REMEDIES FOR BREACH OF CONFIDENCE

A TALK TO THE LONDON SOLICITORS LITIGATION ASSOCIATION

Introduction: the cause of action for breach of confidence

1. It would not be wholly unreasonable to regard the jurisprudence of confidentiality as the work of very learned bodgers. Confidentiality rights were mostly a Victorian invention. The foundation stone of the modern law of confidence was the decision of the House of Lords in *Prince Albert v Strange*[1] (a case concerning the misuse of the Prince Consort's etchings), in which Lord Cottenham LC declared airily that relief was available "on grounds of breach of trust, confidence or contract". It is doubtful whether he meant by "confidence" what we now mean by it – he may well have been harking back to the usage of Francis Bacon, who in his *Reading on the Statute of Uses*[2] defined a confidence as a kind of temporary trust.

2. But even if Lord Cottenham was thinking about confidence as a form of equitable property, subsequent authorities have made it clear that the analogy between confidential information and property is a very limited one: instead the focus has been on the equitable principles applicable to the relationship between someone who provides confidential information and someone who receives it. And, as we shall see, that may prove to be of some significance for the nature of the remedies that are available. The classic formulation is that of Megarry J in *Coco v A.N.Clark (Engineers) Ltd*[3]:

   > *In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself … must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.*

3. The equitable action for breach of confidence is not to be confused with the new common law action for misuse of private information. The House of Lords initially refused to

[1] (1848) 1 Mac & G 25
[2] Delivered at Gray's Inn in 1600
[3] [1968] FSR 415, at 419

recognise any right of privacy at common law[4], but yielded to the European Convention on Human Rights in *Campbell v MGN Ltd*[5], holding that Article 8 (which guarantees rights of personal privacy) is engaged when someone publishing information knows or ought to know that the other person can reasonably expect the information to be kept confidential because of its private nature.

4. There then followed some ill-starred attempts to create a single cause of action encompassing both confidentiality and personal privacy, but it is now clear that the two are to be considered separately[6], and that the newly developed common law tort of misuse of private information has not after all supplanted the old equitable claim for breach of confidence. They defend quite separate interests and values, as demonstrated by the remarkable case of *PJS v News Group Newspapers Ltd*[7], in which it was held that, regardless of confidentiality or secrecy, the Convention right to respect for private life also embraces the right to prevent unwanted intrusion into one's personal space.

5. In commercial litigation, breach of confidence is more often relevant than misuse of private information and it is on the claim for breach of confidence that we focus in this talk.

Entitlement to compensation for breach of confidence

6. Very often, the real problem facing those who seek to enforce confidentiality is the practical inadequacy of the remedies on offer. Before a breach of confidence is committed, a potential claimant is rarely sufficiently well informed to obtain pre-emptive relief. Once the breach of confidence has been committed, then the cat is out of the bag and (*pace* the Privy Council in *B v Auckland District Law Society*[8]) often strongly resistant to being put back in the bag. Sometimes, to mix one's metaphors, one can obtain springboard relief - in other words, a temporary injunction designed to protect a claimant from the wrongful head-start which the defendant would otherwise enjoy. But in many cases the claimant's only recourse is to look for compensation.

[4] *Wainwright v Home Office* [2004] 2 AC 406
[5] [2004] 2 AC 457
[6] See *Vidal-Hall v Google Inc* [2016] QB 1003, at [21].
[7] [2016] AC 1081
[8] [2003] 2 AC 736

7. Confidentiality rights may arise under a contract or in equity alone. Even in the latter case, it is now fairly clearly established that equitable compensation is recoverable in the same way that damages are recoverable at common law for tortious wrongdoing[9]. However, practical difficulties often arise. One difficulty is that the adverse causal consequences of a leak of information may be difficult to identify with clarity. Another is that it can be forensically difficult to paint in attractive colours a complaint that an inconvenient truth has got out.

8. But these practical difficulties are not the result of any shortage of available remedies in theory. We propose to consider briefly in our allotted 40 minutes two rather controversial possible examples: *Wrotham Park*, or licence fee, damages and constructive trust.

Licence fee damages

9. In *Marathon Asset Management v Seddon*[10] Leggatt J gave detailed consideration to the circumstances in which so-called *Wrotham Park*[11] damages (or "licence fee damages") might be recoverable for breach of confidence – in particular, in circumstances where a claimant is unable to prove that it has suffered financial loss. In the words of the head-note, he held:

> *…that where there was no alternative means by which the defendant, acting lawfully, could have obtained such a benefit and it was not reasonable to expect that the claimant would license the defendant's use of its property for a reasonable fee, as on the evidence was the case in the present case, it made no sense to value the benefit by postulating a hypothetical negotiation between a willing seller and a willing buyer; that the appropriate method of valuation in such a case was to assess the amount of profit made by the defendant that was fairly attributable to its wrongful use of the claimant's property; that, however, the extent of the misuse of the confidential information had to be identified before valuing its benefit to the defendant, so that the remedy matched the wrong actually committed by the defendant…*

Constructive trust

[9] See eg *Indata Equipment Supplies Ltd v ACL Ltd* [1998] 1 BCLC 412.
[10] [2017] ICR 791
[11] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798

10. A breach of confidence does not always require the publication of confidential information to third parties. Sometimes it consists in a misuse of confidential information which does not involve its publication.

11. Suppose that company X sees a commercial opportunity and discloses information about that on a confidential basis to company Y. Company Y misuses that information by pursuing the commercial opportunity for its own benefit. It is clearly established in those circumstances that Company X can claim either compensation or an equitable account of profits.

12. But suppose too that Company Y is insolvent and its creditors are circling. It then becomes an important question whether Company X may have, not only a personal remedy against Company Y, but also a proprietary remedy. In particular, could Company Y be said to hold either acquired assets or profits on constructive trust for Company X, in which case Company X will obtain an advantage over the general body of Company Y's creditors?

13. The authorities and academics do not speak with a single voice on this topic and the debate continues. My aim is to conduct a brief survey of the current state of play, looking in particular at the relatively recent decision of the Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC*[12].

14. The starting-point for anyone arguing for the existence of a constructive trust remedy for breach of confidence is the Canadian Supreme Court decision in *LAC Minerals Ltd v International Corona Resources Ltd*[13]. In that case the defendant had acquired mining rights through misuse of information given to it in confidence by the plaintiff, which would otherwise have obtained the mining rights and developed the mine for itself. The trial judge declared that the defendant held the property on trust for the plaintiff, and he ordered it to deliver up the property on being compensated for the value of improvements it had made to the property in developing the mine. That order was upheld by the Canadian Supreme Court.

[12] [2015] A.C. 250
[13] [1990] FSR 441. See also *Soulos v Korkontzilas* [1997] 2 SCR 217.

15. The decision is in some respects a difficult authority, partly because the Supreme Court's decision was taken only by three out of five judges and partly because that bare majority included two judges who would have held that the defendant had acted, not just in breach of confidence, but also in breach of fiduciary duty. And, more importantly still, it appears from the judgments that the Supreme Court considered that it was imposing a *remedial* constructive trust. This emerges most clearly from the *dicta* of La Forest J:

> *…it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role…*

16. The distinction between an institutional constructive trust and a remedial constructive trust is a significant one. As explained by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[14], the former recognises substantive property rights which come into existence by operation of law from the date of the circumstances that give rise to the trust, while the latter comes into existence as the result of a decision by the court that a constructive trust is the appropriate remedy for the wrong that has been committed. Remedial constructive trusts are recognised in a number of jurisdictions, including Canada, Australia, New Zealand, and the USA, but, as is well known, the English courts have been more cautious about them.

17. So much for Canadian authority. The English authorities did not speak with one voice about the availability of a constructive trust remedy for breach of confidence. For example:

    17.1. The problems posed by disloyal intelligence operatives were responsible for a number of the leading decisions about confidentiality and in the *Spycatcher* litigation there were high level *dicta* supporting the proposition that spies who used state secrets to write books should expect to find that they hold the copyrights on trust for the state[15]. In particular, Dillon LJ said in the Court of Appeal:

> *It has seemed to me throughout the hearing of this appeal that there could have been strong arguments for saying that, [as] Mr. Wright wrote and published Spycatcher in breach of his duty of secrecy to the Crown and was only able to do so by the misuse of secret information which had come to him in the course of his employment as an officer in the Security Service of the*

[14] [1996] AC 669, at 714-715

[15] See eg *Attorney General v Guardian Newspaper (No.2)* [1990] 1 AC 109, *per* Dillon LJ at 211C, Lord Keith at 263A, Lord Griffiths at 276A, and Lord Goff at 288.

Crown, the copyright in Spycatcher belongs in equity to the Crown and is held on a constructive trust for the Crown with whatever consequences may follow from that. Since, however, the Crown has in the most explicit terms disclaimed any reliance on equitable copyright, I put such thoughts out of mind.

17.2. In *Ocular Sciences Ltd v Aspect Vision Care Ltd*[16] Laddie J described the question of the availability of constructive trust as a remedy for breach of confidence as a difficult one, but said that he could see the attraction of imposing a constructive trust in some circumstances (though not in the circumstances before him).

17.3. However, in *Satnam Ltd v Dunlop Heywood Ltd*[17] the Court of Appeal dismissed a claim that the second defendant company held a site on constructive trust for the claimant. The second defendant had allegedly acquired the site with the benefit of confidential information which it knew had been passed to it by the first defendant, the claimant's surveyors, in breach of fiduciary duty. The Court of Appeal held that, in circumstances where the second defendant (unlike the first defendant) owed no fiduciary duty to the claimant and had not been found to have acted dishonestly, there were no grounds for imposing any form of constructive trust on the second defendant.

17.4. On the other hand, in *United Pan-Europe Communications NV v Deutsche Bank AG*[18] the Court of Appeal cited *Lac Minerals* before holding that a claimant alleging breach of confidence had an arguable case that the defendant was a constructive trustee in respect of shares which it had allegedly acquired by the misuse of the claimant's confidential information.

18. So the position in English law was unclear. Some commentators took a straightforward view that a defendant could not be said to hold the "product" of a breach of confidence on constructive trust for the claimant[19], but others considered cautiously that there was at

[16] [1997] RPC 289, at 411 to 416
[17] [1999] 3 All ER 652
[18] [2000] 2 B.C.L.C. 461
[19] See, eg, Paul Stanley's *The Law of Confidentiality: a Restatement* (Hart Publishing, 2008), at pp.151-155.

least some room for thinking that a proprietary remedial constructive trust could potentially be awarded[20].

19. Then in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*[21] Lord Neuberger MR said:

> *Whether a proprietary interest exists is a matter of property law, and is not a matter of discretion: see Foskett v McKeown [2001] 1 AC 102, 109 per Lord Browne-Wilkinson. It follows that the courts of England and Wales do not recognise a remedial constructive trust as opposed to an institutional constructive trust.*

20. This passage does not appear to have been the subject of any argument between the parties. Moreover, *Foskett v McKeown* was in fact a case all about tracing, not a case about constructive trusts, and it appears from Lord Browne-Wilkinson's *dicta* in *Westdeutsche Bank v Islington*[22], that he was not averse *in principle* to the possibility of a remedial constructive trust in appropriate circumstances.

21. But Lord Neuberger's words in *Sinclair Investments* were undoubtedly a blow to those who sought to maintain that a constructive trust should be an available remedy for breach of confidence, because if one takes away remedial constructive trusts, all that is left is the institutional constructive trust, which has generally been regarded as a branch of the law of property. Confidential information does not for most purposes count as property in the eyes of the law[23], and one cannot in any traditional conventional sense trace through from confidential information into property acquired with the benefit of that confidential information.

22. Then in 2014 Lord Neuberger was also a member of the Supreme Court which decided *FHR European Ventures LLP v Cedar Capital Partners LLC*[24]. In a single judgment, which Lord Neuberger delivered, the Supreme Court held definitively that an agent which receives a bribe or secret commission from a third party holds that bribe or secret commission on constructive trust for its principal.

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[20] See, eg, Matthew Conaglen, *Thinking about proprietary remedies for breach of confidence* IPQ, 2008, 1, 82-109.
[21] [2012] Ch 453, at [37]
[22] [1996] AC 669, at 714-715
[23] See, eg, *Douglas v Hello! Ltd (No.3)* [2008] 1 AC 1, *per* Lord Walker at [275]-[276].
[24] [2015] AC 250

23. Whatever hopes there may have been for the future of the remedial constructive trust in English law were firmly sat on by the Supreme Court. Criticising a number of decisions of the Court of Appeal which it over-ruled, the Court said[25]:

> *…the notion, adopted by Cotton and Brett LJJ that a trust might arise once the court had given judgment for the equitable claim seems to be based on some sort of remedial constructive trust which is a concept not referred to in earlier cases, and which has authoritatively been said not to be part of English law…*

24. However, for present purposes the Supreme Court's discussion of the traditional institutional constructive trust is also interesting. It framed its discussion by reference to what it described as an accepted equitable rule[26]:

> *…at least in some cases where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the equitable rule ("the rule") is that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies.*

25. The Supreme Court summarised the parties' rival contentions about "the rule"[27]:

25.1. First the respondents – and you will see that the respondents' argument proceeded from the nature of the relationship between principal and agent:

> *The respondents' formulation of the rule, namely that it applies to all benefits received by an agent in breach of his fiduciary duty to his principal, is explained on the basis that an agent ought to account in specie to his principal for any benefit he has obtained from his agency in breach of his fiduciary duty, as the benefit should be treated as the property of the principal… More subtly, it is justified on the basis that equity does not permit an agent to rely on his own wrong to justify retaining the benefit: in effect, he must accept that, as he received the benefit as a result of his agency, he acquired it for his principal.*

25.2. Then the appellants – and you will see that the appellants stuck to a traditional property-based analysis:

> *The appellant's formulation of the rule, namely that it has a more limited reach, and does not apply to bribes and secret commissions, has… various different formulations and justifications. Thus, it is said that, given that it is a proprietary principle, the rule should not apply to benefits which were not*

[25] At [47]
[26] At [7]
[27] At paragraphs 30 to 31

> *derived from assets which are or should be the property of the principal… It has also been suggested that the rule should not apply to benefits which could not have been intended for the principal and were, rightly or wrongly, the property of the agent… In* Sinclair*… it was suggested that the effect of the authorities was that the rule should not apply to a benefit which the agent had obtained by taking advantage of an opportunity which arose as a result of the agency, unless the opportunity "was properly that of the [principal]".*

26. So one can see that the respondents' approach focused on the *relationship* between agent and principal, while the appellants adopted a *property*-based analysis. Since confidentiality is not a property right, the latter approach might sink a constructive trust claim for breach of confidence, but it was the former approach that prevailed with the Supreme Court, which upheld the respondents' relationship-based analysis.

27. The Supreme Court's decision seems to me to give hope to claimants hoping to impose a constructive trust in breach of confidence cases in two ways.

28. First, and less controversially, it establishes clearly that a traditional institutional constructive trust is an appropriate remedy for a breach of fiduciary duty. One must not confuse duties of confidentiality with fiduciary duties: imparting confidential information does not in itself create a fiduciary relationship or give rise to fiduciary duties[28]. But fiduciary relationships often provide the backdrop for exchanges of confidential information. So a claimant with a claim for breach of confidence will in many cases also have a claim for breach of fiduciary duty. And although *FHR v Cedar Capital* was itself concerned only with one class of fiduciary, the agent, it clearly also provides encouragement for constructive trust claims against other fiduciaries deriving a benefit from their breach of fiduciary duty.

29. But secondly, the Court's focus on the relationship between agent and principal as the well-spring of the trust obligation may open the door for an analogous analysis of the relationship between confider and confidant. In many breach of confidence cases, the analogy will be inapposite. Thus when HMRC obtains confidential information about the affairs of an individual taxpayer, it undoubtedly owes a duty of confidence to the taxpayer[29]. However, the taxpayer provides information to HMRC, not for his own

[28] *Indata Equipment Supplies Ltd v ACL Ltd* [1998] FSR 248, at 256 and 262
[29] *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] 1 WLR 4164

purposes, but for the statutory purposes of HMRC. So if an individual officer at HMRC misuses the taxpayer's information to pursue a commercial opportunity, the argument that he must be treated as having acted for the taxpayer in pursuing the commercial opportunity would appear to lose much, if not all of its force.

30. But in many other cases, when a confider provides confidential information to a confidant for the confider's own purpose, and the confidant receives that information in full awareness that it is being provided to him for that purpose, then it seems to me that the analogy with the fiduciary relationship is a powerful one. Even if the confidant is not affected by the all-encompassing obligations of a fiduciary, his obligations *in relation to the confidential information* are the same as the fiduciary's. If he misuses that information, why should he not be regarded by the law in just the same way? If he received the information for the purpose of benefiting the confider, why should he not be required (like the fiduciary) to accept that he similarly must be taken also to have *used* it for that purpose?

31. One cannot know how the law will develop but - coming back to Company X and the insolvent Company Y - it would be a mistake to write off too readily Company X's prospects of getting to the front of the queue of Company Y's creditors and recovering what might by many be regarded as Company X's own money.

12 December 2017

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