a more rigid standard⁶⁷⁸ of what constitutes “the public domain” in respect of information relating to the plaintiff personally than is applicable to purely commercial information. Indeed, it is often difficult to

⁶⁷⁵Para. 103.

⁶⁷⁶See *Franchi v. Franchi* [1967] R.P.C. 149, 152-3, cited in para. 4.20 above.

⁶⁷⁷See *Ackroyds (London) Ltd. v. Islington Plastics Ltd.* [1962] R.P.C. 97, 104, cited in n. 144 above.

⁶⁷⁸As, for example, by limiting the cases relating to personal information, where this is to be regarded as having come into the public domain, to those cited from Working Paper No. 58 at the end of para. 6.68 above.

determine when information ceases to be of commercial value and becomes merely personal. If a person suffers hardship by reason of the repetition of true stories about him which are already in the public domain, the question whether he should be given a remedy cannot depend on the law of confidence, because the information is public. Any remedy would have to be sought under a law of privacy, which lies outside our terms of reference. We would, however, wish to emphasise that information is not "available" to the public if, to extract the actual information in respect of which the claim of confidence is made, a member of the public would have to make a significant contribution of labour, skill or money.⁶⁷⁹

The "springboard doctrine"

6.70 The second specific problem which we raised⁶⁸⁰ concerning the requirement that information must not be in the public domain was whether the so-called "springboard doctrine" is inconsistent with the requirement that the information should not be in the public domain. In the light of the full text of the judgment in the case⁶⁸¹ in which the "springboard doctrine" was enunciated, we do not think that that doctrine is in principle inconsistent with the requirement as to public domain; nor, indeed, do we think that acceptance of the doctrine necessitates any major modification of the requirement as to public domain. Once information is in the public domain, it should cease to have the quality of secrecy necessary for a successful breach of confidence action, whether it was put into the public domain by the plaintiff himself, by the person who was subject to an obligation of confidence regarding it, or by a third party. It follows that even a person who puts information into the public domain, when himself subject to an obligation of confidence, should not be enjoined for all time from using the information,⁶⁸² although we should emphasize that he will be liable in damages for his initial breach of confidence in disclosing the information to the public. The purpose of the "springboard doctrine" is to protect the plaintiff, not to punish the defendant; and we think that the interest of the plaintiff which the doctrine seeks to protect can be protected by a qualification of, or perhaps more accurately by a gloss on, the "public domain" principle. Suppose that a person in breach of confidence has used certain information with a view to exploiting it commercially; he may, for example, have tooled up his factory to make the product to which the information relates or have organised in advance a special sales system to market it. The information thereafter comes into the public domain (whether

⁶⁷⁹In para. 102 of Working Paper No. 58, the relevant passage from which is cited more fully in para. 6.68 above, we gave the example of "The back files of a local newspaper [which] may, if properly and assiduously searched, yield a good deal of information not generally known about a person who spent his early life in the area—his family and educational background, his business connections, his political beliefs and his personal and social problems" (emphasis added). Our present view is that the fact that such information can be extracted from the back files of a newspaper which are available for reference at a public library will not mean that the information which a search of these files might produce is itself to be regarded as in the public domain if such a search would involve a significant expenditure of labour, skill or money. It is important, however, to bear in mind that the ease with which such information may be retrieved will be greatly affected by increased computerisation.

⁶⁸⁰See para. 5.11 above.

⁶⁸¹*Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.* [1967] R.P.C. 375. See para. 4.26 above.

⁶⁸²I.e. we adhere to our provisional preference expressed in Working Paper No. 58 for the "Conmar" rule. See para. 4.30 above.

or not as a result of the defendant's breach of confidence). Unless restrained, such a person would, vis-à-vis the person to whom the obligation of confidence was originally owed, be in a more favourable position than any of the latter's trade competitors: he would have obtained a "head start" over those who could only begin to make preparations for exploiting the information when it had entered the public domain. His advantage would continue until that point in time when manufacturers in general, relying on the public release of the information, could reasonably be expected to reach the stage in the exploitation of the information which he had in fact already reached when the information became public. The gloss on the principle of public domain to which the springboard doctrine gives rise may be expressed as follows: objection cannot be taken to a claim for an injunction⁶⁸³ in proceedings for breach of confidence in respect of the use of information on the sole ground that the information in question is in the public domain, so long as, by reason of the defendant's having use of the information in breach of confidence before it entered the public domain, he would, unless restrained, enjoy an advantage over those who have had to obtain the information through its public release.

Information revealed in court

6.71 An important example of information coming into the public domain is where it emerges in the course of a public hearing in a court. Thus, a person may have accepted an obligation of confidence in respect of certain information given to him; subsequently he is required,⁶⁸⁴ notwithstanding that obligation, to reveal that information when giving evidence in open court. The information at that point passes into the public domain and thereafter neither the original recipient of the information in confidence nor anyone else into whose possession the information comes is liable for breach of confidence in respect of his use or disclosure of the information. It remains, however, to consider whether this principle requires any modification in the light of the decision of the Court of Appeal in *Home Office v. Harman*.⁶⁸⁵ At the outset we would emphasize that this case related to liability not for breach of confidence but for contempt of court, which latter is not the concern of this report. Miss Harman, a solicitor for a plaintiff in an action against the Home Office, was held liable for contempt in showing documents, already read out⁶⁸⁶ in open court, to a journalist who wrote a newspaper article based on them. She was held so liable because she had obtained most of these documents on discovery and had given a specific assurance to the Treasury Solicitor, acting on behalf of the Home Office, that they would not be used other than for the purpose

⁶⁸³A similar rule should apply to the granting of an adjustment order, as discussed in paras. 6.110-6.112 below.

⁶⁸⁴We have explained in paras. 4.57-4.67 above that a court in exercise of its inherent powers can order information to be disclosed notwithstanding that it is subject to an obligation of confidence, although the fact that it is subject to an obligation of confidence is a factor which will in the exercise of its discretion be taken into account by the court.

⁶⁸⁵[1981] 2 W.L.R. 310. Leave to appeal to the House of Lords has been granted: [1981] 1 W.L.R. 529 (H.L.).

⁶⁸⁶Lord Denning M.R. ([1981] 2 W.L.R. 310, 325) pointed out that it was improbable that every word of every one of the 800 documents in issue was in fact read out in court, but for the purposes of their judgment the Court of Appeal appear to have assumed that the 800 were so read out, from a total of 6000 in respect of which discovery was obtained.

of the action. The Home Office, however, had refused to make available a few of these documents on the ground that their disclosure would not be in the public interest, and they were only disclosed after a court order for their discovery had been made, the judge⁶⁸⁷ relying on the previous assurance given by Miss Harman as to the limited use to be made of the documents. Whether or not disregard of an undertaking to the other side in a case and, *a fortiori*, by implication to the court itself, especially when the offending person is herself an officer of the court, amounts to contempt of court,⁶⁸⁸ we do not think that civil liability for breach of confidence should persist after the information to which the relevant obligation of confidence relates has been published in open court,⁶⁸⁹ whoever it is who, subsequent to the court hearing, discloses or uses it. In the interests of the free circulation of information we think everyone ought to be able to rely, so far as any civil liability for breach of confidence is concerned, on the fact that the information in question has been published in open court. We ought, however, to make clear that by publication in open court we mean that the information has been made generally available to those present in court and, furthermore, that the publication has been made orally. This will mean that documents which are taken as read, without having been actually read out, will not have been put into the public domain.

6.72 There are a number of circumstances where information may be disclosed in open court but where the publication of that information outside the court is prohibited. The prohibition on publication may be statutory⁶⁹⁰ or the power to prohibit publication may be conferred on the court.⁶⁹¹ If publication of information disclosed in open court is prohibited in either of these ways, we do not believe that the information should be regarded as having come into the public domain.

6.73 In the situation where the court is sitting in private, we believe that a quite different approach should be adopted, namely that the information is not to be regarded as having been placed in the public domain by its disclosure in such proceedings. Indeed, as has been seen in paragraphs 6.21–6.27 above, we have gone further and recommend that the use or disclosure out of court of information revealed during a private session should, if that information is not already in the public domain, constitute a breach of an obligation of confidence owed to the person who disclosed the information.

⁶⁸⁷McNeill J., in *Williams v. Home Office* [1981] 1 All E.R. 1151. It is clear that Lord Denning attached importance to McNeill J.'s reliance on Miss Harman's assurance ([1981] 2 W.L.R. 310, 324).

⁶⁸⁸Attempts to change the law of contempt of court on this point during the passage of the Bill which became the Contempt of Court Act 1981 were unsuccessful, see *Hansard* (H.L.) 10 February 1981, vol. 417, cols. 153–163; (H.C.) 16 June 1981, vol. 6, cols. 902–912.

⁶⁸⁹In this respect we think that a fairly wide interpretation should be given to "court" and that, as under the Administration of Justice Act 1960, s. 12(3), (see para. 6.24 and n. 590 above), it should include a judge and a tribunal and anyone exercising the functions of a court, judge or tribunal.

⁶⁹⁰See, for example, the Judicial Proceedings (Regulation of Reports) Act 1926 and the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s. 2(1) and (3) (as amended).

⁶⁹¹For example, by the Children and Young Persons Act 1933, s. 39(1) (as amended) and the Defence Contracts Act 1958, s. 4(3).

Recommendations

6.74 *Our recommendations regarding "public domain" are as follows:*

- (i) *To be capable of enjoying the protection of an action for breach or feared breach of confidence, the information must be information which is not in the "public domain". We do not think that it would be desirable to define this beyond saying that information is in the public domain when, having regard to its nature and the circumstances of its disclosure, it is generally available to the public.*
- (ii) *Information should not be treated as being in the public domain where it is only accessible to the public after a significant contribution of labour, skill or money has been made.*
- (iii) *A defendant should not be able to resist an injunction (or an adjustment order under paragraphs 6.110–6.112 below) against the use of information solely on the ground that the information is in the public domain so long as, by reason of his use of it in breach of confidence before it entered the public domain, he would, unless restrained, enjoy an advantage in the exploitation of the information over those who have had to obtain it through its public disclosure.*
- (iv) *For the purposes of an action for breach of confidence, information which is orally disclosed so as to be generally available to those present at the proceedings of any court comes into the public domain if the court is sitting in public, though not if it is sitting in private, provided that publication of the information is not prohibited by any statutory provision or order of the court.*

(b) *The information must be other than personal knowledge, skill or experience acquired in the course of work*

6.75 In paragraphs 4.32–4.35 above we have explained the important principle of public policy, which applies not only to a contractual relationship but also where reliance is placed on the action for breach of confidence, that the confidentiality of information cannot be protected if the information relates only to personal knowledge, skill or experience acquired during the course of work. We pointed out that the principle appeared as equally relevant to an independent contractor carrying out work for another or to partners⁶⁹² as it is to personal knowledge, skill or experience acquired by an employee in the course of his employment. There may in some cases be a fine distinction to be drawn between information which is capable of protection by the courts and information of the personal character we have described, but we think this should, as at present, be left to be drawn by the courts in the light of the circumstances in individual cases; it is important in our view that any test be formulated in broad terms so that account can be taken both of changing views on the employment relationship and of technical developments.

6.76 *We therefore recommend that, where information is acquired by one person during the course of his work (whether, for example, as an employee or*

⁶⁹²The decided cases seem, however, as we said in para. 4.35 above, to have been concerned only with employees.

independent contractor), such information should not be capable of protection by the action for breach of confidence if it is fairly to be regarded only as an enhancement of the personal knowledge, skill or experience of the acquirer.

(c) The information must be such as, on a balance of the public interests involved, ought to be protected from disclosure or use

6.77 In the light of the history⁶⁹³ of, and recent developments⁶⁹⁴ in, the question of public interest as it affects the protection of confidentiality, we attach considerable importance to our proposal that it shall be a requirement of the statutory action for breach of confidence that the relevant information, on a balance of the public interests involved, deserves to be protected. The protection of confidence, whether relating to personal information (such as a patient's disclosures to his doctor) or of a technical character (such as an inventor's description to a possible purchaser of the details of his invention), is only one aspect of the public interest. There are other aspects of the public interest which may require the disclosure or use of the information outside the ambit of any obligation of confidence with which it has been impressed. Our general conclusion is that the courts should have a broad power to decide in an action for breach of confidence whether in the particular case the public interest in protecting the confidentiality of the information outweighs the public interest in its disclosure or use.

6.78 We have drawn attention to the views of the majority of the Law Lords in *British Steel Corporation v. Granada Television Ltd.*⁶⁹⁵ indicating that the public interest can only justify the disclosure of information which is subject to an obligation of confidence if the information concerns "iniquity", an expression which apparently extends to misconduct in general.⁶⁹⁶ In our view the courts, in considering whether the balance of public interest lies in favour of the disclosure of information, should not be restricted to considering only information which concerns "misconduct". We think there are important areas of information, not necessarily involving "misconduct", where the public's claim to be informed should be weighed by the courts against the interest in protecting confidentiality.⁶⁹⁷ In weighing the conflicting interests in the balance, the court will have regard to the circumstances of the particular case. It has, for example, been suggested recently by Mason J., in the High Court of Australia,⁶⁹⁸ that when the protection of information in the hands

⁶⁹³See paras. 3.5 and 3.6 above.

⁶⁹⁴See paras. 4.36-4.53 above.

⁶⁹⁵[1980] 3 W.L.R. 774. See paras. 4.46-4.48 above.

⁶⁹⁶See the passage from Lord Wilberforce's speech in the *British Steel* case cited in para. 4.47 above. It will be noted that Granada did not in fact argue that disclosure of the information in *British Steel's* documents was in the public interest, and the observations of the Law Lords are therefore in this regard to be treated as *obiter*.

⁶⁹⁷This is what Lord Widgery C.J. did, ruling in favour of disclosure, in *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752 in respect of Cabinet secrets. See paras. 4.41-4.44 above. This approach was also favoured, in respect of the management of a public corporation, by Lord Salmon in his dissenting speech in the *British Steel* case: see para. 4.48 above. A similar approach was adopted by Lord Denning M.R. in *Schering Chemicals Ltd. v. Falkman Ltd.* [1981] 2 W.L.R. 848, 864-865.

⁶⁹⁸*Commonwealth of Australia v. John Fairfax and Sons Ltd.* (1980) 55 A.L.J.R. 45

of the government is in issue the court should "look at the matter through different spectacles" from those appropriate to examining the protection of "the personal, private and proprietary interests of the citizen."⁶⁹⁹ This distinction was drawn in the following way:

"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 publication of material concerning its actions 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 criticize 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 be not 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. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality."⁷⁰⁰

6.79 Where an obligation of confidence has arisen in respect of certain information by reason of the means by which it has been acquired,⁷⁰¹ the question arises whether the court is entitled to take those means into account when striking a balance between the public interest in upholding confidentiality and the public interest in the disclosure or use of the information. For example, the defendant may have knocked down the plaintiff and stolen a document from him. In such a case should the court be entitled to give additional weight to the importance of protecting confidence beyond what it would give where, for example, the defendant had broken an obligation of confidence which he had voluntarily accepted? We think that in assessing the public interest in protecting the confidentiality of information the court should take all the circumstances into account, including the manner in which the information was acquired whether by the original acquirer or by a third party.

6.80 In referring to the public interest in the disclosure or use of information, we do not mean that if there is such a public interest it necessarily follows that the disclosure or use should be subject to no restriction. In each case the

⁶⁹⁹ *Ibid.*, 49.

⁷⁰⁰ *Ibid.*

⁷⁰¹ See the recommendations in para. 6.46 above.

question will arise as to whether the actual disclosure or use is, having regard to its extent and character, on balance justifiable in the public interest. Thus, as Lord Denning M.R. said in *Initial Services Ltd. v. Putterill*,⁷⁰² “the disclosure must . . . be to one who has a proper interest to receive the information” and he indicated that, in appropriate circumstances, this would include the press.⁷⁰³

6.81 The public interest in the confidentiality of information as well as the public interest in its disclosure or use may be vitally affected by the time which has elapsed since the information in question originally became subject to an obligation of confidence. In this connection we have already referred to the importance which Lord Widgery C.J. attached to the time factor in *Attorney-General v. Jonathan Cape Ltd.*;⁷⁰⁴ we think that this factor should be taken into account in breach of confidence actions generally.

6.82 As we have pointed out,⁷⁰⁵ until Lord Widgery’s judgment in *Attorney-General v. Jonathan Cape Ltd.*,⁷⁰⁶ it was generally assumed that it was for the defendant to raise as a defence any question of a public interest in the disclosure or use of information subject to an obligation of confidence. In *Cape* Lord Widgery adopted a different approach. He stated that it was for the plaintiff to establish that restraint of publication was required in the public interest and that this factor was not outweighed by the public interest in the disclosure of the information. Having regard to the importance in our view of the free circulation of information, we think it in principle right that the plaintiff should be required to establish that the balance of the public interest lies in his particular case in protecting the confidentiality of the relevant information. On the other hand there will be many cases of breach of confidence in which there is no real issue of public interest in the disclosure of the information and where it would be unnecessary and burdensome to require the plaintiff formally to establish the absence of an overriding public interest in disclosure. We therefore propose that such a burden should fall on the plaintiff only when the defendant satisfies the court that in fact there was a public interest involved in the relevant disclosure or use of the information in question. It would then be for the plaintiff to establish that that public interest is outweighed by the public interest in protecting the confidentiality of the information.⁷⁰⁷

6.83 We have pointed out⁷⁰⁸ that the “balance of convenience” test enunciated by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*⁷⁰⁹ as a guide to a court in deciding whether to grant or withhold an

⁷⁰²[1968] 1 Q.B. 396, 405–406. See para. 4.38 where the passage from which this quotation is taken is cited more fully. Lord Denning gave the examples of a “proper” disclosure of a crime to the police and of a breach of the Restrictive Trade Practices Act to the registrar, as compared with cases which from their nature may justify more widespread publication (*ibid.*, 405–406).

⁷⁰³*Ibid.*, 406.

⁷⁰⁴[1976] Q.B. 752, 771. See para. 4.43 above.

⁷⁰⁵See para. 4.42 above.

⁷⁰⁶[1976] Q.B. 752.

⁷⁰⁷The implications of our recommendations on public interest for the law relating to contractual obligations of confidence are discussed in paras. 6.130–6.133 below.

⁷⁰⁸See paras. 4.93–4.95 above.

⁷⁰⁹[1975] A.C. 396.

interlocutory injunction was not formulated in relation to a situation in which any question of the public interest arose, and that the factor of the public interest has in fact been taken into account in decisions after *Cyanamid*. We think that the approach to the question of public interest which we are recommending should apply not only to past but also to apprehended breaches and, in respect of the latter, to claims not only for a final but also, so far as the provisional character of such proceedings allows, for an interlocutory injunction.

6.84 *Our recommendations in respect of the public interest are as follows:*

- (i) *Information should only enjoy the protection of the action for breach of confidence if, after balancing the respective public interests in confidentiality on the one hand and in disclosure or use of the information on the other, the information is found to merit such protection.*
- (ii) *In assessing the public interest in the protection of the confidentiality of information the court should take into account all the circumstances, including the manner in which the information was acquired.*
- (iii) *In assessing the public interest in the disclosure or use of the information the court should take into account all the circumstances, including the extent and character of such disclosure or use. A public interest may arise in the disclosure or use of confidential information whether or not the information relates to iniquity or other forms of misconduct.*
- (iv) *In assessing the public interest in the protection of confidentiality as against the public interest in the disclosure or use of information the court should take into account the time that has elapsed since the information originally became subject to an obligation of confidence.*
- (v) *It should be for the defendant to satisfy the court that there was a public interest involved in the relevant disclosure or use of the information in question. If the defendant discharges this burden, it should be for the plaintiff to establish that this interest is outweighed by the public interest in the protection of the confidentiality of the information.*
- (vi) *The above-mentioned approach in relation to the public interest should apply not only to past but also to apprehended breaches of confidence and, in respect of the latter, to claims not only for a final injunction but also, so far as the provisional character of such proceedings allows, for an interlocutory injunction.*

6. The transmissibility of obligations of confidence

6.85 In accordance with our recommendation in paragraph 6.51 above, liability under a pre-existing obligation of confidence will affect anyone who comes into possession of the information in question from the time he acquires actual or constructive knowledge that the information is subject to that

obligation.⁷¹⁰ This principle will apply not only to a third party who acquires the information from the person subject to an obligation of confidence but also to those acquiring the information on the bankruptcy or death of the latter person.⁷¹¹

6.86 Under the law of patents,⁷¹² as under the law of copyright,⁷¹³ the rights to which they respectively relate are declared by statute to be personal property and to be assignable both voluntarily and by operation of law. Furthermore, formal requirements for their assignment are laid down by statute. It is not possible, however, to treat the transferability of information subject to an obligation of confidence in exactly the same way by providing a similar "code". Lord Upjohn pointed out in *Boardman v. Phipps*⁷¹⁴ that although "in general, information is not property at all . . . 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 horse race based on stable or other confidential information". Whilst this list gives some idea of the range of information which may be subject to an obligation of confidence, it cannot be regarded as exhaustive and, indeed, virtually any information, however personal, may in appropriate circumstances be the subject of an obligation of confidence. It is not possible to lay down specific rules for the assignability and formal requirements of assignment of obligations of confidence in relation to such a wide range of information. Indeed, in our view, it is neither desirable nor necessary to do so. The position under the present law would appear to be that it is clear that choses in action relating to commercial information are transferable either by equitable assignment or by statutory assignment under section 136 of the Law of Property Act 1925.⁷¹⁵ There will, however, be other cases of information protected by an obligation of confidence where, because of the personal nature of the information, the obligation of confidence cannot be regarded as transferable property—for example, clearly a patient should not be able to transfer the benefit of an obligation of confidence owed to him by his doctor. We do not think that the present state of the law on the transferability of obligations of confidence will be affected by the creation, under the proposals in this report, of a new statutory obligation of confidence. We believe that the courts should continue to be free to decide, in the light of the general law,⁷¹⁶ whether, having regard to the nature of the information involved, the benefit of an obligation of confidence to which it is subject is capable of being assigned voluntarily or,

⁷¹⁰We should emphasise that strictly speaking the liability is not "transferred" to the third party, as the person originally subject to the obligation of confidence remains liable for any breach of that obligation.

⁷¹¹The effect generally of death in relation to the action for breach of confidence is discussed in paras. 6.115–6.120 below.

⁷¹²Patents Act 1977, s. 30(1), (2) and (3).

⁷¹³Copyright Act 1956, s. 36(1).

⁷¹⁴[1967] 2 A.C. 46, 127–128.

⁷¹⁵See *Chitty on Contracts*, 24th ed., (1977), vol. I, ch. 19. So far as involuntary assignment by reason of bankruptcy is concerned, as we have already stated (n. 30 above), a secret formula was held, in *Re Keene* [1922] 2 Ch. 475, to pass to the owner's trustee in bankruptcy.

⁷¹⁶See as to the analogous field of contract *Chitty on Contracts*, 24th ed., (1977), vol. I, paras. 1171–1177.

as the case may be, by operation of law.⁷¹⁷ We also consider that the courts should be left to decide to what extent the right to sue in respect of a breach of confidence which has already occurred should be capable of assignment.⁷¹⁸ We deal separately below⁷¹⁹ with the position which arises on the death of a person to whom an obligation of confidence was owed.

6.87 *We recommend that the benefit of an obligation of confidence should be capable of assignment to a person other than the person in whose favour the obligation has arisen but only to the extent that, having regard to the nature of the information protected by the obligation, such benefit is capable of being assigned in accordance with the general law governing the assignability of rights.*

7. Termination of the obligation of confidence

6.88 We have seen that an obligation of confidence may, under our proposals, be created in a variety of ways, e.g. by an undertaking of confidence,⁷²⁰ by improper acquisition,⁷²¹ by acquiring information disclosed in or for the purposes of legal proceedings⁷²² and as a third party recipient of information already so acquired.⁷²³ An obligation, once created should be capable of being brought to an end in a number of different ways virtually all of which seem to us to be both obvious and unexceptionable.

6.89 In the case of the normal obligation of confidence which arises from an undertaking of confidentiality by the acquirer of the information, the limits of the obligation may be set at the very outset. The undertaking may have been given expressly or by inference for a fixed period of time or until the happening of an event, such as the death of the giver, or even of the recipient, of the information.⁷²⁴ The expiry of the time or the happening of the event will terminate the obligation. Similarly, the person to whom the obligation, however created, is owed may expressly or impliedly release the acquirer of the information from his obligation of confidence. The obligation of confidence can only apply, as we have seen, to information which is not in the public domain. Once, therefore, information subject to such an obligation comes into the public domain as the result of the conduct of anyone the obligation comes to an end;⁷²⁵ though if it is put into the public domain by the person

⁷¹⁷It is difficult to envisage information covered by an obligation of confidence breach of which could result in mental distress, and which would under the general law sufficiently partake of the nature of property to be transferable. Nevertheless, in view of the novelty of the action of breach of confidence for mental distress, we specifically recommend (see para. 6.106 below) that proceedings for breach of confidence in respect of mental distress should only be capable of being brought in respect of distress suffered by the original person in whose favour an obligation of confidence has arisen. Such proceedings cannot be brought by an assignee of the benefit of the obligation of confidence. For assignment on death, see paras. 6.118–6.119 below.

⁷¹⁸See e.g. *Trendtex Trading Corp. v. Credit Suisse* [1980] Q.B. 629 and, in particular, Lord Denning M.R. at pp. 654–658.

⁷¹⁹See para. 6.118 below.

⁷²⁰See paras. 6.6–6.17 above.

⁷²¹See paras. 6.28–6.46 above.

⁷²²See paras. 6.18–6.27 above.

⁷²³See paras. 6.52–6.55 above.

⁷²⁴The effect of death on the obligation of confidence is discussed more fully in paras. 6.115–6.120 below.

⁷²⁵This is discussed more fully in paras. 6.67–6.74 above.

under the obligation of confidence, he may be liable for so doing. The only significant⁷²⁶ exception to this proposition is that, in a case involving the operation of the "springboard doctrine", the courts should be able to restrain the use of information in the public domain until its "head start" advantage has ended.⁷²⁷

6.90 *Our recommendations in respect of the termination of an obligation of confidence are that an obligation of confidence shall come to an end:*

- (i) *where the period for which an undertaking of confidence was given has expired;*
- (ii) *where the acquirer of information subject to an obligation of confidence is expressly or impliedly released from the obligation by the person to whom it is owed;*
- (iii) *when (subject to paragraph 6.74(iii) above) the information comes into the public domain.*

8. Defences to the action for breach of confidence

(a) General

6.91 In paragraphs 4.54–4.72 above we have discussed the questions which arise regarding the defences available in an action for breach of confidence. In the light of our recommendation in paragraph 6.55 above it will be clear that we are not recommending that it should be a defence to such an action that the information was originally acquired for value without actual or constructive notice of the fact that it was subject to an obligation of confidence, if, at the time when the action is brought, the defendant has such notice. Further, for reasons stated in Working Paper No. 58,⁷²⁸ which were supported on consultation, we do not think it should be a defence to an action for breach of confidence that the defendant was under a contractual duty to disclose or use the information subject to an obligation of confidence. In the light also of our recommendations in paragraphs 6.76 and 6.84 above, the claim that the information relates only to personal knowledge, skill or experience acquired in work, or that the public interest requires its disclosure or use, does not arise as a defence but is relevant to the basic question whether the information is of a character to which the action should accord protection.

6.92 One of the consequences of our recommendation⁷²⁹ that the action for breach of confidence should for the future be reformulated as a statutory cause of action in tort is that all the defences generally available to a cause of action in tort will be available in an action for breach of confidence. Whilst we do not think that it is necessary in this report to examine in detail all these

⁷²⁶An obligation of confidence may also come to an end if the court refuses to grant an injunction but makes an adjustment order in favour of the plaintiff; see paras. 6.110–6.112 below.

⁷²⁷See para. 6.70 above.

⁷²⁸See para. 88 of the working paper, cited in part in para. 4.56 above.

⁷²⁹See para. 6.5 above.

possible defences,⁷³⁰ such as for example, contributory negligence, there are a number of defences to which we think special consideration ought to be given and it is to those that we now turn.

(b) *Absolute privilege*

6.93 In paragraph 4.69 above we have considered whether, by analogy with the law of defamation, the statutory action for breach of confidence should be provided with a defence of absolute privilege. For the reason there given, and in the light of our consultation, we adhere to the provisional conclusion of Working Paper No. 58 that a disclosure of information in breach of confidence in circumstances which, for the purpose of defamation, would confer absolute privilege, should be subject to the same defence.

(c) *Qualified privilege*

6.94 On the other hand we do not think that a defence of qualified privilege, as in the law of defamation, is appropriate or necessary in the context of the action for breach of confidence.⁷³¹ In the first place, unlike the position in defamation where publication is a unilateral act, breach of confidence rests on the assumption that there is an obligation of confidence to be broken. The extent to which that obligation prohibits or allows the disclosure or use of the information in question will depend on the express or implied terms on which the obligation of confidence has come into being. Some of the situations where in the law of defamation there is a defence of qualified privilege are dealt with in the law of breach of confidence by reference to the scope, express or implied, of the original obligation of confidence. Thus in the law of defamation an employer who dictates a defamatory statement to his secretary will seek to rely on that heading of qualified privilege which accords such privilege to:

“statements made for the protection or furtherance of an interest, to a person who has a common or corresponding duty or interest to receive them; such interest may be either private to the publisher, or public.”⁷³²

But if, in the context of breach of confidence, a doctor who has received information from his patient in the course of a professional interview subsequently dictates a note of the interview to his secretary, the question is whether such disclosure is expressly or (as would normally be the case) impliedly authorised under the obligation of confidence.

6.95 Secondly, a very high proportion of the occasions which in the law of defamation are covered by qualified privilege would not give rise to an

⁷³⁰It is unlikely that the defence of consent, as such, will be significant because the obligation of confidence itself will be limited to the extent that use or disclosure of the information is authorised, expressly or impliedly, by the person to whom the obligation is owed; see para. 6.56 above.

⁷³¹This view, which we provisionally expressed in Working Paper No. 58, para. 90, was generally agreed on consultation. However, having regard to a number of issues which arise in the context of considering whether such a defence to an action for breach of confidence should be introduced, we here consider in greater detail the arguments against it.

⁷³²Report of the Faulks Committee on Defamation (1975), Cmnd. 5909, para. 184(b).

obligation of confidence in any event, because the information would *ex hypothesi* be in the public domain.⁷³³ Thirdly, the concept of malice, or an improper motive defeating the privilege, cannot appropriately be applied to some analogous defence in the law of breach of confidence. One way of showing malice or an improper motive to defeat a claim of qualified privilege in the law of defamation is to prove that the defendant did not believe the statement was true. This does not fit into the scheme of breach of confidence where the information in question normally is true; it is the fact that the information is true which makes the person who has confided it to another in confidence particularly anxious to prevent its disclosure.

6.96 The fourth and in our view most general and persuasive reason why the defence of qualified privilege is inappropriate to breach of confidence is that the protection which that defence sometimes affords in defamation⁷³⁴ is provided in breach of confidence by the more far-reaching requirement that information cannot be protected unless, on a balance of the interests involved, the public interest requires its protection. In establishing that balance the court will take into account the existence of such social or moral duties as might in defamation ground a defence of qualified privilege to the extent that the recognition of such duties is in fact in the public interest.

(d) *Statutory duty or authority*

6.97 The action for breach of confidence which we are recommending should be subject to the defence that the disclosure or use complained of was made pursuant to a duty or authority provided by or under statute.⁷³⁵

6.98 In this context, we think we ought specifically to mention the proposals of the Committee on Data Protection. In their report⁷³⁶ that Committee recommend the setting up of a Data Protection Authority, one of whose functions would be to prepare Codes of Practice prescribing for the holders of personal data "such matters as the data to be handled, the uses to which they are to be put, their disclosure to data subjects and third parties, the assurances to be given when they are collected, the safeguards for ensuring their accuracy, relevance, timeliness and completeness, the measures for ensuring their security and the circumstances in which users must seek the consent of data subjects or authorisation from the DPA."⁷³⁷ The Committee envisage that the Codes of Practice would be implemented by statutory instruments which, when approved by Parliament, would acquire the force

⁷³³This becomes clear from the list of statements which are privileged by virtue of the provisions of s. 7 of, and the Schedule to, the Defamation Act 1952.

⁷³⁴As where the statement is made pursuant to a social or moral duty to someone with a corresponding duty or interest to receive it. So far as a legal duty on which a defence of qualified privilege in defamation may be based is concerned, the position in breach of confidence will be that a statutory requirement (or authority) to disclose or use information will be a defence (see para. 6.97 below), as will such disclosure or use pursuant to an order of a court (see para. 6.101 below); but (see para. 6.91 above) a contractual duty will not of itself constitute a defence.

⁷³⁵For examples under the existing law see para. 4.55 and n. 272 above. This defence would, of course, include E.E.C. legislation which is directly applicable in this country by reason of s. 2 of the European Communities Act 1972.

⁷³⁶(1978) Cmnd. 7341.

⁷³⁷*Ibid.*, summary, para. 13, p. xxi.

of law, breach of which would involve criminal penalties and form the basis of a civil action for damages. In Chapter 34 of their report they consider the possibility of a clash between their recommendations and obligations arising from the law of breach of confidence. The Committee suggest that any such conflict should be resolved by the court of trial "in the light of all the circumstances of the case",⁷³⁸ and that any "small loss of certainty would be substantially outweighed by the unjust decisions which courts might otherwise be forced to make if either of these two branches of the law were to prevail over the other in every case, regardless of its particular facts."⁷³⁹

6.99 The recommendations of the Committee on Data Protection have not been implemented and in March 1981, the Home Secretary indicated⁷⁴⁰ that the government does not intend to set up an independent Data Protection Authority. He accepted the need for statutory controls in the field of data protection but took as a starting point the principles formulated by the Younger Committee⁷⁴¹ and indicated that the basis of the government's proposals would be the establishment of a public register. Users of systems which handle personal information automatically would be required to register and, inter alia, publish their codes of practice. There is no indication whether these codes of practice could be the subject of binding orders as envisaged by the Committee on Data Protection. If a binding order conflicting with the requirements of an obligation of confidence was made, such an order would have to be treated, *in the law of breach of confidence*, as a valid defence, in so far as such an order was a valid order for disclosure made under statutory powers. If, however, codes of practice are not to be given legal force a court will still be able, as part of the law on breach of confidence, to balance the public interest in the protection of confidentiality against the public interest in such disclosure, in such a way as might appear to be desirable in the light of the considerations emphasised by the Committee on Data Protection.

(e) *Agreements contrary to an E.E.C. obligation*

6.100 In paragraph 4.68 above we have pointed out that in certain circumstances an obligation of confidence may arise out of an agreement which is contrary to Article 85⁷⁴² of the Treaty of Rome and that such an agreement is by paragraph (2) of Article 85 automatically void, section 2(1) of the European Communities Act 1972⁷⁴³ giving effect to this provision as part of the law of the United Kingdom. We do not recommend, however, that special statutory provision be made to provide a defence in the event of an agreement creating an obligation being contrary to a provision of the Treaty of Rome having direct effect in our internal law, since such an obligation must by virtue of section 2(1) of the 1972 Act be void to the extent that it is contrary to the Treaty.

⁷³⁸ *Ibid.*, para. 34.17.

⁷³⁹ *Ibid.*, para. 34.18.

⁷⁴⁰ *Hansard*, (H.C.) 19 March 1981, vol. 1, Written Answers, cols. 161-162.

⁷⁴¹ (1972) Cmnd. 5012, paras. 592-600.

⁷⁴² For a summary of cases before the European Commission and relevant parts of a Draft Commission Regulation see Appendix D below.

⁷⁴³ The text of s. 2(1) is set out in n. 331 above.

(f) *Order of a court*

6.101 We envisage that it will—as it is at present—be a good defence to an action for breach of confidence that the disclosure in issue was made pursuant to an order made in exercise of the powers of the court in that regard. As we have already emphasised,⁷⁴⁴ the law which governs the exercise of such powers is distinct from the law governing breach of confidence, although the fact that information in respect of which an order for disclosure is sought from a court is subject to an obligation of confidence is a matter which the court will take into account. We have referred at length to recent cases⁷⁴⁵ in which the courts have had to determine the principles on which disclosure may be ordered, but we have done so only to make clear the dividing line between the action for breach of confidence and an order for discovery. It is not our purpose in this report to make recommendations as to the proper limits of the latter area of law.

(g) *Pre-existing and subsequently acquired information*

6.102 The nature of information, unlike physical property, is such that an individual may acquire, or appear to acquire, the same item of information from several sources or on different occasions from the same source. This characteristic of information can in certain circumstances give rise to a defence to what would otherwise be a viable action for breach of confidence. The problem with which we are concerned involves the effect on A's liability to C of the fact that A is already under a similar obligation of confidence to B, or on A's liability to B of the fact that A later receives similar information from C. There is a danger that a recipient doubly subject to an obligation of confidence might escape altogether. For instance this paradoxical result would follow if A, being successively bound by obligations of confidence in respect of the same information to B and C, could argue that he was not liable to B because he subsequently became aware of the information independently through C, and that he was not liable to C because at the time of his undertaking towards him he already was in possession of the information from B. We must examine the problems arising from pre-existing and subsequently acquired information in more detail.

- (a) Suppose A undertakes, in the event of negotiations falling through for the sale to him by B of certain know-how, not to disclose or use the information in question. After B has disclosed the know-how to A, the latter realises that he was already in possession of this information. If A subsequently discloses or uses that information and B sues him for breach of confidence, can A successfully argue that he cannot be said to have acquired information under an obligation of confidence from B even though he purported to have undertaken such an obligation of confidence in respect of that acquisition, as he was already in possession of the information? We think A should

⁷⁴⁴See para. 4.58 above.

⁷⁴⁵See paras. 4.57–4.67 above.

have such a defence,⁷⁴⁶ provided that the pre-existing awareness of the information on which A relies was not itself subject to a separate obligation of confidence or, if it was so subject, provided that it had become free of such an obligation before the alleged breach of confidence vis-à-vis B.⁷⁴⁷

- (b) If, however, A's pre-existing awareness of the information purporting to have been given to him by B under an obligation of confidence was subject to a separate obligation of confidence to C and that obligation was still running at the time of the alleged breach of confidence by A vis-à-vis B, A should not have the defence of pre-existing awareness against B. Since the information is the same in both cases, it would be impossible to say whether the disclosure or use related to the information as coming from B or C, and A should not be entitled in effect to plead his own breach of confidence vis-à-vis C as a defence to an action for breach of confidence brought by B.
- (c) Similar principles should apply to the situation where, after information has been received under an obligation of confidence, the recipient is given the same information from an independent source. If, at the time when the obligation which the first giver alleges to be owed to him was broken, the recipient can show that his disclosure or use relates to the information as obtained by him from an independent source, in respect of which he is not bound by a separate obligation of confidence, then the recipient should have a good defence against any action for breach of confidence brought by the first giver. It would, in our view, be quite unreasonable for the recipient's undertaking to preserve confidence to have the effect of precluding him from disclosing or using the same information which he had subsequently acquired from another source without any obligation of confidence. Here again unsuccessful negotiations for the purchase of know-how may provide an example. After the breakdown of negotiations the recipient of the information, who has undertaken to the would-be vendor not to disclose or use it, is given the same information, with a right to disclose or use it, by a third party, perhaps at a much lower price than that demanded by the first and unsuccessful vendor.⁷⁴⁸ The undertaking in respect of the first negotiations should not, if those negotiations fail, in effect preclude the recipient of the

⁷⁴⁶Although it might be said that the imparting of information under an obligation of confidence is a requirement of the action and therefore the obligation to satisfy it falls on the plaintiff, the state of the defendant's knowledge as to the information in question lies within his competence and should in our view be raised as a defence.

⁷⁴⁷We would wish to emphasise this qualification. Suppose A successively enters into separate negotiations with B and C for the same information, undertaking in each case not to disclose or use it in the event of negotiations breaking down. After the initial failure of both negotiations, A reaches an agreement with B which gives him complete freedom with regard to the information. A should be able successfully to argue that his disclosure or use relates to the information as communicated to him by B and that he has committed no breach of confidence vis-à-vis C.

⁷⁴⁸Alternatively, the recipient of the information subject to an obligation of confidence may subsequently by his own experiments acquire the know-how. One division of a large corporation may acquire in confidence information as to an industrial secret which another research division later discovers independently, in ignorance of the earlier information.

information from entering into later negotiations with a third party who is able to provide a separate source for the same information.

- (d) Where however the recipient of information under an obligation of confidence is subsequently given the same information subject to a separate obligation of confidence, his position is similar to that of A in sub-paragraph (b) above. That is to say, he can claim no defence merely because he has acquired independently subsequent knowledge of the information in respect of which breach of confidence is alleged. He is liable for breach of confidence both to the original confider of the information and to the later third party and cannot make the breach of his obligation of confidence to one an excuse for his breach of confidence vis-à-vis the other.⁷⁴⁹

(h) *Recommendations as to defences*

6.103 *Our recommendations as to defences to an action for breach of confidence are as follows:*

- (i) *In addition to defences generally available in tort, it should be a defence that:*
- (a) *The disclosure of the information took place in circumstances which, for the purposes of defamation, would confer absolute privilege.*
 - (b) *The disclosure or use of the information was made pursuant to a requirement imposed, or authority conferred, by or under statute (including a statute implementing our obligations under the Treaty of Rome).*
 - (c) *The disclosure of the information was ordered to be made by a court pursuant to a power in that regard.*

However, no defence of qualified privilege is appropriate or necessary in the context of breach of confidence.

- (ii) *In relation to pre-existing or subsequently acquired information:*
- (a) *It should be a defence to an action for breach of confidence in respect of the disclosure or use of information that the person alleged to be subject to an obligation of confidence was, at the time he acquired the information under such an obligation, already in possession of that information.*

⁷⁴⁹It should be emphasised that the conclusions reached in this paragraph only relate to the action for breach of confidence. Subject to the law governing agreements in respect of restraint of trade and other aspects of public policy, it may be possible by contract to undertake not to disclose or use information which at the time when the contract is made is already in the possession of the person giving such an undertaking; and it may also be possible to undertake by contract to one donor of information not to disclose or use it, even though the recipient were later to acquire the same information from another and independent source. Contractual obligations of confidence are discussed in paras. 6.127–6.134 below.

- (b) *Recommendation (ii)(a), however, should not apply if the disclosure or use of the information constituted a breach of a separate, prior obligation of confidence.*
- (c) *It should also be a defence to an action for breach of confidence in respect of the disclosure or use of information that the person subject to an obligation of confidence has, subsequent to the creation of that obligation, obtained the same information by independent means.*
- (d) *Recommendation (ii)(c), however, should not apply if the disclosure or use of the information constituted a breach of a separate, subsequent obligation of confidence.*

9. The remedies for breach of confidence

(a) Remedies for damage already suffered

6.104 In paragraphs 4.75–4.86 we have reviewed the existing law covering the remedies for damage which has already been suffered from a breach of confidence and in paragraph 5.17 we have drawn attention to the problems arising from, and the inadequacies of, these remedies. We deal first with those matters where the present law is uncertain or inadequate and on which we make recommendations which would alter or clarify the law. We then turn to those areas of the law where in the context of this report the law in our view calls for no change.

6.105 First, it is doubtful whether there is an independent right to damages for a breach of confidence which has actually taken place,⁷⁵⁰ as distinguished from an award of damages in lieu of an injunction. It will follow from our recommendation that breach of confidence should become a statutory tort that there will be a clear right to damages for a past breach of confidence.

6.106 Secondly, the question arises whether a plaintiff should be able to recover damages not only in respect of any pecuniary loss which he has suffered by reason of a past breach of confidence, but also in respect of mental distress which he has suffered as a result of the disclosure.⁷⁵¹ It is true that the common law has in the past leaned against awarding damages for distress, as, for example, in respect of bereavement arising from the death of a near relative caused by a tortious act. Moreover, we realise that the assessment in monetary terms of values which in their nature are non-economic involves particular difficulties and that the recognition of “mental distress” as a head of damage might tend to stimulate extravagant or frivolous claims. On the other hand, if the action for breach of confidence is to be regarded, albeit only within its limited sphere of operation, as a possible remedy for some infringements of personal privacy, as the Younger Committee envisaged when they originally recommended that the action be referred to the Law Commissions,⁷⁵² then in our view it is necessary to recognise mental distress

⁷⁵⁰See paras. 4.75–4.77 above.

⁷⁵¹See paras. 4.79–4.82 above.

⁷⁵²See para. 1.2 above.

resulting from such infringement as a head of damage.⁷⁵³ Where personal information has already been disclosed and an injunction would be inapplicable, the plaintiff might otherwise have no effective remedy. Furthermore, as we have pointed out earlier,⁷⁵⁴ recognition has been given by statute to damages for distress in the spheres of race relations and, perhaps, copyright; and the courts in a relatively recent development have taken account of what may be broadly described as distress in awards of damages for breach of certain kinds of contract. It must be borne in mind that mental distress can cover a very broad spectrum from, at one end, relatively insignificant disappointment and upset, to, at the other, major illness and neurological complaints caused by the shock and distress. Although it is not possible to envisage physical injury or harm resulting directly from the use or disclosure of confidential information, it is quite possible for mental or physical harm to ensue as a result of mental distress, and the latter head of damage should extend to include such mental or physical harm.⁷⁵⁵ However, we think that a plaintiff should not qualify for an award of damages for mental distress unless a person of reasonable fortitude placed in his position would be likely to suffer mental distress.⁷⁵⁶ Finally, we think it is desirable specifically to provide, in view of the novelty of proceedings for breach of confidence resulting in mental distress, that such proceedings can only be brought in respect of mental distress suffered by the person in whose favour the obligation of confidence originally arose.⁷⁵⁷

6.107 Turning to the matters where we propose no change in the existing law, we have discussed the question of punitive or exemplary damages in relation to breach of confidence in paragraphs 4.83–4.85 above, particularly in cases where there is some arguable analogy with an action for breach of copyright and in the light of the as yet unimplemented views of the Whitford Committee on the Law on Copyright and Designs.⁷⁵⁸ We believe, however, that the question of exemplary damages raises general issues which it would be unsatisfactory to attempt to resolve in the context of the action for breach of confidence alone. We therefore make no specific recommendation concerning exemplary or punitive damages, and the position regarding the action for

⁷⁵³In Australia the Law Reform Commission have recommended in their Report No. 11, on *Unfair Publication: Defamation and Privacy* (1979) that "the extent to which the publication and the conduct of the defendant tend to injure the health or social or financial position of the plaintiff or to cause him distress, annoyance or embarrassment" should be one of the criteria specified in respect of damages awardable in the "privacy action" which they propose should be made available (emphasis added); see para. 264 (where they state: "A privacy action aims at providing the plaintiff with compensation for the distress and embarrassment resulting from the publication"); and clause 29(1)(b) of the draft *Unfair Publication Bill*.

⁷⁵⁴See paras. 4.79–4.80 above.

⁷⁵⁵For the purposes of the law relating to limitation of actions, claims for mental distress and for any mental or physical harm resulting therefrom should, in our view, be regarded as claims for personal injuries and be subject to a three-year limitation period: see the *Limitation Act 1980*, ss. 11–14.

⁷⁵⁶The present law as to the requirement of reasonable fortitude is discussed in para. 4.81 above.

⁷⁵⁷As we explain in n. 717 above, it is unlikely that in any event, under the general law governing the transferability of rights, the right to bring the action could be regarded as assignable. If, however, the cause of action had arisen before the death of the person distressed, it would survive for the benefit of his estate, see para. 6.117 below.

⁷⁵⁸(1977) Cmnd. 6732. Support for the views of the Whitford Committee on the topic of exemplary damages is to be found in *Reform of the Law relating to Copyright, Designs and Performers' Protection: A Consultative Document* (1981), Cmnd. 8302, Chapter 14, para. 3.

breach of confidence will accordingly be that such damages will be awardable only to the extent that they are now recoverable under the general law—i.e. in accordance with the test laid down in *Rookes v. Barnard*.⁷⁵⁹ Nor do we think it necessary to make specific provision as to the basis on which damages should be assessed where information of a commercially exploitable character is involved, although we agree with Lord Denning M.R. in *Seager v. Copydex Ltd. (No. 2)*⁷⁶⁰ that in such cases the basis of assessment should vary according to the nature of the information in question. Finally, we think that the existing discretionary remedy of an account of profits⁷⁶¹ should continue to be available, as an alternative, though not in addition, to an award of damages. The former is likely seldom to be preferred because of the complexities of calculation which it may involve.

(b) *Remedies against a feared future breach of confidence*

Interlocutory injunctions

6.108 In paragraphs 4.87–4.98 above we have considered at some length the principles which govern the grant of an interlocutory injunction in a case of breach of confidence in the light of the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*⁷⁶² and of later cases in which the implications of that decision have been worked out by the courts. In paragraph 5.18 above we have raised the question whether these principles are satisfactory when applied to breach of confidence actions or whether they require, as in defamation,⁷⁶³ to be qualified in respect of breach of confidence by considerations of the public interest. It is important at the outset to emphasize that in *Cyanamid* considerations of the public interest did not arise; what was in issue was the balance of convenience as between the parties. It is, however, clear that in the grant of an interlocutory injunction the public interest is a relevant factor.⁷⁶⁴ We therefore think that it is not necessary in respect of breach of confidence actions to make special rules governing the grant or refusal of an interlocutory injunction. In particular, we do not think it is desirable to apply to applications for an interlocutory injunction in breach of confidence actions a rule similar to that which governs such applications

⁷⁵⁹[1964] A.C. 1129. See para. 4.83 above.

⁷⁶⁰[1969] R.P.C. 250, 256; [1969] 1 W.L.R. 809, 813, cited in para. 4.78 above. Lord Denning there makes a distinction between information which could have been obtained from a competent consultant (when the fee which would have been payable to such a consultant would constitute the measure of damages) and more original information (when the capitalised value of a royalty payable for the use of such information would be appropriate).

⁷⁶¹See para. 4.86 above.

⁷⁶²[1975] A.C. 396.

⁷⁶³See para. 4.94 above.

⁷⁶⁴See para. 4.93 above and *Khashoggi v. Smith* (1980) 130 New L.J. 168; (1980) 124 S.J. 149 where the Court of Appeal, in dismissing an appeal against a refusal to grant an interlocutory injunction, said that the information, the confidentiality of which it was sought to protect, was of two kinds: allegations of criminal conduct which the second defendant, a newspaper, wished to investigate and allegations concerning men with whom the plaintiff was said to have had affairs. The Court of Appeal were clearly unwilling to grant an interlocutory injunction which would hinder the investigation of alleged criminal conduct which, if the allegations were substantiated, it might on balance be in the public interest to disclose; and they considered that the second kind of allegation was in the circumstances so closely linked with the first that the balance of convenience lay against granting an interlocutory injunction.

in defamation cases, namely that an interlocutory injunction will not be granted "if there is any doubt whether the words are defamatory, or the defendant says that he will plead justification, fair comment, qualified privilege, or any other defence, and it is not manifest that such a defence is bound to fail".⁷⁶⁵ In a defamation case, if an interlocutory injunction is not granted and nevertheless the defences put forward ultimately fail, the plaintiff will have the satisfaction of the vindication of his good name in court as well as an award of damages. In a breach of confidence case, on the other hand, if the plaintiff is refused an interlocutory injunction but succeeds at the trial, there may be no way, comparable to the vindication of the plaintiff's good name in a defamation case, by which he can undo the harm caused by the disclosure of the information which he is seeking to protect and for which, where the information is of a personal character, damages may not be an adequate compensation. In exercising its discretion in regard to the grant or refusal of an interlocutory injunction in a breach of confidence case the court would, however, be guided by the principles laid down in *Cyanamid*, as elucidated in later cases. That is to say, the court would determine in all the circumstances where the balance of convenience lies as between:

- (a) any hardship to the plaintiff in the event of an interlocutory injunction being refused which, were he to succeed in the action, could not be adequately compensated by an award of damages and
- (b) any hardship to the defendant, or injury to the public interest, which, in the event of an interlocutory injunction being granted but the defendant ultimately being successful, could not be adequately compensated or redressed by the plaintiff's undertaking in damages.⁷⁶⁶

Final injunctions

6.109 We think that the court should continue to be able at its discretion to award a final, as opposed to an interlocutory, injunction to prevent the disclosure or use of information so long as the requirements of the action for breach of confidence in respect of that information continue to be fulfilled. The qualification is important, as in changing circumstances some of those requirements may no longer be satisfied. For example, the information in question may come into the public domain and thus, in accordance with the recommendation we have made,⁷⁶⁷ cease to enjoy protection, even if it was put into the public domain by the defendant himself (although he will of course be liable in damages for his breach of confidence); again, the public interest in the disclosure of the information, which at one time may have been thought to be slight, may at some later period acquire much greater importance and outweigh the public interest in maintaining the confidentiality of the information. Where, for these or other reasons, there is doubt as to the continuing status of information so far as its protection by the action for breach of confidence is concerned a court may refuse an

⁷⁶⁵This version of the rule is taken from the Report of the Faulks Committee on Defamation (1975), Cmnd. 5909, paras. 375-377. See n. 424 above.

⁷⁶⁶See n. 396 above.

⁷⁶⁷See para. 6.74(i) above.

injunction altogether or grant it in terms limiting the period of its operation.⁷⁶⁸ Even if the injunction is not expressly limited as to the period of its operation, it is always open to the defendant to come back and apply to the court for its discharge.

Damages in lieu of an injunction and adjustment orders

6.110 We have explained⁷⁶⁹ that a court in a breach of confidence action has a discretionary power to make a monetary award in lieu of an injunction; and we have suggested⁷⁷⁰ that, having regard to the special character and needs of the action,⁷⁷¹ this power could usefully be refined and developed. Under this new discretionary remedy, which we suggest should be called an "adjustment order", the court would be enabled:

- (a) to make a monetary award to the plaintiff in lieu of an injunction⁷⁷² on such basis of assessment as is appropriate in all the circumstances, one of which may be the nature of the information involved.⁷⁷³ Such an award would take the form either of a lump sum or of a royalty

⁷⁶⁸Such an injunction could for example be used to prevent a defendant, who is in possession of information covered by an obligation of confidence before that information reaches the public domain, from obtaining an unfair advantage by his preparations for the exploitation of the information over others who have had to wait until the information reaches the public domain. See para. 6.70 and the recommendation in para. 6.74(iii) above. A further example of an injunction which is limited in time is provided by the Canadian case of *International Tools Ltd. v. Kollar* (1968) 67 D.L.R. (2d) 386, 393 where a permanent injunction was qualified as follows: "Since it is conceivable that sometime in the future, some person other than the plaintiff may by his own thought and effort and quite independently of any improper disclosure of the plaintiff's secret, evolve a manufacturing method embodying the plaintiff's method which constitutes its trade secret, the duration of the injunction should not continue beyond the time the plaintiff's trade secret remains a secret exclusively known to the plaintiff or to those to whom it has been voluntarily disclosed under conditions imposing an obligation of confidentiality upon them." However, for an English court a simpler way of achieving the same objective might have been to grant an injunction unlimited in time, leaving the defendant free to apply for its variation or discharge.

⁷⁶⁹See paras. 4.99-4.101 above.

⁷⁷⁰See paras. 5.19-5.22 above.

⁷⁷¹We have particularly in mind: the character of information, as contrasted with material forms of property, in that information is not fully "transferred" to, but only "shared" with, another; the wide variety of types of information which may be the subject of an action for breach of confidence; the fact that information may at some time in the future cease to have the qualities which entitle it to protection by the action for breach of confidence; and the desirability of taking into account (i) expenditure by the defendant in connection with the information incurred at a time when he neither knew or ought to have known that the information was subject to an obligation of confidence (see para. 5.21 above); (ii) expenditure by the plaintiff preparatory to exploiting the information where such expenditure is likely to be wasted in whole or in part if the defendant, in consideration of a payment to be made to the plaintiff, is to be allowed to exploit the information (see para. 5.22 above).

⁷⁷²Where the plaintiff is also awarded damages for a past breach of confidence, the court should, in calculating the sum to be awarded by way of adjustment order in relation to the defendant's future use of the information, have power to take account of such element of the damages award as may relate to future loss.

⁷⁷³See the distinction made in *Seager v. Copydex Ltd. (No. 2)*, cited in para. 4.78 above and discussed in n. 760 above, between information obtainable from any competent consultant and information of a more original character.

in respect of the defendant's future use of information on such terms and for such period as the court deems appropriate;⁷⁷⁴

- (b) to order the defendant to make such a fair and equitable contribution to the expenses of the plaintiff preparatory to exploiting the information as are likely to be wasted if the defendant is to be allowed to exploit it;
- (c) to determine the extent (if at all) to which each of the parties will respectively be free to use the information (as, for example, to grant licences to use it to third parties);
- (d) where the defendant is to be restrained by injunction from exploiting the information and he has incurred expenditure preparatory to exploiting the information before he knew or ought to have known that it was subject to an obligation of confidence, to require the plaintiff to make such contribution to those expenses as may be fair and equitable.

6.111 The proposal in paragraph 6.110(d) above will involve the court in balancing the conflicting interests of two "competing innocents". There may be circumstances where to grant an injunction to the plaintiff would be oppressive to the defendant, and in such cases, were the court to have no such power as we recommend in paragraph 6.110(d), it would have to award damages instead of an injunction, with the consequence that the defendant would then be free to exploit what had been the plaintiff's information. That decision might, however, be unfair in some cases to the plaintiff, to whom an injunction might be of such value that he would be willing to make an appropriate payment to the defendant in order to obtain one, thereby agreeing in effect to an apportionment of the loss. The court would only exercise its discretionary power to make an adjustment order where it would, on the one hand, be oppressive to the defendant to grant an injunction without more and where, on the other hand, damages in lieu of an injunction would be an inadequate remedy for the plaintiff; and we envisage that in practice an adjustment order involving a particular payment to be made by the plaintiff would rarely be made otherwise than with his consent.

6.112 We may illustrate the working of the adjustment order in general by the following example. The plaintiff has given particulars of an unpatented invention to a draughtsman to make drawings for the plaintiff's use and the draughtsman accepts an obligation of confidence in respect of the invention. The draughtsman sells the invention to the defendant as his own discovery and the defendant neither knows nor ought to know of the draughtsman's obligation of confidence. The defendant builds a factory to exploit the invention commercially and meanwhile the plaintiff, not being aware that his secret is now shared with the defendant, also builds a factory for the same purpose. If, when the defendant discovers that the information is subject to an obligation

⁷⁷⁴As Lord Denning M.R. has emphasised, the courts do not at present possess the power to order a royalty to be paid: see *Seager v. Copydex Ltd. (No. 2)* [1969] R.P.C. 250, 256; [1969] 1 W.L.R. 809, 813, cited in para. 4.78 above (see the last sentence in the passage cited). Compare the power to grant compulsory licences under the Patents Act 1977 s. 48, where a patent is being insufficiently or otherwise unsatisfactorily exploited.

of confidence, the court decides to grant an injunction against him, it could under the adjustment order require the plaintiff to make such contribution as in the circumstances is fair and equitable to the expenses vainly incurred by the defendant, including what the latter paid to the draughtsman for the information.⁷⁷⁵ Moreover, we would emphasise that the remedy would be discretionary and flexible. The court might decide that it would in the circumstances be inappropriate to grant an injunction if, for example, the defendant's factory was already in full production and a large number of people were employed there.⁷⁷⁶ The court could then make an adjustment order under which the defendant would be required to make a payment to the plaintiff including such contribution to the plaintiff's expenditure as would in the circumstances be likely to have been wasted: in determining the amount of this payment the court would have regard to the extent (if any) to which under the terms of the adjustment order the plaintiff was to be allowed himself to continue to exploit the information, albeit in competition with the defendant.

Order for destruction or delivery up

6.113 The remaining remedy,⁷⁷⁷ so far as a feared future breach of confidence is concerned, is the discretionary order for the destruction or delivery up of the material containing the information in question. In paragraphs 4.102–4.104 above we have described this remedy and illustrated its value, particularly where the unsuccessful defendant is not regarded by the court as reliable and where the relevant material, being the property of the defendant, cannot be recovered by an order for the delivery of goods under section 3(2)(a) and (b) of the Torts (Interference with Goods) Act 1977. We think that a discretionary order for the destruction or delivery up of the material containing the confidential information should continue to be available.

(c) Recommendations on remedies

6.114 *We therefore recommend that the remedies available for breach of confidence should be as follows:*

(i) In respect of damage which has already been suffered:

⁷⁷⁵Of course both parties would have an action against the draughtsman: the plaintiff for damages for breach of confidence and the defendant for breach of an implied term that the draughtsman was free to sell the information.

⁷⁷⁶This was a relevant consideration in the court's refusal to grant an interlocutory injunction in *Potters-Ballotini Ltd. v. Weston-Baker* [1977] R.P.C. 202. See n. 516 above and, for the facts of the case, para. 4.95 above.

⁷⁷⁷We do not intend that the fact that we have specifically listed a number of remedies which should, in our view, be available in breach of confidence actions should affect the continued availability, where appropriate, of any ancillary or incidental relief which it is open to a court to grant. For example, it is obviously desirable that the courts should continue to have a discretion to grant Anton Piller orders: see *Anton Piller K.G. v. Manufacturing Processes Ltd.* [1976] Ch. 55. In that respect we note that the criticisms expressed in the House of Lords in *Rank Film Distributors Ltd. v. Video Information Centre* [1981] 2 W.L.R. 668 of the law relating to incrimination in the context of Anton Piller orders have been substantially met by the Supreme Court Act 1981, s. 72.

- (a) *damages assessed on such basis as is appropriate in all the circumstances, or alternatively, at the discretion of the court, an account of profits gained as a result of the breach of confidence;*
 - (b) *additionally, or solely, as the case may be, damages for mental distress (and for mental or physical harm resulting therefrom) where a person of reasonable fortitude placed in the position of the plaintiff might be expected to suffer mental distress as a result of the breach of confidence; but proceedings for breach of confidence resulting in mental distress should only be capable of being brought in respect of mental distress suffered by the person in whose favour the relevant obligation of confidence originally arose.*
- (ii) *In respect of a feared future breach of confidence:*
- (a) *at the discretion of the court, an interlocutory or a final injunction;*
 - (b) *at the discretion of the court, an adjustment order by virtue of which a court would be enabled:*
 - (1) *to make a monetary award to the plaintiff in lieu of an injunction on such basis of assessment as is appropriate in all the circumstances, such award taking the form either of a lump sum or of a royalty in respect of the defendant's future use of information on such terms and for such period as the court deems appropriate;*
 - (2) *to order the defendant to make such a fair and equitable contribution to the expenses of the plaintiff preparatory to exploiting the information as are likely to be wasted if the defendant is to be allowed to exploit it;*
 - (3) *to determine the extent (if at all) to which each of the parties will respectively be free to use the information;*
 - (4) *where the defendant is to be restrained by injunction from exploiting the information and he has incurred expenditure preparatory to exploiting it before he knew or ought to have known that the information was subject to an obligation of confidence, to require the plaintiff to make such contribution to those expenses as may be fair and equitable;*
 - (c) *at the discretion of the court, an order for the delivery up or destruction of any material containing the confidential information involved.*

10. Death and the action for breach of confidence

(a) General

6.115 In paragraphs 4.105–4.107 above we have discussed the extent to which death may be a relevant factor in connection with an action for breach of confidence. In the light of that discussion we here state our conclusions in regard to:

- (i) **the survival of a cause of action for breach of confidence already subsisting against or vesting in any person on his death;**

- (ii) the death of a person to whom an obligation of confidence is owed before any breach of that confidence has occurred;
- (iii) the death of a person under an obligation of confidence before any breach of that confidence has occurred.

6.116 Before we consider these matters in detail, two general points ought to be made. First, it should be borne in mind that the effect of death as such in relation to an action for breach of confidence is to be distinguished from the operation of other rules governing breach of confidence. For example, the ambit of the original obligation of confidence may be expressly or impliedly limited to the lifetime of the person imposing the obligation. Secondly, if there has been a considerable lapse of time between the creation of the obligation and its alleged breach it may be that the information in question has meanwhile come into the public domain, or the lapse of time may have resulted in a change in the balance of the public interests involved, so that an action for breach of confidence has become no longer sustainable.

(b) Survival of an existing cause of action

6.117 With regard to (i) above, we have said⁷⁷⁸ that, by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, all causes of action which subsist against or vest in any person at his death "survive against, or, as the case may be, for the benefit of, his estate", the only current exception being defamation. In Working Paper No. 58 we took the provisional view that, if the Faulks Committee on Defamation recommended that defamation be no longer excluded from the Act of 1934, the argument would be strengthened for leaving unchanged the present law in respect of the effect of death on the action for breach of confidence. In the event the Faulks Committee have by a majority made such a recommendation,⁷⁷⁹ although they distinguished between the case where a person defamed has started an action but then has died before judgment and one where the person defamed has died before starting the action.⁷⁸⁰ In the latter case they would allow the personal representatives of the deceased to bring proceedings "to the extent only of claiming an injunction and actual or likely pecuniary damage suffered by the deceased or his estate as a result of the defamation". If a similar distinction were to be made in respect of the action for breach of confidence it would follow that, where a person had a right to bring an action but had not done so before his death, his personal representatives would have the remedies which would have been available to him if he had not died; but if it became possible to give damages for mental distress irrespective of actual pecuniary damage suffered⁷⁸¹ then such damages would not be obtained by the personal representatives of a deceased in respect of a cause of action which arose in the latter's lifetime but on which he had not at the time of his death started proceedings. In favour of the exclusion of any right of the personal representatives to obtain damages for such distress, it may be argued that distress should be treated as something personal to the person who has

⁷⁷⁸See para. 4.105 above.

⁷⁷⁹(1975) Cmnd. 5909, paras. 392-416.

⁷⁸⁰*Ibid.*, para. 415(b) and (c).

⁷⁸¹As we have recommended: see para. 6.114(i)(b) above.

a right of action for breach of confidence. On the other hand, actions for damages in respect of pain and suffering, which are as personal to the plaintiff as any distress he may suffer by reason of a breach of confidence, survive his death. It may also be noted that under section 57(1)⁷⁸² of the Race Relations Act 1976 so does a claim for "damages in respect of an unlawful act of discrimination [which] may include compensation for injury to feelings whether or not they include compensation under any other head".⁷⁸³ Bearing in mind the desirability of consistency, we think that the statutory action for breach of confidence should, like the present action, be governed by section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 and accordingly survive against, or (as the case might be) for the benefit of, the estate of a person on his death.

(c) Death of a person to whom an obligation is owed before a breach of confidence has occurred

6.118 We now turn to the situation covered by paragraph 6.115(ii) above, namely where a person to whom an obligation of confidence is owed has died before any breach of that obligation has taken place. We think that the benefit of an obligation of confidence in such a case should pass to the personal representatives of the deceased person to the extent that such a benefit is assignable under the general law. That is to say, our recommendation in paragraph 6.87 above⁷⁸⁴ as to the general assignability of the benefit of an obligation of confidence should apply to assignability by operation of law on the death of the person to whom the obligation of confidence is owed. We should add that on the consultation on Working Paper No. 58 one organisation⁷⁸⁵ took the view that, for example, a doctor should not be free to publish confidential information about his patient immediately after the latter has died. But although such conduct might arguably be a breach of medical ethics⁷⁸⁶ we do not think that the action for breach of confidence is the appropriate means of dealing with it. If such conduct is to be restrained, it would be better to deal with it as an aspect of the broader question of the protection of the privacy of the affairs of the dead rather than by a strained

⁷⁸²Under this subsection a claim that an act of discrimination has been committed "may be made the subject of civil proceedings in like manner as any other claim in tort".

⁷⁸³Race Relations Act 1976, s. 57(4).

⁷⁸⁴This recommendation was:

"We recommend that the benefit of an obligation of confidence should be capable of assignment to a person other than the person in whose favour the obligation has arisen but only to the extent that, having regard to the nature of the information protected by the obligation, such benefit is capable of being assigned in accordance with the general law governing the assignability of rights."

The recommendation was explained in para. 6.86 above.

⁷⁸⁵Justice (the British Section of the International Commission of Jurists).

⁷⁸⁶It may be noted that such conduct might have amounted to an actionable violation of privacy under Mr. Brian Walden's Right of Privacy Bill of 26 November 1969. Clause 9 of that Bill provided that the "right of privacy" included the right of any person to be protected from intrusion upon *inter alia* "his family" by, among other methods of intrusion, "the unauthorised use or disclosure of confidential information"; and "family" was stated to mean "husband, wife, child" and a long list of other relatives "whether living or dead". Though this Bill failed to get through the House of Commons, it led to the establishment of the Younger Committee on Privacy: see Cmnd. 5012 (1972), para. 2.

extension of the scope of the action for breach of confidence.⁷⁸⁷ Our conclusion is therefore that the personal representatives of a person to whom an obligation of confidence is owed but who has died before any breach of confidence has occurred should have a right of action for a subsequent breach of that confidence but only to the extent that such a benefit can pass to them under the general law governing the transmissibility of choses-in-action.

(d) Death of a person under an obligation of confidence before breach has occurred

6.119 The situation covered by paragraph 6.115(iii) above—namely where a person who is under an obligation of confidence, however it may have arisen, dies before any breach of that obligation has taken place—does not in our view give rise to any difficulty. The general principles of the present law as to breach of confidence, as well as of our proposed statutory action, which apply to a third party who comes into possession of information subject to an obligation of confidence, will require any third party (including personal representatives) to respect the obligation as from the time he acquires actual or constructive knowledge of that obligation. Thus, for example, the personal representatives of a doctor who on the latter's death came into possession of the confidential files of his patients are not under the existing law, and would not under our recommendations be, free to publish them merely because the doctor is dead. The obligation should continue until such time as it would have come to an end in relation to the deceased.⁷⁸⁸ We might mention here a point to which we have referred earlier,⁷⁸⁹ namely that, in relation to the death of a person who has given an undertaking of confidence, that undertaking to keep information confidential may be expressly or impliedly understood to end with the death of the person giving the undertaking.

(e) Recommendations in respect of death and breach of confidence

6.120 *Our recommendations in respect of death and the action for breach of confidence are as follows:*

- (i) An action for breach of confidence subsisting against or vesting in any person on his death should, in accordance with section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, survive against or, as the case may be, for the benefit of his estate.*
- (ii) Where a person to whom an obligation of confidence is owed has died before any breach of confidence has taken place his personal representatives should have an action for breach of confidence to the extent that such a benefit is assignable under the general law.⁷⁹⁰*

⁷⁸⁷As, for example, by regarding the obligation of confidence as being owed not only to a living person but also the memory of a deceased.

⁷⁸⁸See paras. 6.88–6.90 above.

⁷⁸⁹See para. 6.89 above.

⁷⁹⁰I.e. in accordance with our recommendation in para. 6.87 above as to the assignability in general of the benefit of an obligation of confidence.

11. *Trial of the action for breach of confidence*

6.121 Actions for breach of confidence are in practice tried by a judge alone, although the court has power to order trial with a jury. In Working Paper No. 58 we provisionally proposed that, in respect of any new statutory action, the position as to the mode of trial should remain unchanged.⁷⁹¹ Although this proposal was widely accepted on consultation, one organisation⁷⁹² suggested that the "public interest" issue in all breach of confidence cases ought to be decided by a jury. They argued that juries are more likely than judges to keep abreast of changing social conditions and that those, like editors of newspapers, who have to decide at short notice whether the disclosure of information they wish to reveal is likely to be decided by the courts as being in the public interest, can more easily anticipate the reaction of a jury than that of a judge. But there is plainly room for more than one view about this. In any event the most important question in a breach of confidence case is frequently whether an interlocutory injunction can be obtained, and at that stage no question of a jury would arise. Furthermore, the need to balance the public interest in the protection of confidence and the public interest in the disclosure or use of information will play a central part in the new action we propose. We believe that a body of law and practice can gradually be built up on this question which will enable general principles to emerge. Such a development can, in our view, only come about if the balancing of interests is entrusted to judges who, unlike juries, will give reasons for the conclusions which they have reached. We therefore adhere to our provisional view, namely that there should be no absolute right to a jury in actions for breach of confidence. The court should continue to have a discretion to order trial with a jury in an appropriate case to the same extent as in other civil actions.⁷⁹³

⁷⁹¹ Para. 129. It can be argued that there is some analogy between an action for defamation and at least some kinds of breach of confidence action. It should therefore be mentioned that, after Working Paper No. 58 was published, the Faulks Committee on Defamation ((1975) Cmnd. 5909, paras. 503-504) by a majority recommended the abolition of the *right* to a jury in defamation actions. The Faulks Committee also made certain detailed proposals, by a majority, as to the respective functions of judge and jury (para. 513), and, unanimously, as to the powers of the Court of Appeal in respect of damages (para. 514), when trial with a jury is ordered. At present a plaintiff is entitled to a trial with a jury unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury (see the Administration of Justice (Miscellaneous Provisions) Act 1933, s. 6(1), which on this point is repealed and re-enacted (as from 1 January 1982) by the Supreme Court Act 1981, s. 69(1)). We think, however, that the action for defamation is to a large extent *sui generis*. Analogy with it is not very close or persuasive, quite apart from the fact that the recommendations of the Faulks Committee have not been implemented.

⁷⁹² Justice (the British Section of the International Commission of Jurists).

⁷⁹³ See para. 4.108 above.

⁷⁹⁴ Apart from the question of the respective roles of the High Court and the county court in the trial of breach of confidence actions, mention should be made of the jurisdiction given to the Patents Court constituted (as part of the Chancery Division of the High Court) by s. 96(1) of the Patents Act 1977. It has jurisdiction (see s. 96(1)) "in such proceedings relating to patents and other matters as may be prescribed by rules of court" (emphasis added). The Supreme Court Act 1981 repeals s. 96(1) but re-enacts its effect in ss. 6(1)(a) and 62(1) of the 1981 Act. The reference to "other matters" appears to be inspired by a paragraph in the Government White Paper on Patent Law Reform ((1975) Cmnd. 6000, para. 27) which envisaged the extension of the jurisdiction of the Patents Court to include, *inter alia*, breach of confidence actions, but no rules in this sense have yet been made.

6.122 As we have explained in paragraph 4.109 above, in practice breach of confidence actions are at present tried only in the High Court.⁷⁹⁴ Where the obligation of confidence rests on contract, the county court, within the financial limits of its jurisdiction, has power to try a breach of confidence case, but it cannot grant an injunction or make a declaration where there is no accompanying money claim. Since however an injunction or a declaration is often the main purpose of the action, the jurisdiction in this respect of the county court is of little practical significance. We recognise that some of the highly technical questions which arise in breach of confidence cases would be unsuitable for the county court and in such cases it is possible that there would in any event be a money claim outside the court's financial limits. On the other hand, the county court might be the appropriate and convenient forum for some actions for breach of confidence, particularly where the information involved is of a purely personal kind without complicated commercial implications and where the expense of a High Court action would be disproportionate to the importance of the issues involved. We think that it should be possible to bring an action in the High Court or, within the limits of its jurisdiction, the county court. In any event there will (as from 1 January 1982) under the amendments to the County Courts Act 1959 made by the Supreme Court Act 1981 be very wide powers enabling any proceedings (subject to certain immaterial exceptions) to be transferred from the High Court to a county court and vice versa.⁷⁹⁵ Where an action for breach of confidence is tried in the county court, that court should have power to grant an injunction or to make a declaration, whether or not there is a claim for damages.

6.123 We think, however, that it is desirable to make certain special provisions in regard to the remedy of an adjustment order⁷⁹⁶ when a breach of confidence action is tried in a county court. First, where under our recommendation in paragraph 6.114(ii)(b)(1) above a court is empowered to make an award to the plaintiff in the form of a royalty in lieu of an injunction, we think that this power should be limited to the High Court, as monetary limits set for the county court's jurisdiction are stated in lump sum terms and we think it would lead to undesirable complexity to formulate an equivalent limit in terms of a royalty. Secondly, where in accordance with our recommendation in paragraph 6.114(ii)(b)(4) above a plaintiff who obtains an injunction against a defendant is ordered to make a contribution to expenses incurred by the defendant, we think that the amount of the expenses so ordered to be paid should not be restricted in amount. In view of our policy that the plaintiff should have the right to apply for an injunction in the county court, whether or not he is seeking other relief, we do not think that the plaintiff should be unable to avail himself of this right merely because the court would wish only to grant the injunction sought on terms that the plaintiff pay a large sum to the defendant by way of contribution to the latter's expenses.

⁷⁹⁵See respectively the new sections 75A, 75B and 75C inserted in the County Courts Act 1959 by s. 149(1) and Schedule 3 of the Supreme Court Act 1981. The limitations on transfer imposed by ss. 43, 44, 45 and 54 of the County Courts Act 1959 have been repealed by s. 152(4) and Schedule 7 of the Supreme Court Act 1981.

⁷⁹⁶See paras. 6.110, 6.111 and 6.114(ii)(b) above.

6.124 *Our recommendations regarding the trial of an action for breach of confidence are as follows:*

- (i) *Actions for breach of confidence should not be triable by a jury as of right but, in accordance with Order 33 of the Rules of the Supreme Court (or, as the case may be, Order 14 of the County Court Rules), the court should have power to order trial by jury in an appropriate case.*
- (ii) *Breach of confidence actions should be triable in the High Court or, within the financial limits of its jurisdiction, in the county court and, when an action for breach of confidence is tried in the county court, the latter should have power to grant an injunction or to make a declaration, whether or not damages are claimed in the action.*
- (iii) *However, a county court should not have power to make an adjustment order under which the defendant is ordered to pay a royalty.*
- (iv) *But a county court should have power to make an adjustment order without restriction of amount in favour of the defendant upon granting an injunction to the plaintiff.*

12. Transitional provisions

6.125 The final issue relating to the new statutory action for breach of confidence which we have recommended concerns the matter of transitional provisions.⁷⁹⁷ The first question which arises for consideration is whether the changes in the law which we are recommending should be capable of imposing liability retrospectively and our view on that is clear. We do not believe that changes in the law should normally have a general retrospective effect. Applying that principle in the present context, the use or disclosure of information which attracts liability under the present law of breach of confidence or which would do so under our proposals, as where the information has been obtained by one of the improper methods listed in paragraph 6.46 above, should not be affected by our recommendations if that use or disclosure occurred before the date on which the legislation implementing our recommendations came into effect. There is, however, a further question to be considered and that is whether the legislation should apply to a use or disclosure, after the legislation came into force, of information which had been acquired before that date in any of the circumstances giving rise to an obligation of confidence under our proposals. Should there be liability if, for example, information is obtained improperly by theft or surreptitious surveillance before the legislation came into effect but was not used or disclosed until after that date? In our view the critical date for determining liability for breach of confidence, unlike a law of privacy, is the date on which the undertaking of confidence is broken and the information is wrongfully used

⁷⁹⁷For ease of exposition, we discuss transitional provisions in the context of the proposed statutory tort; but the discussion and recommendation apply equally to the limited effects of our proposals on the law of contract, discussed in paras. 6.127–6.134 below, in that the change in the law relating to public interest in the context of contractual obligations (see paras. 6.130–6.133 below) will apply to contractual undertakings not to use or disclose information given before the legislation comes into force provided that the use or disclosure occurs after that date.

or disclosed. That leads us to the conclusion that legislation implementing our recommendations should apply to information acquired before the legislation came into force provided the use or disclosure of the information occurred after that date. There is one final problem to be considered which relates to the liability of the person who has received information from a person already under an obligation of confidence.⁷⁹⁸ Such a third party recipient of information will only be liable as from such time as he has both acquired the information and knows or ought to know of the circumstances giving rise to the obligation of confidence resting on the person from whom he acquired it. In our view such a third party recipient should be subject to our proposals if he discloses or uses, after the legislation came into force, information acquired before it came into force whether he acquired the requisite knowledge before or after that date; though he will only be liable, under our proposals, for such use or disclosure from the later of the times when he acquired the requisite knowledge or when the legislation came into force.

6.126 *Our recommendation in relation to transitional provisions is that the legislation implementing the recommendations in this report should not apply to any use or disclosure of information taking place before the legislation comes into force, but the legislation should apply to any use or disclosure after that date even though the information was acquired before that date. A third party recipient of information subject to an obligation of confidence should be liable for the use or disclosure, after the legislation comes into force, of information acquired before that date, but only for such use or disclosure as from the later of that date and the date when he acquired the requisite knowledge under the recommendation in paragraph 6.55.*

C. Relation of a statutory tort of breach of confidence to the law of contract

1. General

6.127 There are three matters concerning contracts which require examination in the context of the relationship between the new statutory tort of breach of confidence which we are recommending and the law of contract. Some of these have been touched on already,⁷⁹⁹ but we think that it would be helpful to consider them all in one place. They are:

- (a) Contractual undertakings of confidence and the new statutory tort.
- (b) Wider liability in contract than under the new statutory tort.
- (c) Contractual obligations and the public interest.

2. Contractual undertakings of confidence and the new statutory tort

6.128 We have recommended⁸⁰⁰ that an obligation of confidence should arise whenever the person who acquires information either gives an express undertaking to keep the information confidential or such an undertaking is to be inferred from his conduct or the nature of the relationship between the

⁷⁹⁸See paras. 6.52-6.55 above.

⁷⁹⁹See paras. 2.12, 4.15 n. 140, 4.21, 6.2, 6.102 n. 749.

⁸⁰⁰See paras. 6.6-6.17 above.

parties. In many cases, such an undertaking will be given between parties who are in a contractual relationship, as in the case of the implied obligation of confidentiality in contracts of employment, or will be given in circumstances leading up to the creation of a contractual relationship, as in the course of the negotiation of a licensing agreement. Subject to one exception discussed below,⁸⁰¹ we do not propose to alter the contractual obligations which may arise as a result of such an undertaking of confidentiality. On the other hand, there seems to us to be no reason why the new statutory obligation of confidence should not come into being even though the undertaking of confidence has contractual force. If, in such a case, the obligation was broken there would, as elsewhere in the common law, be a co-existence of remedies in contract and tort.

3. Wider liability in contract than under the new statutory tort

6.129 If there is a contractual undertaking not to use or disclose information which has been received, there may not only be co-existence with our proposed new statutory tort of breach of confidence, but the contractual undertaking could, as under the present law,⁸⁰² go wider than the limits of the law of breach of confidence. Whilst the new statutory tort would apply only to information which is not in the public domain, it is possible, subject to the law of restraint of trade and other aspects of public policy,⁸⁰³ by contract to bind someone, for example an employee or a party to a licensing agreement, not to reveal information which is already in the public domain.⁸⁰⁴ That power to impose a wider obligation by means of a contractual undertaking should, in our view, continue to exist and, subject to one matter discussed in paragraphs 6.132–6.133 below, should be unaffected by the introduction of a new statutory tort of breach of confidence.

4. Contractual obligations and the public interest

6.130 We have discussed in paragraphs 6.77–6.84 above the part that the balancing of the public interest in favour of confidentiality and in favour of disclosure should play in a new statutory tort of breach of confidence. We concluded that, where the issue of public interest is raised, use or disclosure of the information acquired in circumstances of confidence should be permitted if the plaintiff fails to satisfy the court that the public interest in favour of disclosure is outweighed by that favouring confidentiality. We also indicated that the public interest in disclosure should be broadened from the concept of “iniquity”⁸⁰⁵ under the present law so as to permit any public interest favouring disclosure to be weighed against the public interest in the preservation of confidences. Such a change in the law of breach of confidence has important implications for the law relating to contractual obligations of

⁸⁰¹See paras. 6.130–6.133 below.

⁸⁰²See paras. 4.15 and n. 140, and 4.21 above.

⁸⁰³*Ibid.*

⁸⁰⁴It might also be possible by contract, though not under our proposed statutory tort, to impose an obligation of confidence in relation to information of which the recipient is already aware or which he later acquires from an independent source, see para. 6.102 and n. 749 above.

⁸⁰⁵I.e., disclosure relating to crime, fraud or other misconduct.

confidence. We have indicated already⁸⁰⁶ that contractual obligations should be permitted to co-exist with the new statutory obligations of confidence and that, in principle, the latter should not affect the former. It is, however, desirable in our view to introduce one significant change in the law relating to contractual obligations of confidence, a change which is, we believe, both desirable in itself and which would avoid an unfortunate conflict between contractual and tortious obligations of confidence.

6.131 The rule that information which is the subject of an obligation of confidence can be disclosed if such disclosure, to an appropriate person, reveals the commission of some "iniquity" is a rule that applies whether the obligation of confidence in question is contractual or equitable in origin. Indeed, a number of leading decisions on the scope of the "iniquity" rule involved contractual obligations of confidence;⁸⁰⁷ but it seems clear that the courts have been prepared to apply the rule in exactly the same way irrespective of the particular legal basis of the obligation of confidence.⁸⁰⁸ Indeed, it would be strange if they did otherwise because, although the obligation of the original discloser may have been founded on contract, that of a third party recipient cannot have been. If our proposals in relation to the new statutory tort of breach of confidence for moving away from the "iniquity" rule in favour of a more general balancing of the public interests in issue were not extended to contractual obligations of confidence, a distinction would, for the first time, have to be drawn between contractual obligations and other obligations of confidence in relation to the public interest. This would in our view be a particularly unfortunate distinction. It would mean, for example, in a case like *British Steel Corporation v. Granada Television Ltd.*⁸⁰⁹ that the question whether an employee could disclose confidential information would be governed by the old "iniquity" rule whilst the question whether a television company which received such information could publish it would be governed by the broader approach in our proposals. Such a distinction seems to us to be one that should be avoided if at all possible. Our conclusion is that the new broader approach to a balancing of the public interests involved in disclosure should apply not only to the statutory tort but also to contractual obligations of confidence.

6.132 However, we have also had to consider whether we should extend our proposed change in the law of contract a little further. We pointed out earlier⁸¹⁰ that it may be possible by contract to agree not to use or disclose information which is already in the public domain. A contractual undertaking not to use or disclose information might be given in relation to a whole body of information; for example, in the course of licensing negotiations. Some of the information might be secret; some might be in the public domain. We have already concluded that the contractual obligation not to use or disclose the secret information should be subject to our proposals in relation to the

⁸⁰⁶See para. 6.129 above.

⁸⁰⁷E.g., *Weld-Blundell v. Stephens* [1920] A.C. 956; *Initial Services Ltd. v. Puterill* [1968] 1 Q.B. 396.

⁸⁰⁸E.g., *Gartside v. Outram* (1856) 26 L.J. Ch. 113; *Hubbard v. Vosper* [1972] 2 Q.B. 84.

⁸⁰⁹[1980] 3 W.L.R. 774; see paras. 4.46-4.48 above.

⁸¹⁰See para. 6.129 above.

public interest; and we believe that those proposals should also apply to the contractual undertaking not to use or disclose information which is in fact in the public domain. At first sight it may appear incongruous to apply a public interest test to the question whether or not it should be permissible to use or disclose information which is already in the public domain. However, in the context of our general recommendations concerning the public interest it would be even more incongruous to apply only the present "iniquity" test to such information, since this would be liable to lead to the paradoxical result that, in relation to contractually assumed obligations, the use or disclosure of information which is already in the public domain would be held to be restricted to a greater extent than in relation to confidential information. Moreover, we do not think that in practice the court would have any difficulty in weighing the balance, in relation to all information where use or disclosure is contractually restricted, between the public interest in use or disclosure on the one hand and the upholding of the contractual undertaking on the other. We therefore recommend that the test of the public interest should be applicable to the use or disclosure of all information which is restricted by contract.

6.133 We are, therefore, to a limited, but in our view justifiable, extent, proposing changes in the law of contract as it applies to obligations not to use or disclose information, whether or not in the public domain.⁸¹¹ We do not believe that this is likely to cause difficulty in the law of contract. Indeed, an analogy may be drawn between our proposals for striking a balance of public interests and the present law in relation to contracts in restraint of trade, where the court has to be satisfied that the restraint is justified not only in the interests of the parties, but also in the public interest.⁸¹² Apart from the exception relating to public interest, we are making no recommendation concerning the power of excluding or restricting by contract rights which would otherwise arise by virtue of the statutory action for breach of confidence.⁸¹³

5. Recommendations concerning contract

6.134 *Our recommendations regarding the inter-relationship of the proposed statutory tort of breach of confidence and the law of contract are as follows:*

- (i) *The new statutory obligation of confidence may arise as a result of an undertaking which is contractually binding on the parties thereto. Breach of such an undertaking would give rise to co-existent remedies in contract and tort.*
- (ii) *The power to impose, by means of a contractual undertaking, a wider obligation of confidence than that available under the present law of*

⁸¹¹The relevant transitional provisions have been discussed in para. 6.125 and n. 797 above.

⁸¹²*Herbert Morris Ltd. v. Saxelby* [1916] A.C. 688, 700 *per* Lord Atkinson, 708 *per* Lord Parker of Waddington, 716–718 *per* Lord Shaw of Dunfermline; *Wyatt v. Kreglinger and Fernau* [1933] 1 K.B. 793, 806–807 *per* Scrutton L.J., 809–810 *per* Siesser L.J.; *Bull v. Pitney-Bowes Ltd.* [1967] 1 W.L.R. 273.

⁸¹³This power will of course be subject to the general law and in particular to the Unfair Contract Terms Act 1977.

breach of confidence should continue to exist and be unaffected by the introduction of a new statutory tort of breach of confidence.

- (iii) *Contractual obligations not to use or disclose information, whether or not that information is in the public domain, should be subject to a similar provision in respect of use or disclosure in the public interest (see paragraph 6.84 above) to that applicable to obligations arising under the proposed statutory tort.*

PART VII

SUMMARY OF RECOMMENDATIONS

7.1 In this Part of the report we summarise the recommendations for reform set out in Part VI. Where appropriate we identify the relevant clauses in the draft Breach of Confidence Bill⁸¹⁴ which are aimed at putting into effect particular recommendations.

7.2 Our recommendations on the law relating to breach of confidence are as follows:

- (1) The present action for breach of confidence should be abolished and replaced by a new statutory tort of breach of confidence, the incidents of which would be those attaching to any case of breach of a duty in tort except to the extent that they are specifically provided for in the ensuing recommendations.

(paragraphs 6.1–6.2 and clauses 1 and 10)

- (2) An obligation of confidence should come into existence where the recipient of the information has expressly given an undertaking to the giver of the information to keep confidential that information, or a description of information within which it falls, or where such an undertaking is, in the absence of any indication to the contrary on the part of the recipient, to be inferred from the relationship between the giver and the recipient or from the latter's conduct. Furthermore, an obligation of confidence should arise whether the undertaking was given before, after or at the time when the information was acquired.

(paragraphs 6.6–6.13 and clause 3)

- (3) In addition to Recommendation (2) we recommend that:

- (i) an obligation of confidence may arise (whether by way of express undertaking or by inference) between the acquirer of information and the person on whose behalf he has acquired it;
- (ii) a person, who acquires information from another and knows or ought to know that that other person is supplying the information on behalf of a third party, shall be treated as having acquired the information not only from that other person but also from the third party.

(paragraphs 6.15–6.16 and clause 3(2) and (4))

⁸¹⁴See Appendix A.

- (4) Information (other than evidence given in open court) which, for the purposes of legal proceedings, is required to be given under the inherent powers of the court, or under rules of court, should be impressed with an obligation of confidence not to disclose or use it otherwise than for the purposes for which it was required to be given. This obligation should be imposed on the person to whom the information is required to be disclosed and also, where the information is received by one person on behalf of another, on that other person.
(paragraphs 6.18–6.19 and clause 4(1))
- (5) A person who acquires information in the course of the proceedings of a court or tribunal sitting *in camera* should be subject to an obligation of confidence in respect of the information so acquired.
(paragraphs 6.21–6.22 and clause 4(2), (4) and (5))
- (6) A person who acquires information in the course of the proceedings of a court or tribunal sitting in chambers should be subject to an obligation of confidence in respect of the information so acquired if:
- (i) the proceedings are for breach of an obligation of confidence constituting a tort under our proposed legislation or a breach of contract, and the information is material to the proceedings; or
 - (ii) the proceedings relate to a secret process, know-how, discovery or invention and the information is material to the proceedings; or
 - (iii) the court thinks fit to order that the information in question should be treated as subject to an obligation of confidence.
(paragraphs 6.21, 6.23–6.26 and clause 4(2)–(5))
- (7) A person should owe an obligation of confidence in respect of information acquired in the following circumstances:
- (i) by unauthorised taking, handling or interfering with anything containing the information;
 - (ii) by unauthorised taking, handling or interfering with anything in which the matter containing the information is for the time being kept;
 - (iii) by unauthorised use of or interference with a computer or similar device in which data is stored;
 - (iv) by violence, menace or deception;
 - (v) while he is in a place where he has no authority to be;
 - (vi) by a device made or adapted solely or primarily for the purpose of surreptitious surveillance where the user would not without the use of the device have obtained the information;
 - (vii) by any other device (excluding ordinary spectacles and hearing aids) where he would not without using it have obtained the information, provided that the person from whom the information is obtained was not or ought not reasonably to have been aware of the use of the device and ought not reasonably to have

taken precautions to prevent the information being so acquired.
(paragraphs 6.28–6.38 and clause 5(1)–(3))

- (8) An obligation of confidence shall be imposed on a person who jointly participates in the acquisition of information if, though he did not use any of the improper means listed in Recommendation (7) above, he personally acquired the information and he is, or ought to be, aware that the information was acquired by the use of any such improper means by his fellow participator.
(paragraph 6.39 and clause 5(5))
- (9) An obligation of confidence should not arise in accordance with Recommendation (7) above where the information has been obtained by a person in the course of the lawful exercise of an official function in regard to the security of the State or the prevention, investigation or prosecution of crime or by a person acting in pursuance of any statutory provision so far as the information has been disclosed or used for those purposes or for any purpose expressly or impliedly authorised by a statutory provision.
(paragraphs 6.40–6.45 and clause 5(6))
- (10) The fact that information is required to be supplied by or by virtue of any statutory provision or is supplied in connection with an application, under any statutory provision, for the grant of any benefit or permission should not of itself prevent an obligation of confidence ensuing on the part of the recipient of the information. He should, however, be free to use or disclose it to the extent that he is expressly or impliedly authorised to do so by or by virtue of any statutory provision.
(paragraphs 6.47–6.50 and clauses 3(5) and (8))
- (11) A person who acquires information already impressed with an obligation of confidence, however created, should become subject to that obligation as soon as he has both acquired the information and knows or ought to know that the information is so impressed.
(paragraphs 6.52–6.54 and clause 6)
- (12) We recommend that:
- (i) the duty owed by a person who is under an obligation of confidence, however created, in respect of information in his possession should be a duty not to disclose or use it except to the extent that the disclosure or use is authorised by the person to whom the duty is owed; and that a person who is under such a duty should also be under a duty to take reasonable care to ensure that unauthorised disclosure or use does not take place;
 - (ii) where a person owes an obligation of confidence in relation to information which is supplied under or by virtue of a statutory provision (see Recommendation (10) above), the recipient should be free to use or disclose it to the extent that he is expressly or impliedly authorised to do so by or by virtue of that or any other statutory provision;

- (iii) where an obligation of confidence is owed in respect of information disclosed in or for the purpose of legal proceedings in private (see Recommendations (5) and (6) above), the recipient should be free to use or disclose it for the purposes of those proceedings;
- (iv) where a person acquires information already subject to an obligation of confidence (see Recommendation (11) above), he should be free to use or disclose it to the same extent as the person from whom he received it is free to do so.

(paragraphs 6.56–6.58 and clause 8)

(13) We recommend that:

- (i) the person to whom an obligation of confidence is owed should be the person who has given information to another person under an obligation of confidence expressly or by inference undertaken by that other person;
- (ii) a person who acquires information on behalf of another, having given that other an undertaking of confidence, express or to be inferred, should owe an obligation of confidence to that other;
- (iii) where a person acquires information from another, having given to that other an undertaking of confidence, express or to be inferred, and knows or ought to know that that other person is supplying the information on behalf of a third person, obligations of confidence should be owed both to the person from whom the information is acquired and to the person on whose behalf it is supplied.

(paragraphs 6.15–6.16, 6.60 and clause 3)

(14) Where an obligation of confidence arises in respect of information obtained by the improper means specified in Recommendation (7) above the persons to whom the obligation of confidence is owed should be:

- (i) the person from whom the information has been obtained and
- (ii) the person on whose behalf the person from whom the information was obtained was holding that information.

(paragraph 6.62 and clause 5(1))

(15) For the purposes of Recommendation (7)(iii) above, (information obtained by unauthorised use or interference with a computer or similar device in which data is stored) the person who supplies information to a computer or similar device and any person on whose behalf it is so supplied should be treated as the person from whom the information has been obtained.

(paragraph 6.63 and clause 5(4))

(16) Where an obligation of confidence arises from the disclosure of information in legal proceedings at a time when the court is sitting in private, the obligation is owed both to the person making the disclosure and to any other person on whose behalf the disclosure

is made, provided that the defendant is, or ought to be, aware that the former person is so acting.

(paragraph 6.64 and clause 4(4))

- (17) Where an obligation of confidence arises from the acquisition of information which has been required to be disclosed for the purpose of legal proceedings, the obligation of confidence is owed both to the person who was required to disclose the information for the purpose of those proceedings and to any person on whose behalf the disclosure was made provided that the defendant is, or ought to be, aware that the former person is so acting.

(paragraph 6.64 and clause 4(4))

- (18) Where information subject to an obligation of confidence is acquired by a third party with knowledge of that obligation, the person to whom the obligation of confidence is owed by the third party should be the person to whom the original obligation of confidence was owed.

(paragraph 6.65 and clause 6)

- (19) To be capable of enjoying the protection of an action for breach or feared breach of confidence, the information must be information which is not in the "public domain". We do not think that it would be desirable to define this beyond saying that information is in the public domain when, having regard to its nature and the circumstances of its disclosure, it is generally available to the public.

(paragraphs 6.67-6.69 and clause 2)

- (20) Information should not be treated as being in the public domain where it is only accessible to the public after a significant contribution of labour, skill or money has been made.

(paragraph 6.69 and clause 2(2))

- (21) A defendant should not be able to resist an injunction (or an adjustment order under Recommendation (29)(ii)(b) below) against the use of information solely on the ground that the information is in the public domain so long as, by reason of his use of it in breach of confidence before it entered the public domain, he would, unless restrained, enjoy an advantage in the exploitation of the information over those who have had to obtain it through its public disclosure.

(paragraph 6.70 and clause 16(1))

- (22) For the purposes of an action for breach of confidence, information which is orally disclosed so as to be generally available to those present at the proceedings of any court comes into the public domain if the court is sitting in public, though not if it is sitting in private, provided that publication of the information is not prohibited by any statutory provision or order of the court.

(paragraphs 6.71-6.73 and clause 2(3)-(4))

- (23) Where information is acquired by one person during the course of his work (whether, for example, as an employee or independent contractor), such information should not be capable of protection

by the action for breach of confidence if it is fairly to be regarded only as an enhancement of the personal knowledge, skill or experience of the acquirer.

(paragraph 6.75 and clause 7)

(24) In respect of the public interest, we recommend that:

- (i) information should only enjoy the protection of the action for breach of confidence if, after balancing the respective public interests in confidentiality on the one hand and in disclosure or use of the information on the other, the information is found to merit such protection;
- (ii) in assessing the public interest in the protection of the confidentiality of information the court should take into account all the circumstances, including the manner in which the information was acquired;
- (iii) in assessing the public interest in the disclosure or use of the information the court should take into account all the circumstances, including the extent and character of such disclosure or use. A public interest may arise in the disclosure or use of confidential information whether or not the information relates to iniquity or other forms of misconduct;
- (iv) in assessing the public interest in the protection of confidentiality as against the public interest in the disclosure or use of information the court should take into account the time that has elapsed since the information originally became subject to an obligation of confidence;
- (v) it should be for the defendant to satisfy the court that there was a public interest involved in the relevant disclosure or use of the information in question. If the defendant discharges this burden, it should be for the plaintiff to establish that this interest is outweighed by the public interest in the protection of the confidentiality of the information;
- (vi) the above-mentioned approach in relation to public interest should apply not only to past but also to apprehended breaches of confidence and, in respect of the latter, to claims not only for a final injunction but also, so far as the provisional character of such proceedings allows, for an interlocutory injunction.

(paragraphs 6.77–6.83 and clause 11)

(25) The benefit of an obligation of confidence should be capable of assignment to a person other than the person in whose favour the obligation has arisen but only to the extent that, having regard to the nature of the information protected by the obligation, such benefit is capable of being assigned in accordance with the general rule governing the assignability of rights.

(paragraphs 6.85–6.86 and clause 18)

- (26) An obligation of confidence shall come to an end:
- (i) where the period for which an undertaking of confidence was given has expired;
 - (ii) where the acquirer of information subject to an obligation of confidence is expressly or impliedly released from that obligation by the person to whom it is owed;
 - (iii) when (subject to Recommendation (21) above) the information comes into public domain.
- (paragraphs 6.88-6.89 and clause 9)

- (27) In addition to defences generally available in tort, it should be a defence that:
- (i) the disclosure of the information took place in circumstances which, for the purposes of defamation, would confer absolute privilege;
 - (ii) the disclosure or use of the information was made pursuant to a requirement imposed, or authority conferred, by or under statute (including a statute implementing our obligations under the Treaty of Rome);
 - (iii) the disclosure of the information was ordered to be made by a court pursuant to a power in that regard.
- However, no defence of qualified privilege is appropriate or necessary in the context of breach of confidence.
- (paragraphs 6.91-6.101 and clause 12(2)-(5))

- (28) In relation to pre-existing or subsequently acquired information:
- (i) it should be a defence to an action for breach of confidence in respect of the disclosure or use of information that the person alleged to be subject to an obligation of confidence was, at the time he acquired the information under such an obligation, already in possession of that information;
 - (ii) Recommendation (28)(i), however, should not apply if the disclosure or use of the information constituted a breach of a separate, prior obligation of confidence;
 - (iii) it should also be a defence to an action for breach of confidence in respect of the disclosure or use of information that the person subject to an obligation of confidence has, subsequent to the creation of that obligation, obtained the same information by independent means;
 - (iv) Recommendation (28)(iii), however, should not apply if the disclosure or use of the information constituted a breach of a separate, subsequent obligation of confidence.
- (paragraph 6.102 and clause 12(1))

(29) The remedies available for breach of confidence should be as follows:

- (i) In respect of damage which has already been suffered:
 - (a) damages assessed on such basis as is appropriate in all the circumstances, or alternatively, at the discretion of the court, an account of profits gained as a result of the breach of confidence;
 - (b) additionally, or solely, as the case may be, damages for mental distress (and for mental or physical harm resulting herefrom) where a person of reasonable fortitude placed in the position of the plaintiff might be expected to suffer mental distress as a result of the breach of confidence; but proceedings for breach of confidence resulting in mental distress should only be capable of being brought in respect of mental distress suffered by the person in whose favour the relevant obligation of confidence originally arose.

(ii) In respect of a feared future breach of confidence:

- (a) at the discretion of the court, an interlocutory or a final injunction;
- (b) at the discretion of the court, an adjustment order by virtue of which a court would be enabled:
 - (1) to make a monetary award to the plaintiff in lieu of an injunction on such basis of assessment as is appropriate in all the circumstances, such award taking the form either of a lump sum or of a royalty in respect of the defendant's future use of information on such terms and for such period as the court deems appropriate;
 - (2) to order the defendant to make such a fair and equitable contribution to the expenses of the plaintiff preparatory to exploiting the information as are likely to be wasted if the defendant is to be allowed to exploit it;
 - (3) to determine the extent (if at all) to which each of the parties will respectively be free to use the information;
 - (4) where the defendant is to be restrained by injunction from exploiting the information and he has incurred expenditure preparatory to exploiting it before he knew or ought to have known that the information was subject to an obligation of confidence, to require the plaintiff to make such contribution to those expenses as may be fair and equitable;
- (c) at the discretion of the court, an order for the delivery up or destruction of any material containing the confidential information involved.

(paragraphs 6.104–6.113 and clauses 13–16, 18(2))

(30) In respect of death and the action for breach of confidence we recommend as follows:

- (i) an action for breach of confidence subsisting against or vesting in any person on his death should, in accordance with section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, survive against or, as the case may be, for the benefit of his estate;
- (ii) where a person to whom an obligation of confidence is owed has died before any breach of confidence has taken place his personal representatives should have an action for breach of confidence to the extent that such a benefit is assignable under the general law.

(paragraphs 6.115–6.119 and clauses 18 and 21(4))

(31) In relation to the trial of an action for breach of confidence we recommend that:

- (i) actions for breach of confidence should not be triable by a jury as of right but, in accordance with Order 33 of the Rules of the Supreme Court (or as the case may be, Order 14 of the County Court Rules), the court should have power to order trial by jury in an appropriate case;
- (ii) breach of confidence actions should be triable in the High Court or, within the financial limits of its jurisdiction, in the county court and, when an action for breach of confidence is tried in the county court, the latter should have power to grant an injunction or to make a declaration, whether or not damages are claimed in the action;
- (iii) however, a county court should not have power to make an adjustment order under which the defendant is ordered to pay a royalty;
- (iv) but a county court should have power to make an adjustment order without restriction of amount in favour of the defendant upon granting an injunction to the plaintiff.

(paragraphs 6.121–6.123 and clauses 17 and 20(1))

(32) With regard to the inter-relationship of the proposed statutory tort of breach of confidence and the law of contract, we recommend that:

- (i) the new statutory obligation of confidence may arise as a result of an undertaking which is contractually binding on the parties thereto. Breach of such an undertaking would give rise to co-existent remedies in contract and tort;
- (ii) the power to impose, by means of a contractual undertaking, a wider obligation of confidence than that available under the present law of breach of confidence should continue to exist and be unaffected by the introduction of a new statutory tort of breach of confidence;
- (iii) contractual obligations not to use or disclose information, whether or not that information is in the public domain, should be subject to a similar provision in respect of use or disclosure in the public interest (see Recommendation (24) above) to that

applicable to obligations arising under the proposed statutory tort.

(paragraphs 6.127–6.133 and clauses 1(3), 3(5)(b) and 19)

- (33) The legislation implementing the recommendations in this report should not apply to any use or disclosure of information taking place before the legislation comes into force, but the legislation should apply to any use or disclosure after that date even though the information was acquired before that date. A third party recipient of information subject to an obligation of confidence should be liable for the use or disclosure, after the legislation comes into force, of information acquired before that date, but only for such use or disclosure as from the later of that date and the date when he acquired the requisite knowledge under Recommendation (11) above.

(paragraph 6.125 and clause 21(1)–(3))

(Signed) MICHAEL KERR, *Chairman, Law Commission*
STEPHEN M. CRETNEY
STEPHEN EDELL
PETER NORTH

R. H. STREETEN, *Secretary*
30 July 1981.

APPENDIX A

DRAFT

Breach of Confidence Bill

ARRANGEMENT OF CLAUSES

Preliminary

Clause

1. New statutory obligations of confidence.
2. Information to which the Act applies.

Circumstances in which obligations of confidence arise

3. Undertaking to treat information confidentially.
4. Acquisition of information disclosed in or for purposes of legal proceedings.
5. Improper acquisition of information.
6. Acquisition by third party of information subject to an obligation of confidence.
7. No obligation of confidence where information acquired in course of work merely enhances personal skills, etc.

Obligations of confidence

8. Duties arising out of an obligation of confidence.
9. Termination of obligations of confidence.

Proceedings for breach of confidence

10. Proceedings for breach of confidence.
11. Plaintiff's claim liable to fail unless upholding of confidentiality is in public interest.
12. Defences.

Remedies

13. Remedies in proceedings for breach of confidence: general.
14. Damages.
15. Adjustment orders.
16. Remedies in respect of future use of information which is no longer subject to an obligation of confidence.
17. Special provisions as to county court.

Transmission of benefit of obligations of confidence

18. Transmission of benefit of obligations of confidence.

Operation of Act in relation to proceedings in contract

19. Operation of Act in relation to proceedings in contract.

General

20. Interpretation.
21. Supplemental.
22. Application to the Crown.
23. Citation, commencement and extent.

DRAFT
OF A
B I L L

TO

Impose obligations of confidence giving rise to liability in tort on persons acquiring information in certain circumstances and otherwise to amend the law of England and Wales as to civil liability for the disclosure or use of information and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Preliminary

New
statutory
obligations
of
confidence.

1.—(1) The provisions of this Act have effect for the purpose of—

- (a) providing for obligations of confidence, within the meaning of section 8, to be imposed on persons acquiring information in the circumstances mentioned in sections 3 to 6; and
- (b) providing for proceedings to be brought under this Act in respect of breaches of such obligations, and for the remedies available in those proceedings.

(2) In consequence of the provisions of this Act, any principles of equity or rules of the common law by virtue of which obligations arise in respect of the acquisition of information in circumstances of confidence, or by virtue of which relief may be granted in respect of the disclosure or use of information in breach of confidence, are (subject to subsection (3)) abolished.

(3) Nothing in subsection (2) has effect in relation to—

- (a) contractual obligations to treat information confidentially so far as enforceable by proceedings for breach of contract; or
- (b) proceedings for contempt of court.

EXPLANATORY NOTES

Clause 1

1. This clause concerns the relationship between the provisions of the Bill and the present law as to breach of confidence. The first recommendation in the report, which appears in paragraph 6.5, is that the existing law as to breach of confidence should be abolished and replaced by a new statutory tort. Subsection (2) of this clause accordingly effects, as the prerequisite of such replacement, the abolition of the existing substantive law. However, subsection (3) of the clause makes clear that the abolition of the present law relates only to breach of confidence as such and not to certain related areas of law which may have a bearing on obligations of confidence.

2. *Subsection (1)(a)* refers to four later clauses, 3 to 6, which concern the creation of obligations of confidence in various situations. Clauses 3, 4 and 5 relate respectively to the initial creation of an obligation of confidence arising by virtue of (i) an undertaking on the part of the recipient of information not to disclose or use it, (ii) the acquisition in certain circumstances of information disclosed in or for the purposes of legal proceedings and (iii) the improper acquisition of information. Clause 6 imposes, subject to certain conditions, a duty of confidence upon a third party who acquires information which has already been impressed with an obligation of confidence. Clause 8, to which clause 1(1)(a) also refers, sets out the duties comprised in an obligation of confidence that has arisen under any of clauses 3 to 6.

3. *Subsection (1)(b)* provides for the replacement of both the existing law and its remedies by the new obligations of confidence and the remedies for their breach laid down in later provisions of the Bill.

4. (a) *Subsection (2)* abolishes the existing law, which is wholly non-statutory, on breach of confidence. The present remedies for breach of confidence are abolished by the subsection (to be replaced by the range of remedies referred to in clauses 13 to 17), since the principles now governing the subject may be viewed as relating either to substantive rights or to procedural remedies.

(b) The effect of the reference to subsection (3) is explained in paragraphs 5 and 6 below.

5. Where an obligation of confidence takes the form of a contractual undertaking, proceedings for breach of contract may be brought in the event of such obligation being broken. *Subsection (3)(a)* preserves the right to bring such proceedings notwithstanding the general abolition of the present law on breach of confidence. The point is explained in paragraph 6.128 of the report. The Bill does, however, affect to some extent the law concerning contractual undertakings not to disclose or use information: see clause 19.

EXPLANATORY NOTES

Clause 1 (continued)

6. In certain circumstances a breach of confidence will also constitute a contempt of court. An example, which would arise under clause 4(2) of the Bill, is the disclosure of information which, though not subject to a pre-existing obligation of confidence, is revealed in proceedings held *in camera*: see paragraph 6.22 of the report. The recommendations in the report are not intended to affect the law of contempt, and *subsection (3)(b)* accordingly preserves unaltered the existing law in that field.

Breach of Confidence

Information
to which the
Act applies.

2.—(1) An obligation of confidence can arise under this Act only with respect to information which is not in the public domain; and references to information in any of sections 3 to 6 are accordingly references to such information.

(2) Information in the public domain includes information which is public knowledge or accessible to the public (whether or not on payment of a fee or subject to any other restriction); but, for the purposes of this Act, information which is capable of being extracted from any matter in the public domain (whether a document, product, process or anything else) is not in the public domain on that ground alone if such extraction would require a significant expenditure of labour, skill or money.

(3) For the purposes of this Act, information not already in the public domain which is orally disclosed in such a way as to be generally available to those present at the proceedings of any court—

- (a) does not come into the public domain if the court is sitting in private; but
- (b) comes into the public domain if the court is in open session and publication of the information is not prohibited in the circumstances by any statutory provision or by an order or direction of the court (having the power to make such an order or direction).

(4) In subsection (3) “court” includes a judge, tribunal and any person exercising the functions of a court, judge or tribunal; and the reference to a court sitting in private includes a court sitting in camera or in chambers.

EXPLANATORY NOTES

Clause 2

1. This clause provides that an obligation of confidence under the Bill cannot arise in respect of information in the public domain. However, the provisions of clause 11 of the Bill, relating to the public interest, apply (with appropriate minor modifications) to a contractual undertaking not to disclose or use information, whether or not such information is in the public domain: see clause 19(1) and (3).

2. *Subsection (1)* gives effect to the first part of the recommendation in paragraph 6.74(i) of the report. The reason why information within the public domain is incapable of being the subject of an obligation of confidence under the Bill is explained in paragraph 6.67. Clauses 3, 4 and 5 deal with the various situations in which an obligation of confidence will initially arise, and clause 6 concerns the imposition of an obligation of confidence, in certain circumstances, upon a third party who comes into possession of information that has previously been impressed with such an obligation.

3. *Subsection (2)* defines the “public domain” only to the limited extent expressed in the first limb of the subsection in accordance with the second part of the recommendation in paragraph 6.74(i). The reasons for the formulation only in broad terms of the requirement that, to be capable of forming the subject-matter of an obligation of confidence, information should not be within the public domain are explained in paragraph 6.69.

4. The second limb of the subsection gives effect to the recommendation contained in paragraph 6.74(ii): the matter is considered at the end of paragraph 6.69.

5. *Subsection (3)(a)*, in conjunction with subsection (4), which explains the reference to a court sitting in private, implements the recommendation in paragraph 6.74(iv) in relation to proceedings held *in camera* or in chambers: see paragraph 6.73. *Subsection (3)(b)* gives effect to that recommendation in regard to information disclosed in open court. The matter is considered in paragraphs 6.71–6.72.

6. *Subsection (4)* defines “court”, and explains the reference in this clause to a court sitting in private, in terms similar to those contained in the Administration of Justice Act 1960, s. 12(3), where the relevant definitions appear in the context of a provision specifying the circumstances in which publication of information relating to proceedings *in camera* or in chambers may constitute contempt of court: see paragraphs 6.24 and 6.25 of the report.

Breach of Confidence

Circumstances in which obligations of confidence arise

Undertaking
to treat
information
confidentially.

3.—(1) A person who has acquired information from another person shall owe the other an obligation of confidence under this section with respect to the information if—

- (a) he has expressly undertaken to the other to treat the information, or a description of information within which it falls, confidentially; or
- (b) an undertaking by him to the other to that effect is, in the absence of any contrary indication given by him to the other, to be inferred from the nature of any relationship between the parties or from his conduct in relation to the other.

(2) A person who has acquired information on behalf of another person shall, if either paragraph (a) or (b) of subsection (1) is applicable, owe to the other person an obligation of confidence under this section with respect to the information.

(3) For the purposes of this section it is immaterial whether the undertaking given by a person (expressly or by inference) was given at the time when he acquired the information in question or at some other time, whether before or afterwards.

(4) A person who has acquired information from another person and is, or in all the circumstances ought to be, aware that the information was supplied by the other on behalf of a third person shall be treated for the purposes of this section as having acquired the information from that third person as well.

(5) It is declared that subsection (1) applies in relation to the following, namely—

- (a) the acquisition by a person from another person of information supplied to him by the other in accordance with any requirement to do so imposed by or by virtue of any statutory provision, or so supplied in connection with an application under a statutory provision for the grant of any benefit or permission;
- (b) an undertaking within paragraph (a) or (b) of subsection (1) which is an express or implied obligation of a contract.

EXPLANATORY NOTES

Clause 3

1. This clause relates to the initial creation of obligations of confidence which are voluntarily undertaken in respect of information not in the public domain.

2. *Subsection (1)* implements the first part of the recommendation in paragraph 6.14 (which follows the detailed consideration in paragraphs 6.6–6.13) as to the criterion applicable to the creation of an obligation of confidence by means of a voluntary undertaking.

3. The reason for the reference in paragraph (a) of the subsection to a “description of information within which” the relevant information falls is explained in the first part of paragraph 6.13 of the report.

4. Paragraph (b) of the subsection refers to the inference of an undertaking of an obligation of confidence arising from the nature of a relationship between the parties (for example, between doctor and patient: see paragraph 6.8 of the report). The reason for the reference in this paragraph of the subsection to the absence of a contrary indication is specifically explained in paragraph 6.10 of the report.

5. *Subsection (2)* gives effect to the recommendation in paragraph 6.17(i): the point is explained in paragraph 6.15.

6. *Subsection (3)* incorporates the recommendation formulated in paragraph 6.14(ii) on the basis of the point made in the second part of paragraph 6.13. Where the acquisition of the information is not contemporaneous with the undertaking (whether express or arising by inference) to treat the information confidentially, the obligation of confidence will arise either at the time of the acquisition or at that of the undertaking, whichever is the later.

7. *Subsection (4)* implements the recommendation in paragraph 6.17(ii) of the report. In paragraph 6.16 the matter is explained by reference to a hypothetical example.

8. (a) *Subsection (5)(a)* gives effect to the first part of the recommendation in paragraph 6.51. The matter is considered in paragraphs 6.47–6.50: see in particular paragraph 6.50.

(b) The term “statutory provision” in this paragraph of the subsection includes a provision contained in subordinate legislation: see the definition in clause 20(1) and paragraph 2 of the note on that clause.

9. *Subsection (5)(b)*: The report contains a recommendation (in paragraph 6.134(i)) that an obligation of confidence under the Bill may arise as the result of an undertaking which is contractually binding. Breach of such an undertaking will give rise to co-existent remedies in contract as well as, under the Bill, in tort. The situation is discussed and exemplified in paragraph 6.128. This declaratory provision gives effect to the recommendation.

Breach of Confidence

Acquisition
of
information
disclosed
in or for
purposes
of legal
proceedings.

4.—(1) Where information, or any document or other matter containing information, is required to be disclosed to a person for the purposes of any legal proceedings (pending or otherwise)—

- (a) by an order or direction of a court, or
- (b) by rules of court,

then, on acquiring the information as a result of it or the matter containing it being disclosed in pursuance of that order or direction or those rules, that person or any other person to whom the disclosure is made on his behalf shall owe an obligation of confidence under this subsection with respect to the information to the person required to make the disclosure.

(2) Where information is disclosed in legal proceedings—

- (a) at a time when the court is sitting in private otherwise than in chambers, or
- (b) if this subsection applies to that disclosure in accordance with subsection (3), at a time when the court is sitting in chambers,

any person who thereupon acquires the information shall owe an obligation of confidence under this subsection with respect to the information to the person making the disclosure.

(3) Subsection (2) applies to a disclosure of information at a time when the court is sitting in chambers in the following cases, namely—

- (a) where the proceedings relate to a breach of an obligation of confidence under this Act or to a breach of a contractual obligation to treat information confidentially and the information disclosed is material to the proceedings;
- (b) where the proceedings relate to any secret process, know-how, discovery or invention and the information disclosed is material to the proceedings;
- (c) where it appears to the court proper that the information disclosed should be protected by means of an order under this paragraph and the court accordingly by order directs that subsection (2) is to apply to the disclosure.

(4) If a person acquiring information as mentioned in subsection (1) or (2) is or in all the circumstances ought to be aware that the person in whose favour an obligation of confidence arises under that subsection made the disclosure in question on behalf of a third person, the person acquiring the information shall owe an obligation of confidence under that subsection with respect to it to the third person as well.

EXPLANATORY NOTES

Clause 4

1. This clause governs the various situations in which information which is not in the public domain becomes subject in certain circumstances to an obligation of confidence by reason of its disclosure in or for the purposes of legal proceedings. It does not relate to information which, being already subject to an obligation of confidence, is disclosed in or in connection with those purposes. The rules on that aspect of breach of confidence are contained in clause 2(3) and (4) in relation to the public domain and, more generally, in clause 12(3) and (4); and under clause 6 a third party who acquires such information will in certain circumstances be bound by an obligation of confidence. The point is explained in paragraph 6.21 of the report.

2. *Subsection (1)* implements the recommendation in paragraph 6.20 of the report, discussed in paragraphs 6.18–6.19 (where the example is given of information ordered to be disclosed pursuant to the legal procedure of discovery). This subsection does not refer to the specific exclusion in that recommendation of information revealed in open court, which is effected by clause 2(3)(b). As to the persons to whom an obligation of confidence arising under this subsection is owed, see subsection (4).

3. (a) *Subsections (2) and (3)*, which relate to the creation of obligations of confidence in respect of information disclosed in proceedings held *in camera* or, in certain cases, in chambers, should be read in conjunction with the definition of “court”, and with that of the expression “a court sitting in private” referred to in subsection (5) of this clause and set out in clause 2(4): see paragraph 6 of the note on clause 2.

(b) *Subsection (2)(a)* implements the recommendation concerning information disclosed in proceedings *in camera* contained in paragraph 6.27(i): the reasons for the recommendation appear in paragraph 6.22.

(c) *Subsection (2)(b) and subsection (3)* give effect to the recommendation in paragraph 6.27(ii): the limited circumstances in which an obligation of confidence should be created by virtue of the disclosure of information in proceedings held in chambers are explained in paragraphs 6.23–6.26.

(d) The persons to whom an obligation of confidence arising under subsection (2) are owed is dealt with by subsection (4).

4. *Subsection (4)*, which defines the persons to whom an obligation of confidence arising under subsection (1) or (2) is owed, gives effect to the recommendations in paragraph 6.66(iii) and (iv), the reasons for which appear in paragraph 6.64.

Breach of Confidence

(5) In this section "court" has the meaning given by section 2(4); and the reference in subsection (2)(a) of this section to a court sitting in private includes a court sitting in camera.

(6) Nothing in this section prejudices the exercise by any court of any power to prohibit or punish contempt of court (whether in relation to its own proceedings or otherwise).

EXPLANATORY NOTES

Clause 4 (continued)

5. *Subsection (5)*: see paragraph 3(a) of the note to this clause, above.
6. *Subsection (6)* makes clear that the preceding subsections have no application to the law of contempt, which is outside the ambit of the Bill.

Breach of Confidence

Improper
acquisition
of
information.

5.—(1) Subject to the provisions of this section, a person who improperly acquires information from another person shall owe an obligation of confidence under this section with respect to the information—

- (a) to the person from whom the information is so acquired, and
- (b) if that person is at the time when it is so acquired holding it on behalf of some other person, to that other person as well.

(2) For the purposes of this section a person acquires information improperly if—

- (a) he acquires it as a result of doing any of the following acts without authority (express or implied), namely—
 - (i) taking, handling or interfering with any document, record, model or other thing containing the information,
 - (ii) taking, handling or interfering with anything in which any such thing as is mentioned in sub-paragraph (i) is for the time being kept,
 - (iii) (without prejudice to the generality of the foregoing) using or interfering with any computer or data retrieval mechanism,

whether, as regards any such act, the absence of authority relates to his doing it at all or only to the manner or purpose in or for which he in fact does it; or

- (b) he acquires it as a result of using any violence, menace or deception; or
- (c) he acquires it while somewhere where he has no authority (express or implied) to be; or
- (d) he acquires it by means of the use of—
 - (i) a device made or adapted primarily for the purpose of surreptitiously carrying out the surveillance of persons, their activities, communications or property, or
 - (ii) subject to subsection (3), any other technical device capable of being used for carrying out such surveillance, whether surreptitiously or overtly,

provided that (in either case) he would not in the circumstances have acquired the information but for his use of the device in question.

(3) A person's acquisition of information by means of the use of a device within subsection (2)(d)(ii) is not improper for the purposes of this section if a reasonable man in the position of the person from whom the information is acquired would have appreciated the risk of, and taken precautions adequate to prevent, its being acquired by means of the use of a device of the kind in question; and nothing in that sub-paragraph is to be read as referring to a device designed to bring vision or hearing so far as possible up to a normal standard.

EXPLANATORY NOTES

Clause 5

1. This clause specifies the various situations in which an obligation of confidence will arise in consequence of the "improper" manner in which the relevant information has been acquired, as, for example, in cases of industrial espionage. They give effect to the recommendations in paragraph 6.46 of the report: the relevant discussion appears at paragraphs 6.28–6.39. Subsection (6) contains an exemption for information acquired for certain specified purposes (such as that of crime prevention) or in pursuance of a statutory provision: see paragraph 5, below, of the notes on this clause.

2. *Subsection (1)* implements the recommendation in paragraph 6.66(i).

3. (a) *Subsections (2) to (4)*: As to subsection (2)(a), see paragraphs 6.31–6.32 of the report. Paragraph (a)(iii) of the subsection should be read with subsection (4), which gives effect to the recommendation in paragraph 6.66(ii) of the report; the point is explained in paragraph 6.63.

(b) As to subsection (2)(b), see paragraph 6.33 of the report.

(c) As to subsection (2)(c), see paragraph 6.34 of the report.

(d) *Subsection (2)(d)* should be read with the limitation in subsection (3) placed upon the circumstances in which an obligation of confidence will arise by reason of the use of a surveillance device, other than one made or adapted primarily for the purpose of surreptitious surveillance. The relevant principles are explained in paragraphs 6.35–6.38 of the report.

interfering with a device mentioned in subsection (2)(a)(iii), any person by or on behalf of whom the information was supplied to the device shall be regarded for the purposes of subsection (1) as a person from whom the information is acquired (and subsection (1)(b) accordingly does not apply).

(5) Where two or more persons ("participators") have jointly participated in the acquisition of information from another person, any participator—

- (a) who has personally acquired the information from the other person, and
- (b) whose acquisition of it was not improper under subsection (2) apart from this subsection,

shall nevertheless owe an obligation of confidence under this section to the other person with respect to the information as from such time as the participator is aware, or ought in all the circumstances to be aware, of any act done by any other participator in connection with the acquisition of the information which, if done by the former participator, would have rendered his acquisition of the information improper under subsection (2).

(6) In any case where a person's acquisition of information falls within subsection (2) but the information was acquired by him—

- (a) in the course of the lawful exercise by him of any official function to acquire information for the purposes of protecting the security of the State, or of preventing, detecting or investigating crime, or
- (b) in pursuance of any statutory provision,

nothing in this section or section 6 imposes on him or on any other person directly or indirectly acquiring it from him any liability under this Act in respect of the disclosure or use of that information in so far as it is disclosed or used—

- (i) for any such purposes as are referred to in paragraph (a) of this subsection or for the purpose of bringing any related legal proceedings, or
- (ii) for any purpose expressly or impliedly authorised, in relation to information acquired in pursuance of the statutory provision referred to in paragraph (b) of this subsection, by that or any other such provision.

EXPLANATORY NOTES

Clause 5 (continued)

4. *Subsection (5)* implements the recommendation in paragraph 6.46(ii) of the report: the matter is explained in paragraph 6.39.

5. (a) *Subsection (6)* implements the recommendation in paragraph 6.46(iii) of the report. The reasons for the inclusion of this provision appear under the heading "The position of the police, security services and those acting under statutory authority" and are explained in paragraphs 6.40–6.44 of the report in relation to paragraph (a) of the subsection and in paragraph 6.45 in regard to paragraph (b).

(b) The term "statutory provision" referred to in this subsection includes a provision contained in subordinate legislation including, for example, a byelaw: see the definition in clause 20(1) and paragraph 2 of the note on that clause.

Breach of Confidence

Acquisition
by third
party of
information
subject to an
obligation of
confidence.

6.—(1) If, while an obligation of confidence under section 3, 4 or 5 is owed by any person (“the original acquirer”) to another person with respect to any information—

- (a) the information is acquired from the original acquirer (by whatever means and whether directly or, through successive acquisitions, indirectly) by any third person, and
- (b) the third person becomes aware, or ought in all the circumstances to have become aware, of the material facts or circumstances giving rise to the obligation of confidence owed by the original acquirer or otherwise that an obligation of confidence has arisen with respect to the information under the preceding provisions of this Act,

then, as from the relevant time under subsection (2), the third person shall owe an obligation of confidence under this section with respect to the information to the other person mentioned above.

(2) The relevant time referred to in subsection (1) is whichever is the later of the following, namely the time when the third person acquires the information and the time when he becomes, or ought to have become, aware as mentioned in paragraph (b) of that subsection.

(3) Where a person dies (or, if not an individual, ceases to exist) while owing an obligation of confidence under section 3, 4 or 5 with respect to any information, then, unless that obligation of confidence thereupon ceases to have effect in accordance with subsection (2) of section 9, the information shall for the purposes of this section continue to be subject to that obligation of confidence, as if it were still owed by that person, until such time as that person would have been released from it by virtue of subsection (1) or (2) of section 9 if still alive or (as the case may be) still in existence.

EXPLANATORY NOTES

Clause 6

1. This clause deals with the position of third parties who acquire information that has already been impressed with an obligation of confidence, a matter which is discussed in paragraphs 6.52–6.54 of the report. *Subsections (1) and (2)* give effect to the recommendation in paragraph 6.55 of the report.

2. (a) *Subsection (3)* is necessary for the following reason. On the death of a person who is bound by an obligation of confidence anyone who thereafter acquires the relevant information (for example, his personal representative) may become subject to that obligation in accordance with subsections (1) and (2): see paragraph 6.119 of the report. However, those subsections are so drafted as to apply to the acquisition of the information by a third party only when an obligation of confidence is already “owed by any person” (see the opening words of subsection (1)). Accordingly, it is necessary to extend the ambit of subsections (1) and (2) to the case where, because of the death, there is no obligation of confidence “owed by any person” at the time when the information is acquired by the third party. Of course, if the obligation of confidence is not, according to its terms, to continue after the death of the person under that obligation, it will automatically terminate on his death by virtue of clause 9(2); and accordingly an obligation on such terms is specifically excluded from the scope of the present subsection.

(b) Where a person who is under an obligation of confidence has committed a breach of that obligation, the right of action thus arising against him will automatically survive against his estate: see clause 21(5), which is based on the recommendation in paragraph 6.120(i) of the report. In such a case clause 6 has no application to the deceased’s personal representatives, who will be liable in that capacity under the general law.

Breach of Confidence

No obligation
of confidence
where
information
acquired in
course of
work merely
enhances
personal
skills, etc.

7. Nothing in the preceding provisions of this Act has the effect of imposing an obligation of confidence on any individual with respect to any information which—

- (a) is acquired by him in the course of his work (whether under a contract of employment or as an independent contractor or otherwise), and**
- (b) is of such a nature that the acquisition of it by him amounts to no more than an enhancement of the personal knowledge, skill or experience used by him in the exercise of his calling.**

EXPLANATORY NOTES

Clause 7

This clause makes clear that a person who has acquired information in the course of his work which merely represents an enhancement of his personal knowledge, skill or experience is under no obligation of confidence in respect of that information. The clause implements the recommendation in paragraph 6.76 of the report, and the point is explained in paragraph 6.75.

Breach of Confidence

Obligations of confidence

Duties arising
out of an
obligation
of confidence.

8.—(1) For the purposes of this Act an obligation of confidence owed under any provision of this Act with respect to any information shall, subject to subsections (3) and (4), impose the following duties on the person who owes the obligation, namely—

- (a) a duty not to disclose or use the information except to the extent (if any) to which he is for the time being expressly or impliedly authorised to do so by the person to whom the obligation is owed; and
- (b) a duty to take reasonable care to ensure that the information is not disclosed or used except to the extent mentioned in paragraph (a).

(2) Accordingly, any reference in this Act to a breach of an obligation of confidence is a reference to an act or omission in breach of one or other of the duties subsisting with respect to the information in question in accordance with subsection (1).

(3) Nothing in subsection (1)—

- (a) prevents a person who owes an obligation of confidence under section 3 with respect to information supplied as mentioned in subsection (5)(a) of that section from disclosing or using it to such extent as is, in relation to information supplied in pursuance of the statutory provision in question, expressly or impliedly authorised by or by virtue of that or any other statutory provision;
- (b) prevents a person who owes an obligation of confidence under subsection (1) or subsection (2) of section 4 from disclosing or using the information in question for the purposes of the proceedings referred to in that subsection; or
- (c) prevents a person who owes an obligation of confidence under section 6 with respect to information directly or indirectly acquired from a person such as is referred to in paragraph (a) or (b) of this subsection from disclosing or using the information to the extent to which the latter may do so by virtue of that paragraph.

(4) Where a person owing an obligation of confidence under section 3, 4 or 5 with respect to any information has been expressly or impliedly authorised by the person to whom the obligation is owed to disclose or use the information to any extent, nothing in subsection (1) of this section prevents a person who owes an obligation of confidence under section 6 by virtue of that obligation of confidence from disclosing or using the information to an extent which will not result in a more extensive disclosure or use of the information than has been so authorised.

EXPLANATORY NOTES

Clause 8

1. This clause sets out the incidents of an obligation of confidence, however arising (whether created, for example, voluntarily under clause 3 or in consequence of the improper acquisition of information under clause 5).

2. *Subsection (1)* implements the recommendation in paragraph 6.59(i) of the report: the subject-matter of paragraphs (a) and (b) of the subsection are respectively considered in paragraphs 6.56 and 6.57.

3. (a) *Subsection (3)(a)* gives effect to the recommendation in paragraph 6.59(ii) of the report: see paragraph 6.58.

(b) *Subsection (3)(b)* implements the recommendation in paragraph 6.59(iii) of the report: see paragraph 6.58.

(c) *Subsection (3)(c)* should be read with subsection (4), since both provisions govern the ambit of an obligation of confidence imposed under clause 6 upon a third party who acquires information previously impressed with an obligation of confidence. They implement the recommendation in paragraph 6.59(iv).

4. *Subsection (4)*: see paragraph 3(c), above, of the note on this clause.

Breach of Confidence

Termination
of obligations
of confidence.

9.—(1) A person who, under any provision of this Act, owes another person an obligation of confidence with respect to any information shall cease to owe the other person an obligation of confidence with respect to the information—

- (a) if he is expressly or impliedly released by the other person from such an obligation; or
- (b) in so far as an order of the court under section 15(2) has the effect of releasing him from such an obligation; or
- (c) if the information comes into the public domain.

(2) Where in the case of an obligation of confidence under section 3 the relevant undertaking within subsection (1)(a) or (b) of that section was given, expressly or by inference, for a particular period of time (including a period expiring on the occurrence of any event), that obligation of confidence, and any obligation of confidence owed under section 6 by virtue of it, shall cease to be owed at such time as that period expires.

(3) For the purposes of subsection (1)(c) of this section it is immaterial whether the person responsible for the information coming into the public domain was the person to whom the obligation of confidence was owed, the person who owed it or some other person.

(4) Subsections (1) and (2) of this section are without prejudice to—

- (a) any claim in respect of a person's breach of an obligation of confidence which was committed before, or as a consequence of which, he ceased to owe that obligation in accordance with this section;
- (b) the power of the court to grant relief in respect of such a breach in the circumstances mentioned in section 16.

EXPLANATORY NOTES

Clause 9

1. This clause sets out the various situations in which an obligation of confidence is terminated.

2. (a) *Subsection (1)(a)* gives effect to the recommendation in paragraph 6.90(ii).

(b) *Subsection (1)(b)* relates to the case where in proceedings for breach of confidence the court exercises the power conferred on it by clause 15(2) to make, in lieu of an injunction, an adjustment order regulating the rights and liabilities of the parties in respect of the future exploitation by the defendant of the information in question. When such an order is made, the obligation of confidence is automatically discharged to the extent that the defendant is left free to exploit the information.

(c) *Subsection (1)(c)* implements the general principle contained in the recommendation in paragraph 6.90(iii) of the report: see paragraph 6.89. This paragraph of the subsection should be read with subsections (3) and (4)(a), which respectively make two points clear. The first is that an obligation of confidence comes to an end no matter who puts the relevant information into the public domain and even if the information is put into the public domain in breach of the obligation of confidence. The second point relates to the personal liability of a person who has broken an obligation of confidence; his liability for damages remains unaffected by either (a) the fact that the information subsequently comes into the public domain or (b), as is explained in paragraph 6.70 of the report, the fact that his breach took the form of putting the information into the public domain.

3. (a) *Subsection (2)* implements the recommendation in paragraph 6.90(i) of the report. An example of the operation of this provision would be the automatic termination of an obligation of confidence by reason of the death of a person entitled to the benefit of an obligation of confidence which is expressed to endure only for his lifetime.

(b) Clause 6, referred to in the latter part of this subsection, imposes in certain circumstances an obligation of confidence upon a third party who acquires information which is already subject to an obligation of confidence. The subsection makes clear that the third party's subsequent obligation does not survive the termination of the original obligation.

4. As to *subsection (3)*, see paragraph 1(c) of this note, above.

5. (a) *Subsection (4)(a)* is explained in paragraph 1(c) of this note, above.

(b) *Subsection (4)(b)* relates to the "springboard doctrine", to which effect is given by clause 16. When that doctrine applies a court may, exceptionally, grant certain remedies notwithstanding the fact that the information has come into the public domain and has accordingly ceased to be subject to an obligation of confidence. The relevant recommendation in the report refers to this exceptional case: see paragraph 6.90(iii). The "springboard doctrine" itself is discussed in paragraph 6.70.

Breach of Confidence

Proceedings for breach of confidence

Proceedings
for breach of
confidence.

10.—(1) A breach of an obligation of confidence owed under any of the preceding provisions of this Act is a tort and, subject to the following provisions of this Act, proceedings may be brought in respect of such a breach by any person to whom the obligation is owed in like manner as any other proceedings in respect of a tort.

(2) Proceedings brought by virtue of this section are referred to in this Act as proceedings for breach of confidence.

EXPLANATORY NOTES

Clause 10

This clause implements the recommendation in paragraph 6.5 that the existing law on breach of confidence (abolished by clause 1(2)) should be replaced by a new statutory tort.

Breach of Confidence

Plaintiff's claim liable to fail unless upholding of confidentiality is in public interest.

11.—(1) A defendant in proceedings for breach of confidence shall not be liable to the plaintiff in respect of any disclosure or use of information by the defendant in breach of an obligation of confidence if—

- (a) the defendant raises the issue of public interest in relation to that disclosure or use in accordance with subsection (2); and
- (b) the plaintiff is unable to satisfy the court that the public interest relied on by the defendant under that subsection is outweighed by the public interest involved in upholding the confidentiality of the information.

(2) For the purposes of subsection (1) a defendant raises the issue of public interest in relation to a disclosure or use of information if he satisfies the court that, in view of the content of the information, there was, or (in the case of an apprehended disclosure or use) will be, at the time of the disclosure or use a public interest involved in the information being so disclosed or used.

(3) A public interest may be involved in the disclosure or use of information notwithstanding that the information does not relate to any crime, fraud or other misconduct.

(4) When balancing the public interests involved for the purposes of subsection (1) the court shall have regard to all the circumstances of the case, including—

- (a) the extent and nature of the particular disclosure or use in question as compared with the extent and nature of the disclosure or use which appears to be justified by the public interest on which the defendant relies;
- (b) the manner in which the information was acquired by the defendant and (in the case of an obligation of confidence under section 6) the manner in which it was acquired by the original and any subsequent acquirer of it; and
- (c) the time which has elapsed since the information originally became subject to the obligation of confidence owed by the defendant or (in the case of an obligation of confidence under section 6) became subject to the obligation of confidence by virtue of which that obligation arose.

EXPLANATORY NOTES

Clause 11

1. This clause provides that, if in proceedings for breach of confidence the defendant raises the issue of public interest in relation to the relevant disclosure or use of the information in question, the plaintiff's claim must fail unless he establishes that the public interest in preserving the confidentiality of the information outweighs the public interest in such disclosure or use. The clause implements the recommendations in paragraph 6.84 of the report: the various questions arising in connection with the part played by considerations of the public interest in the new statutory tort created by the Bill are considered in paragraphs 6.77-6.83.

2. In accordance with our recommendation in paragraph 6.84(vi) of the report, the clause will apply to proceedings relating to an apprehended breach of confidence in respect of which a final or interlocutory injunction is sought (as well as to a breach that has already been committed).

3. Clause 19(1) extends the provisions of this clause, with suitable modifications, to obligations not to disclose or use information that are created by contract.

4. *Subsections (1) and (2)* give effect to the recommendations in paragraph 6.84(i) and (v) of the report. As to, first, the preliminary necessity under paragraph (a) of subsection (1) for the defendant to raise the issue of public interest and as to, secondly, the burden placed upon the plaintiff under paragraph (b) in that event, see paragraph 6.82 of the report. The nature of the burden upon the plaintiff in relation to the public interest is explained in that paragraph.

5. *Subsection (3)* implements the recommendation in the second part of paragraph 6.84(iii): the purpose of the recommendation, which is made in the light of certain statements by the House of Lords in *British Steel Corporation v. Granada Television Ltd.* [1980] 3 W.L.R. 774, is explained in paragraph 6.78.

6. *Subsection (4)(a)* gives effect to the recommendation in the first part of paragraph 6.84(iii): see paragraph 6.80. Under this provision the court might, for example, have regard to the fact that the disclosure in question was not confined to those who were appropriate persons to receive the information.

7. *Subsection (4)(b)* implements the recommendation in paragraph 6.84(ii). Under this heading the court might take into account, for example, the fact that the relevant information had been obtained from the plaintiff by violence (so that an obligation of confidence arose by virtue of clause 5(2)(b)). The matter is explained in paragraph 6.79 of the report. The words in parenthesis in this paragraph of the subsection refer to a third party who becomes subject to an obligation of confidence in respect of information already impressed with an obligation of confidence.

EXPLANATORY NOTES

Clause 11 (continued)

8. *Subsection (4)(c)* gives effect to the recommendation in paragraph 6.84(iv), which is based upon the view expressed in paragraph 6.81. The reference in the second limb of this paragraph of the subsection to “an obligation of confidence under section 6” is to the case where a third party has acquired information already impressed with an obligation of confidence, and it makes clear that in such a case the period of time in question is the one commencing when the original obligation of confidence arose.

Breach of Confidence

Defences.

12.—(1) In any proceedings for breach of confidence in respect of a disclosure or use of information it is a defence to prove—

- (a) that, at the time of the defendant's acquisition of the information which gave rise to the obligation of confidence in question, he was already in possession of the information, or
- (b) that he subsequently came into possession of it by independent means,

and, in addition, that at the time he disclosed or used the information the defendant did not, in connection with his previous or (as the case may be) subsequent awareness of the information, owe any other obligation of confidence of which that disclosure or use constituted a breach.

(2) In any proceedings for breach of confidence in respect of a disclosure or use of information it is a defence to prove that the disclosure or use was required or authorised to be made by or by virtue of any statutory provision.

(3) In any proceedings for breach of confidence in respect of a disclosure of information it is a defence to prove that the disclosure was made on such an occasion as attracts, for the purposes of the law of defamation, an absolute privilege in respect of statements made thereon.

(4) Without prejudice to the generality of subsections (2) and (3) it is a defence in any proceedings for breach of confidence in respect of a disclosure of information to prove that the disclosure was required to be made by a court in pursuance of any power to order the disclosure of information.

(5) Defences generally available in tort proceedings are, in accordance with section 10(1), available in proceedings for breach of confidence.

EXPLANATORY NOTES

Clause 12

1. This clause gives effect to the various defences which, it is recommended, should be available in an action for breach of confidence.

2. *Subsection (1)* gives effect to the recommendations in paragraph 6.103(ii) of the report. The reason for the provision of this defence is explained, in relation to the defendant's acquisition of information already in his possession, in paragraph 6.102(a) and (b), and in regard to his subsequent acquisition of it by independent means, in paragraph 6.102(c) and (d) of the report.

3. *Subsection (2)*: The recommendation to which this subsection gives effect appears in paragraph 6.103(i)(b) of the report: this defence is considered in paragraphs 6.97–6.99. As is mentioned in the recommendation, this provision will include any statutory provision implementing in England and Wales any obligation of the United Kingdom under the Treaty of Rome (the point is explained in paragraph 6.100). It will also include a provision contained in subordinate legislation as, for example, a byelaw: see the definition of "statutory provision" in clause 20(1) and paragraph 2 of the notes on that clause.

4. *Subsection (3)* gives effect to the recommendation in paragraph 6.103(i)(a) of the report: see paragraph 6.93. The provision of a possible defence akin to that of qualified privilege in defamation is considered but rejected in paragraphs 6.94–6.96.

5. *Subsection (4)* implements the recommendation in paragraph 6.103(i)(c) of the report: see paragraph 6.101. The opening words of the subsection appear because in many cases a disclosure in respect of which a defence is available under this subsection will also fall within the ambit of subsection (2) or (3).

6. *Subsection (5)* makes explicit one of the consequences of the provision in clause 10(1) that a breach of an obligation of confidence under the Bill should be actionable as a tort. Thus, for example, the defence of contributory negligence would be available: see paragraph 6.92 of the report.

Breach of Confidence

Remedies

Remedies in proceedings for breach of confidence: general.

13.—(1) The following relief may be granted by the court in proceedings for breach of confidence—

- (a) an injunction restraining the defendant from any apprehended breach of an obligation of confidence (with or without, in a case to which section 15(1) applies, an adjustment order under that subsection providing compensation for the defendant);
- (b) damages in accordance with section 14;
- (c) an account of the profits derived by the defendant from the breach;
- (d) an adjustment order under section 15(2) regulating the respective rights and liabilities of the plaintiff and the defendant in so far as the defendant is not to be restrained by injunction;
- (e) an order for the defendant to deliver up or destroy anything in which the information to which the breach relates is contained.

(2) With the exception of paragraph (b), the relief mentioned in subsection (1) is at the discretion of the court.

(3) Nothing in this section prejudices any jurisdiction of the court to grant ancillary or incidental relief.

EXPLANATORY NOTES

Clause 13

1. This clause lists in subsection (1) the various remedies that are to be available for breach of confidence. All of them, except that of damages for a breach of confidence already committed are discretionary: see subsection (2).

2. (a) *Subsection (1)(a)* gives effect to the recommendation in paragraph 6.114(ii)(a) of the report. This power of the court relates both to final and to interlocutory injunctions. However, no specific provision is required as to the latter: see paragraph 6.108 as to this point and interlocutory injunctions generally, and see paragraph 6.109 as to final injunctions.

(b) *Subsection (1)(b)*: The remedy of damages for harm already suffered in consequence of a breach of an obligation of confidence is not discretionary: see subsection (2).

(c) *Subsection (1)(c)* (read with clause 14(2)) implements the recommendation in the second part of paragraph 6.114(i)(a). The remedy of an order for an account of profits is referred to at the end of paragraph 6.107. Clause 14(2) makes clear that (as under the present law) an account of profits may be awarded only as an alternative, and not in addition, to damages.

(d) *Subsection (1)(d)*, together with clause 15, gives effect to the recommendation in paragraph 6.114(ii)(b): see the notes on clause 15.

(e) *Subsection (1)(e)* gives effect to the recommendation in paragraph 6.114(ii)(c). The remedy of an order for delivery up or destruction is considered in paragraph 6.113.

3. *Subsection (3)* makes clear that, although the remedies specified in the Bill replace those available under the existing law, any power now possessed by the court to grant relief of an ancillary or incidental character is preserved. For example, the court will continue to have discretion to grant Anton Piller orders: see n. 777 (at paragraph 6.113) of the report.

Breach of Confidence

Damages.

14.—(1) The damages which may by virtue of section 13(1)(b) be awarded to a plaintiff in proceedings for breach of confidence are, subject to the provisions of this section, damages in respect of either or both of the following matters, namely—

- (a) any pecuniary loss suffered by the plaintiff in consequence of the defendant's breach of an obligation of confidence owed to him; and
- (b) any mental distress, and any mental or physical harm resulting from such distress, suffered by the plaintiff in consequence of that breach.

(2) The court shall not in respect of the same breach of an obligation of confidence both award the plaintiff damages under subsection (1)(a) and order that he shall be given an account of the defendant's profits therefrom.

(3) The court shall not award the plaintiff any damages under subsection (1)(b) unless it appears to the court that a person of reasonable fortitude in the position of the plaintiff would have been likely to suffer mental distress in consequence of the defendant's breach.

EXPLANATORY NOTES

Clause 14

1. This clause deals with the remedy of damages for a past breach of an obligation of confidence. *Subsection (1)*, together with subsection (3), implements the recommendation in paragraph 6.114(i). The remedy under this clause, in contrast to the other remedies specified in the Bill, is not discretionary: see clause 13(2).

2. *Subsection (1)(a)*: The remedy of damages in relation to pecuniary loss is considered in paragraphs 6.105 and 6.107 of the report.

3. *Subsection (1)(b)*: The considerations leading to the recommendation as to the award of damages in respect of mental distress, to which this paragraph gives effect, appear in paragraph 6.106 of the report.

4. *Subsection (2)* makes clear that, in accordance with the terms of the recommendation in paragraph 6.114(i)(a) (which is based upon the conclusion referred to at the end of paragraph 6.107), an order for an account of profits may be made only as an alternative, and not in addition, to damages awarded under this clause.

5. *Subsection (3)*: The restriction imposed by this provision on an award of damages under subsection (1)(b) is referred to in the penultimate sentence of paragraph 6.106 of the report.

Adjustment
orders.

15.—(1) Where in any proceedings for breach of confidence—

- (a) the court proposes to grant an injunction against a defendant restraining him from an apprehended breach of an obligation of confidence owed under section 6, but
- (b) it appears to the court that, prior to the time when he became subject to that obligation, he incurred any expenditure in connection with exploiting the information to which the breach relates,

then, if the court thinks fit, it may (in addition to granting the injunction) make an adjustment order under this subsection requiring the plaintiff to make to the defendant such contribution towards that expenditure as appears to the court to be just and equitable.

(2) Where in any proceedings for breach of confidence the court has power to grant an injunction against a defendant restraining him from an apprehended breach of an obligation of confidence but considers that it would be inappropriate in all the circumstances to do so to any extent, the court may, if it thinks fit, make an adjustment order under this subsection for the purpose of regulating, as regards such future exploitation by the defendant of the information in question as it is not proposing to restrain, the respective rights and liabilities of the plaintiff and the defendant.

(3) An adjustment order under subsection (2) may require the defendant to pay to the plaintiff one or other of the following, namely—

- (a) such sum in lieu of an injunction as appears to the court to be appropriate in all the circumstances, or
- (b) a royalty in respect of the future use by the defendant of the information in question calculated on such basis as appears to the court to be appropriate, the defendant's use of the information being for such period and on such terms as the court may specify in the order,

together with (in either case) such contribution as appears to be just and equitable towards any expenditure which the plaintiff has already incurred in connection with exploiting the information in question and which is likely to become wasted expenditure as a result of the defendant being allowed to exploit the information in future.

(4) The court may in any adjustment order under subsection (2) determine any incidental question relating to the extent to which either of the parties is to be free to exploit the information in question.

(5) In any case where the court proposes to make—

- (a) an award of damages under section 14(1)(a) in respect of the defendant's breach of an obligation of confidence, and

EXPLANATORY NOTES

Clause 15

1. This clause gives effect to the recommendations for the provision of the new remedy by way of an "adjustment order". *Subsection (1)* implements the recommendation in paragraph 6.114(ii)(b). The power to make an order under this provision is exercisable only where an obligation of confidence is owed, by virtue of clause 6, by the defendant as a third party who has come into possession of information already impressed with an obligation of confidence. The matter is explained and exemplified in paragraphs 6.110 to 6.112.

2. In regard to proceedings brought in a county court, the Bill provides that there should be no limit upon the sum that may be awarded to the plaintiff under the power conferred by this subsection: see clause 17(2).

3. *Subsections (2), (3) and (4)* implement the recommendation in paragraph 6.114(ii)(b) of the report.

4. The court's power under subsection (2), in contrast to its power under the preceding subsection, applies where the court decides either not to grant an injunction or to grant a less extensive injunction than is within its power to grant.

5. (a) *Subsection (3)* gives effect to the recommendations in paragraph 6.114(ii)(b)(1) and (2), which is formulated on the basis of the discussion in paragraphs 6.110 to 6.112.

(b) A county court will not have power to award a royalty under paragraph (b) of this subsection: see clause 17(2).

6. *Subsection (4)* implements the recommendation in paragraph 6.114(ii)(b)(3). Under this provision the court might, for example, permit the plaintiff, the defendant or both of them to grant licences to third parties to use the information: see paragraph 6.110(c).

7. An award of damages for breach of confidence in respect of harm already suffered may, in accordance with the general law, include compensation for anticipated future loss (for example, the estimated value, at the date of the award, of future loss of profit). *Subsection (5)* makes clear, as is pointed out in n. 772 (to paragraph 6.110) of the report, that the court should take into account so much of the award as represents that head of damage in deciding whether to grant any, and if so what, sum of money by way of an adjustment order under subsection (3). The purpose of the provision is to ensure that compensation is not awarded twice for the same head of loss.

Breach of Confidence

(b) an adjustment order under subsection (2) of this section in respect of future exploitation by the defendant of the information to which that breach relates,

the court, when determining whether to make the plaintiff an award under subsection (3)(a) or (b) of this section, and if so the amount of any such award, shall take such account of any element of that award of damages which reflects future loss to the plaintiff as it thinks appropriate for the purpose of doing justice between the parties.

(6) Any reference in this section to expenditure incurred by a person in connection with exploiting information includes expenditure incurred by him in connection with acquiring it.

EXPLANATORY NOTES

Clause 15 (continued)

8. The kind of "expenditure" stated by *subsection (6)* to be included within that term is explained in paragraph 6.112 by reference to an example.

Breach of Confidence

Remedies in respect of future use of information which is no longer subject to an obligation of confidence.

16.—(1) The court may, if it thinks fit in the case of a defendant in proceedings for breach of confidence who has committed a breach of an obligation of confidence under this Act, grant relief under this section in respect of the future use by him of the information to which the breach relates notwithstanding that such use will occur at a time when the information has, or is likely to have, come into the public domain (and accordingly ceased to be subject to an obligation of confidence).

(2) The relief which may be granted by the court under this section in the case of such a defendant is—

- (a) an injunction for such period and on such terms as appear to the court to be necessary to prevent the defendant from enjoying an advantage in the exploitation of the information in question over persons able to exploit it only as from its coming into the public domain (granted with or without, in a case to which section 15(1) applies, an adjustment order under that subsection); or
- (b) an adjustment order under section 15(2), but only in respect of such period of future use by the defendant as, in the view of the court, the defendant is likely (in so far as not restrained under paragraph (a) from exploiting the information) to enjoy an advantage in its exploitation over persons able to exploit it only as from its coming into the public domain.

(3) Section 15 shall in its operation for the purposes of this section have effect as if, in each of subsections (1) and (2) of that section, for the words “an injunction against a defendant restraining him from an apprehended breach of an obligation of confidence” there were substituted “an injunction under section 16(2)(a) against a defendant who has committed a breach of an obligation of confidence”.

EXPLANATORY NOTES

Clause 16

1. This clause makes provision for the continuance, in the context of the new statutory tort, of the “springboard doctrine”. That “doctrine” is explained in relation to the present law in paragraphs 4.24–4.31 of the report and referred to, in the context of our recommendations, in paragraph 6.70. The clause implements the recommendation in paragraph 6.74(iii).

2. *Subsection (1) and subsection (2)(a)* respectively relate to the two essential characteristics of the springboard doctrine—namely, (i) that by way of exception to the general rule, an injunction may be granted in respect of information that has already been placed in the public domain and (ii) that an injunction may be so granted only in order to prevent the defendant from enjoying an advantage in exploiting the information over those who can only begin to make preparations for exploiting the information after it has entered the public domain: see paragraph 6.70 of the report for a detailed explanation of the principle.

3. *Subsections (2)(b) and (3)* make clear that an adjustment order under clause 15(2) is available in cases falling within the springboard doctrine, but adapt the general power of the court under that provision to accord with the special features of such cases: see the preceding paragraph of this note.

Breach of Confidence

Special provisions as to county court.

17.—(1) A county court may in proceedings for breach of confidence grant the plaintiff an injunction or a declaration notwithstanding that he does not seek any relief other than an injunction or a declaration.

(2) A county court may in proceedings for breach of confidence make an adjustment order under subsection (1) of section 15 whatever the amount required to be paid by virtue of it by the plaintiff, but shall not have power to make an adjustment order under subsection (2) of that section by virtue of which the defendant is required to pay such a royalty as is mentioned in subsection (3)(b) of that section.

EXPLANATORY NOTES

Clause 17

1. This clause contains special provisions relating to the jurisdiction of county courts to grant certain remedies under the Bill.

2. *Subsection (1)* gives effect to the recommendation in the second half of paragraph 6.124(ii). The reason for this provision appears in paragraph 6.122.

3. *Subsection (2)* implements two recommendations. The first relates to the exercise by a county court of the power under clause 15(1) to order the plaintiff, when granting him an injunction, to pay a sum of money to the defendant. This recommendation is contained in paragraph 6.124(iv) of the report, and relates to the second of the two points referred to in paragraph 6.123. The second recommendation appears in paragraph 6.124(iii): see the first point in paragraph 6.123 for a brief explanation.

Breach of Confidence

Transmission of benefit of obligations of confidence

Transmission
of benefit of
obligations
of confidence.

18.—(1) Subject to subsection (2), nothing in this Act prevents the benefit of an obligation of confidence under this Act from being assigned to a person other than the person in whose favour the obligation of confidence has arisen in so far as it is, in any particular case in view of the nature of the information to which the obligation of confidence relates, capable of being so assigned in accordance with the general law as to the assignment of rights.

(2) No proceedings for breach of confidence shall be brought in respect of mental distress, or mental or physical harm resulting from such distress, suffered by any person other than a person in whose favour an obligation of confidence has arisen under this Act.

(3) Any reference in this Act (whether express or implied and however worded) to the person to whom an obligation of confidence is or was owed includes (subject to subsection (2) and so far as the context so permits) a person to whom the benefit of the obligation of confidence has been assigned.

(4) In this section references to assignment include assignment by operation of law.

EXPLANATORY NOTES

Clause 18

1. Clause 6 of the Bill imposes on a third party (in certain circumstances) the burden of an obligation of confidence. *Subsection (1)* of this clause, by contrast, concerns the transmission of the benefit of such an obligation, whether voluntary or, in accordance with the definition in subsection (4), involuntary. The matter is considered in paragraphs 6.85 to 6.86 of the report, and the relevant recommendation, to which this subsection gives effect, appears in paragraph 6.87.

2. (a) On the death of a person entitled to the benefit of an obligation of confidence (other than one which, according to its terms, ceases to apply on his death) which has not been broken, the benefit of that obligation may pass to his personal representatives by operation of law in accordance with subsections (1) and (4) of this clause. The relevant recommendation appears in paragraph 6.120(ii) of the report, and the position is explained in paragraph 6.118.

(b) However, in so far as an obligation of confidence has been broken before the death of the person entitled to the benefit of it, those provisions have no application: his personal representatives may commence or (as the case may be) continue proceedings for breach of confidence by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934. The latter provision is expressly left unaffected by the Bill: see clause 21(5), and see paragraph 3(b), below, of the note on this clause.

3. (a) *Subsection (2)* implements the recommendation contained in the second half of paragraph 6.114(i)(b): see n. 717 (to paragraph 6.86) and the last sentence of paragraph 6.106 of the report.

(b) Notwithstanding the general terms in which this subsection is expressed, where a person has suffered mental distress (or mental or physical harm resulting from such distress) in consequence of the breach of an obligation of confidence owed to him and dies without having commenced proceedings, his personal representatives may institute proceedings in respect of this head of damage by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934. The latter provision is expressly left unaffected by the Bill: see clause 21(5). (A similar principle applies where the relevant proceedings were instituted, but not concluded, before the death.) The point is explained in paragraph 6.117 of the report.

4. *Subsection (3)* is consequential upon the general provision contained in subsection (1).

5. *Subsection (4)*: see paragraph 1, above, of the note on this clause.

Breach of Confidence

Operation of Act in relation to proceedings in contract

Operation
of Act in
relation to
proceedings
in contract.

19.—(1) Section 11 (plaintiff's claim liable to fail unless upholding of confidentiality is in public interest) shall have effect in relation to proceedings for breach of contract in respect of a breach of a relevant contractual undertaking as it has effect in relation to proceedings for breach of confidence, but with the following modifications, namely—

- (a) any reference to an obligation of confidence shall be read as a reference to a relevant contractual undertaking;
- (b) the reference in subsection (1)(b) to upholding the confidentiality of the information shall be read as a reference to upholding the contractual undertaking in question; and
- (c) subsection (4)(b) and so much of subsection (4)(c) as relates to an obligation of confidence under section 6 shall not apply.

(2) Subject to subsection (1), any relevant contractual undertaking may be enforced by proceedings for breach of contract in all respects as if this Act had not been passed.

(3) In this section “relevant contractual undertaking” means an express or implied contractual undertaking not to disclose or use information.

EXPLANATORY NOTES

Clause 19

1. This clause relates to the operation of the Bill in respect of obligations created by contract not to disclose or use information, in so far as the breach of such an obligation gives rise under the general law to a right to bring proceedings in contract.

2. (a) *Subsection (1)*, which implements the recommendation in paragraph 6.134(iii) of the report, applies to contractual obligations not to disclose or use information, with appropriate minor modifications, the same principles as those applicable under clause 11 to obligations of confidence in general. The matter is explained, under the heading "Contractual obligations and the public interest", in paragraphs 6.130-6.133.

(b) The reason for paragraph (c) of the subsection is as follows. Clause 6 of the Bill concerns only the imposition (in certain circumstances) of obligations of confidence upon third parties who acquire information already impressed with an obligation of confidence. No *contractual* obligation of confidence can therefore arise by virtue of that clause. It would accordingly be inappropriate for those words in clause 11(4)(b) and (c) that relate to obligations of confidence arising under clause 6 to be applied in the context of contractual obligations of confidence.

2. *Subsection (2)* gives effect to the recommendations in paragraph 6.134(i) and (ii) of the report. It makes clear that, except as to the element of public interest referred to in subsection (1), the Bill does not affect the present law relating to the remedies for breach of contract: the point is explained in paragraphs 6.128 and 6.129 of the report.

3. The general principle is that an obligation of confidence can arise under the Bill only in respect of information which is not in the public domain. *Subsection (3)*, however, defines a "relevant contractual undertaking" in terms which will extend to information in the public domain; and accordingly the provisions of clause 11 of the Bill, which relate to the public interest, will, by virtue of this clause and by way of exception to that general principle, apply to the case of a contractual obligation not to disclose or use information, whether or not it is in the public domain. The reason for this provision is explained in paragraphs 6.132 and 6.133 of the report.

Breach of Confidence

General

- Interpretation. **20.—(1)** In this Act, unless the context otherwise requires—
- 1959 c. 22. “the court” means the High Court or, subject to section 17(2) of this Act and section 39 of the County Courts Act 1959 (which contains financial limits on jurisdiction), a county court;
- “proceedings” includes proceedings by way of counter-claim, and references to a plaintiff or defendant in proceedings shall be construed accordingly;
- 1978 c. 30. “statutory provision” means any enactment, whenever passed, or any provision contained in subordinate legislation (as defined in section 21(1) of the Interpretation Act 1978), whenever made.
- (2) References in this Act to information in, or coming into, the public domain shall be construed in accordance with subsections (2) to (4) of section 2.
- (3) References in this Act to an obligation of confidence shall be construed in accordance with section 8, and references to the person to whom such obligation is owed shall be construed in accordance with section 18(3).

EXPLANATORY NOTES

Clause 20

1. This clause relates to the interpretation of various expressions that are used in the Bill.

2. *Subsection (1)*: The definition of the expression "statutory provision" in the concluding paragraph of this subsection refers to provisions contained in subordinate legislation "as defined in section 21(1) of the Interpretation Act 1978". That definition is as follows: "Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act".

Breach of Confidence

Supplemental.

21.—(1) Sections 3 to 6 have effect in relation to acquisitions of information taking place before the commencement of this Act as well as to those taking place thereafter, but an obligation of confidence under section 6 shall not be owed in respect of an acquisition of information taking place before that commencement unless it would have been owed in respect of that acquisition if this Act had at all material times been in force.

(2) Section 19 has effect in relation to contractual undertakings given before or after the commencement of this Act.

(3) Sections 10(1) and 19(1) have effect, however, only in relation to a disclosure or use of information taking place after the commencement of this Act; and accordingly nothing in this Act affects any cause of action accruing before this Act comes into force.

1980 c. 58.

(4) The Limitation Act 1980 shall apply in relation to a claim for damages in respect of mental distress suffered as mentioned in section 14(1)(b) of this Act as it applies in relation to a claim for damages in respect of personal injuries within the meaning of that Act (references to “injury” and cognate expressions in that Act being construed accordingly).

1934 c. 41.

(5) Nothing in this Act affects the operation of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 (survival of causes of action against, or for the benefit of, a deceased’s estate).

EXPLANATORY NOTES

Clause 21

1. The first three subsections of this clause constitute the transitional provisions of the Bill, which does not impose liability retrospectively for the disclosure or use of information in breach of confidence before its provisions come into force: see the first part of paragraph 6.125 of the report.

2. (a) *Subsections (1) to (3)* implement the recommendation in paragraph 6.126. The question of transitional provisions is considered in the middle section of paragraph 6.125.

(b) The principle contained in the second part of subsection (1), relating to obligations of confidence imposed on third parties by clause 6, is explained in the concluding section of paragraph 6.125: it gives effect to the second part of the recommendation in paragraph 6.126.

(c) *Subsection (2)* applies the principles referred to in paragraph 1 and paragraph 2(a), above, of this note to contractual undertakings not to disclose or use information.

3. *Subsection (4)* makes clear that a claim for damages for mental distress (including mental or physical harm resulting from such distress: see clause 14(1)(b)) is categorised as a claim in respect of personal injuries for the purposes of the law concerning limitation of actions.

4. *Subsection (5)*, which relates to the survival of causes of action on death, gives effect to the recommendation in paragraph 6.120(i). The matter is discussed in paragraph 6.117.

Breach of Confidence

Application
to the Crown.
1947 c. 44.

22.—(1) This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947.

(2) Without prejudice to the generality of section 21(1) of that Act (nature of relief in proceedings by or against the Crown), references in sections 15 and 16 of this Act to the granting of an injunction restraining a defendant in proceedings for breach of confidence shall, in relation to the Crown where it is a defendant in such proceedings, be read as references to the granting of such equivalent declaration with respect to the rights of the parties as the court is empowered to grant by virtue of proviso (a) to the said section 21(1).

EXPLANATORY NOTES

Clause 22

1. This clause deals with the application of the Bill to the Crown.
2. *Subsection (1)* provides that the Crown shall be liable under the Bill and, in relation to non-contractual obligations under the Bill, the Crown's liability will be in accordance with the general law of tort as it applies to the Crown.
3. *Subsection (2)* specifically applies to the Bill the general rule concerning the grant of a declaration, in lieu of an injunction, in proceedings against the Crown. That rule, contained in proviso (a) to section 21(1) of the Crown Proceedings Act 1947, states that "where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction . . . , the court shall not grant an injunction . . . , but may in lieu thereof make an order declaratory of the rights of the parties".

Breach of Confidence

Citation,
commence-
ment and
extent.

23.—(1) This Act may be cited as the Breach of Confidence Act 1981.

(2) This Act shall come into force at the end of the period of three months beginning with the day on which it is passed.

(3) This Act extends to England and Wales only.

APPENDIX B

List of persons and organisations who sent comments on Working Paper No. 58

Association of Chief Police Officers of England, Wales and Northern Ireland
Professor P. S. Atiyah
Master R. E. Ball, C.B., M.B.E.
(then Chief Chancery Master)
Birmingham Chamber of Industry and Commerce
British Association of Social Workers
British Broadcasting Corporation
British Computer Society
British Insurance Association
Mr. R. H. Burnett-Hall
Central Statistical Office
Chartered Institute of Patent Agents
Civil Aviation Authority
Mr. A. S. Foster
Guild of British Newspaper Editors
Professor L. C. B. Gower
Independent Broadcasting Authority
"Justice"
Leicester Polytechnic School of Business, Social Sciences and Law
Mr. W. A. Leitch, C.B.
The Law Society
Lloyd's Underwriters
National Coal Board
National Union of Journalists
Mr. A. P. Oakley
Penelope Pearce
The Press Council
Mr. Jeremy Phillips
Mrs. Ursula Philipps-Wollescote
Senate of the Inns of Court and the Bar
The Hon. Mr. Justice Templeman, M.B.E.
Trade Marks, Patents and Designs Federation
Dr. M. Tombs
United Association for the Protection of Trade, Ltd.

APPENDIX C

List of those who attended a seminar on Breach of Confidence, held at All Souls College, Oxford in January 1975*

The Hon. Mr. Justice Cooke, *Chairman*
Mr. N. F. Cairncross, C.B., Home Office
Mr. J. S. Copp, Solicitor, Imperial Chemical Industries Limited
Mr. J. D. Cousin, Secretary, Imperial Chemical Industries Limited
Mr. J. C. Crawley, Chief Assistant to the Director-General, British Broadcasting Corporation
The Rt. Hon. William Deedes, M.C., Editor, *The Daily Telegraph*
The Rt. Hon. Lord Denning, Master of the Rolls
Sir Denis Dobson, K.C.B., O.B.E., Q.C., Permanent Secretary and Clerk of the Crown in Chancery, Lord Chancellor's Office
Mr. H. Evans, Editor, *The Sunday Times*
Mr. J. Evans, Legal Adviser, *The Sunday Times*
Professor R. F. V. Heuston, Regius Professor of Laws, Trinity College, Dublin
Professor Gareth Jones, Trinity College, Cambridge
Mr. Michael Kempster, Q.C., Member of the Younger Committee on Privacy
Mr. Jeremy Lever, Q.C.
Mr. C. M. Monteith, Vice-Chairman, Messrs Faber & Faber
Mr. John F. Mummery, Lincoln's Inn
Mr. Brian Neill, Q.C.
The Rt. Hon. Lord Pearce, formerly Chairman, the Press Council
Mr. P. M. North, Keble College, Oxford
Mr. Paul Sieghart, Member of the Justice Committee on Privacy
Mr. Ewan Stewart, M.C., Q.C., Commissioner, Scottish Law Commission
The Hon. Mr. Justice Templeman, M.B.E.
Mr. J. Weltman, O.B.E., Head of Programme Services, Independent Broadcasting Authority
The Rt. Hon. Sir Kenneth Younger, K.B.E., Chairman, Committee on Privacy appointed by the Home Secretary, The Lord Chancellor and the Secretary of State for Scotland

Law Commission:

Mr. Claud Bicknell, O.B.E., Commissioner
Mr. Aubrey Diamond, Commissioner
Mr. Derek Hodgson, Q.C., Commissioner
Mr. Norman S. Marsh, Q.C., Commissioner and Member of the Younger Committee on Privacy
Mr. J. M. Cartwright Sharp, Secretary
Mr. J. H. Humphreys
Mr. R. H. Streeten

*This list refers to the positions that they held at the date of the seminar.

APPENDIX D

(see paragraph 4.68 of the report)

Agreements not to disclose or use information and the obligations of the United Kingdom under Article 85 of the Treaty of Rome

1. A letter of 17 June 1977, from the Commission of the E.E.C. to Fruehauf International Ltd. and Crane Fruehauf Ltd., which is summarized in Appendix 16 to the Report of the Monopolies and Mergers Commission on the Fruehauf Corporation and Crane Fruehauf Ltd. Proposed Merger (1977), Cmnd. 6906, took objection to a post-contractual ban on the use of the Corporation's know-how in the manufacture and marketing of road trailers and containers in a licence agreement covering the use of that know-how between the Corporation and Crane Fruehauf Ltd. The particular issue has lost its practical importance however since the merger of the Corporation and Crane Fruehauf Ltd.

2. In *Re the Agreement of Burroughs A.G. and Etablissements L. Delplanque et Fils* ([1972] C.M.L.R. (R.P. Supp.) D.67; [1972] J.O.L. 13/50 (17 January 1972)) the Commission had appeared to uphold an agreement not to use the know-how for ten years after the licence to use the know-how expired. However, in *Re the Agreement between Kabel-und Metallwerke Neumeyer A.G. and Les Etablissements Luchaire S.A.* ([1975] 2 C.M.L.R. D.40; [1975] O.J. L222/34 (22 August 1975)) the Commission decided that a post-licence obligation in a licence agreement regarding know-how, which was of indefinite extent, was maintainable in so far as the obligation of secrecy was concerned but, it would seem, was only permissible in respect of an obligation not to use the know-how in the post-licence period because such use was permissible on payment of royalties.

3. In March 1979 the Commission published a draft Regulation (No. C58/11-18, published in the Official Journal of the European Communities, 3 March 1979):

- (a) By Article 1 of this draft it is declared that "until [31 December 1989] Article 85(1) of the Treaty shall not apply to patent licensing agreements to which only two undertakings are party and which include one or more of [certain specified] obligations imposed upon a party to the agreement or upon an undertaking having economic connections with such a party".
- (b) By Article 2 it is provided that Article 1 shall apply "notwithstanding that one or more of [certain specified] obligations is imposed upon the licensor or the licensee or an undertaking that has economic connections with either of them".
- (c) Among the obligations thus listed is (see Article 2, para. 1(5)) "the obligation not to divulge secret manufacturing processes or secret know-how relating to the use or application of industrial technology; the licensee may also be bound by this obligation after the agreement has expired", as well as (see Article 2, para. 1(8)) "the obligation to

pass on to the licensor any experience gained in working the invention and to grant back licences in respect of inventions relating to improvements and new applications of the original invention, provided that this obligation is non-exclusive and the licensor is bound by a like obligation”.

(d) By Article 3, however, Article 1 does not apply “if the agreement contains one or more of [certain specified] provisions or if one or both of the parties thereto take one or more of [certain specified] measures”. Among the cases specified in Article 3 are:

(i) under para. 4(d), “the obligation on the part of the licensee to pay royalties . . . after manufacturing processes or other know-how communicated under the licence have entered into the public domain, unless entry into the public domain is attributable to some default on the part of the licensee, or of an undertaking that has economic connections with him”;

(ii) under para. 10, “a clause prohibiting the licensee from using after the expiry of the agreement secret manufacturing processes or other secret know-how communicated by the licensor; this is without prejudice to any right of the licensor to require payments for the use of such processes or know-how for an appropriate period, even after the expiry of the agreement, but subject to paragraph 4(d) of this Article”.

4. According to a Commission Press Release of 12 November 1980 the Commission intervened on a complaint by Constructions Normalisées A. Cartoux S.A. of France in regard to a ban on the use of know-how after the expiry of the term of a licence of the know-how to the French company by Terrapin (Overseas) Limited of the United Kingdom. However, the Commission closed its investigation without instituting formal proceedings against Terrapin when the latter agreed to allow use of the know-how beyond the licence term for a reasonable fee, in accordance with the principle of Article 3.10 (see above) of the Draft Regulation. The French company's further contention that the know-how was now in the public domain was considered a matter to be decided by the national courts and not by the Commission.