

# **Confidential Information in a Commercial Context: An Analysis of ‘Use’ of Confidential Information and the Availability of a Proprietary Remedy for Breach of Confidence**

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## **I. INTRODUCTION**

The purpose of this article is to examine recent developments in the law relating to the breach of confidence action in the context of commercial, rather than personal, information. Specifically, the focus of this article is on two issues:

1. What constitutes ‘use’ of confidential information; and
2. Whether a proprietary remedy, particularly a constructive trust, is available once a breach of confidence is established.

These issues have been raised in recent decisions of Commonwealth appellate courts. They highlight conflicts of principle and tensions within the law regarding the breach of confidence action and equity generally. The resolution of these issues has greatly advanced the law in this area due to the complex jurisdictional bases of the action and the breadth of remedies available.

## **II. BACKGROUND**

This section canvasses well-established law in order to set out the elements and basic principles underlying the breach of confidence action (also known as an action for misuse of confidential information).

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The classic statement of the elements of the breach of confidence action was made by Megarry J in *Coco v AN Clark (Engineers) Ltd*.<sup>1</sup> That case established that, with the exception of contract based claims, three elements will normally be required for a successful breach of confidence action. These are:<sup>2</sup>

- (i) The information itself must have the necessary quality of confidence.
- (ii) The information must have been imparted in circumstances importing an obligation of confidence.
- (iii) There must be an unauthorised use of that information to the detriment of the party communicating it.

This statement has been universally accepted and applied, with the qualification that detriment is better regarded as relevant to the remedy available, rather than being an element of the action; a matter that Megarry J expressly left open. The concept of detriment appears in the common law, which focuses on the position of the wronged party, rather than on the wrongdoer. However, equity, taking the opposite approach, examines the conduct of the wrongdoer. In equity, detriment to the wronged party is, strictly speaking, irrelevant.

In order to cover circumstances where there has been no express or implied imparting of information, the courts have also recognised that the duty of confidence arises “when confidential information comes to the knowledge of a person ... in circumstances where he has notice, or is held to have agreed, that the information is confidential.”<sup>3</sup>

There is much debate over the jurisdictional basis of the breach of confidence action. At various times the courts have relied on contract, equity and property as the joint or severable jurisdictional bases on which relief for breach of confidence should be granted. The policy of the law to enforce the protection of confidential communications and information has also been advanced as a justification for the grant of relief. Gurry takes the view that the breach of confidence action should properly be regarded as *sui generis*.<sup>4</sup>

Once an obligation of confidence is established, the recipient of confidential information is bound by that obligation until released. This obligation can be released by an agreement for consideration, the express

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<sup>1</sup> [1969] RPC 41. (“*Coco*”).

<sup>2</sup> *Ibid* 47.

<sup>3</sup> *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 281 per Lord Goff.

<sup>4</sup> Gurry, *Breach of Confidence* (1984) 25-26.

or implied consent of the confider, or the expiration of the confidentiality of the information that is the subject of the obligation.<sup>5</sup>

The point in time when confidentiality may be said to have expired is complicated by the Springboard doctrine, which was developed by the courts “to define the duration of the equitable obligation of confidence”.<sup>6</sup>

The first and second of the *Coco* elements have been the subject of extensive research and writing. The issues on which I will focus are applicable to establishing the third of the *Coco* elements and to the remedy available once all the elements of the breach of confidence action have been made out.

### III. “USE”

The third element identified in *Coco* is that there must be an unauthorised use of the confidential information to the detriment of the party communicating it. The crucial question addressed in this section is: what forms of acting on receipt of confidential information constitute ‘use’ of that information?

#### 1. Background

The authorities do not contain a description of what constitutes ‘use’ of confidential information. It seems to be assumed that whether unauthorised use has occurred will be apparent or able to be implied from the facts. Similarities between technical information, processes, or products may establish an inference of use. In the context of business information, an altered course of conduct by a confidant, explicable only by reference to the unauthorised use of confidential information, may also imply that use has occurred.<sup>7</sup>

Once an obligation of confidence is established, a duty is imposed on the confidant. This duty prohibits the confidant from using the information without permission of the confider, or from using it “for any purpose other than that for which it was disclosed”.<sup>8</sup> The obligation of confidence attaches only to information that has the necessary quality of

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<sup>5</sup> Ibid 241.

<sup>6</sup> Ibid 245.

<sup>7</sup> Ibid 256-257.

<sup>8</sup> *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680, 690.

confidence and ceases to exist when the information is no longer confidential.<sup>9</sup>

'Misuse' is use for purposes other than those for which information was disclosed, or disclosure to others without authority:<sup>10</sup>

In establishing a breach of a duty of confidence, the relevant question to be asked is, 'what is the confidEE entitled to do with the information?' and not, 'to what use he is prohibited from putting it?' Any use other than a permitted use is prohibited and amounts to a breach of duty.

This passage assumes that use can be shown without establishing a test of what constitutes use.

Use may be unintentional, as in *Seager v Copydex Ltd*.<sup>11</sup> In this case, although the Court of Appeal found that there was no doubt that the defendants honestly believed that the invention in question was their own idea, they must have 'unconsciously' made use of the confidential information which the defendant had given them, as the coincidences were too strong to permit any other explanation.

## 2. *MacLean v Arklow Investments Ltd*<sup>12</sup>

The plaintiffs (a Mr Wingate and Arklow Investments Limited) intended to buy an island for forestry and property development. They approached the defendant merchant bank (FAR) to assist them to find other investors. The defendants agreed to protect the confidentiality of the plaintiffs' information. This included an information memorandum prepared by the plaintiffs, a merchant bank's draft proposal disclosing a sale price, valuations of forests and a mill on the island, a proposed property development, and interest from a Japanese investor. However, a month later the defendants informed the plaintiffs that they would no longer act for them, and a few months later the island was sold to parties introduced by the defendants. The plaintiffs sued the defendants for breach of fiduciary duty and misuse of confidential information.

The trial judge found for the plaintiffs on both grounds. The basis for this finding was that the defendants had misused the plaintiffs' information; in particular, the vendor's sale price, valuations, details relating to the prospective Japanese party, and by appropriating the

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<sup>9</sup> Ibid 699.

<sup>10</sup> *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 642 per La Forest J. ("*Lac Minerals*").

<sup>11</sup> [1967] 1 WLR 923, 931.

<sup>12</sup> *Supra* note 8.

plaintiffs' business opportunity. The defendants appealed to the Court of Appeal.

In the Court of Appeal, Gault J remarked:<sup>13</sup>

The second issue is whether, in the circumstances, being galvanised into facilitating purchase of the island, known to be for sale, by receipt of information that others were seeking to do so involved misuse of confidential information.

The majority in the Court of Appeal found that the evidence did not show that FAR had misused confidential information, despite finding that "there is considerable circumstantial evidence to support the inference that [FAR] acted opportunistically in facilitating a transaction beneficial to themselves after learning of the status of Mr Wingate's project".<sup>14</sup>

The Court of Appeal went on to hold that:<sup>15</sup>

Taken at its highest the advantage [FAR] derived from the information disclosed by Mr Bailey was in taking stimulus from the fact that Arklow was trying to buy the assets and pursuing (perhaps more accurately speeding up) its efforts to form a consortium to acquire the assets in similar manner to previous transactions they had constructed.

Thomas J, in dissent, concluded that it would be naive to think that the effect of the information was limited to galvanizing FAR into activity and was not used by FAR in putting together its own deal.<sup>16</sup> This imports a separation of the enquiries into whether confidential information has been used and whether someone has been galvanised into action, as do the passages from the decision of the majority quoted above.

The Privy Council adopted the reasoning of the majority of the Court of Appeal in concluding that no actionable misuse of confidential information was established. They held that the action failed "[e]ven if FAR was galvanised into other action by reason of its knowledge that Arklow was in a relatively advanced stage of implementing its scheme."<sup>17</sup>

The judgments of both the Court of Appeal and the Privy Council lead to the conclusion that being galvanised into action does not constitute use of confidential information. In my opinion, this is correct. Whether someone has been galvanised into action and whether they have used confidential information are entirely distinct conceptual enquiries.

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<sup>13</sup> Ibid 682.

<sup>14</sup> Ibid 699.

<sup>15</sup> Ibid 701.

<sup>16</sup> Ibid 739.

<sup>17</sup> *Arklow Investments Ltd v MacLean* [2000] 2 NZLR 1, 8.

### 3. A Test for 'Use'

In *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*<sup>18</sup> Lord Greene MR stated that:<sup>19</sup>

What the Defendants did in this case was to dispense in certain material respects with the necessity of going through the process which had been gone through in compiling these drawings, and thereby to save themselves a great deal of labour and calculation and careful draughtsmanship. ... That, in my opinion, was a breach of confidence.

Lord Greene MR also stated that:<sup>20</sup>

It is perfectly possible to have a confidential document ... which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

Referring to something "constructed solely from materials in the public domain",<sup>21</sup> Megarry J, in *Coco*, considered that such a thing "may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain".<sup>22</sup>

From these passages it is possible to postulate a test for use. Such a test would hold that confidential information will have been 'used' when the defendant has avoided having to go through a process of creative thought and original consideration of the problem or process involved. For example, in *MacLean v Arklow Investments*,<sup>23</sup> the defendants had not used the plaintiffs' valuations as they had obtained their own independent (and, incidentally, more detailed) commercial assessments of the assets.<sup>24</sup>

This proposal is supported by Gurry's claim that the action for breach of confidence essentially protects an original process of mind.<sup>25</sup> He considers that the protection will operate against anyone who, by taking unfair advantage of information that has been disclosed to him, saves himself the time, trouble and expense of going through the same process.

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<sup>18</sup> (1948) 65 RPC 203.

<sup>19</sup> *Ibid* 215.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Supra* note 1, 47.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Supra* note 8.

<sup>24</sup> *Ibid* 700.

<sup>25</sup> *Supra* note 4, 247.

The test could also serve to provide a measure for the quantum of damages or other remedies, which would be measured or granted on the basis of the likely cost the defendants avoided by not going through that process of mind. However, to what extent a defendant saved herself the trouble of going through an original process of mind will not always be easy to determine. Therefore, as a practical matter, the test set out above should be moderated by the use of a threshold.

Such a threshold would require that proof of the defendant avoiding an original process of mind be sufficiently high before it could be said that the defendant had appropriated the plaintiff's process of creative thought. This is consistent with, even mandated by, the view taken by Gurry that a confider must do "more than raise a suspicion of use".<sup>26</sup>

Determination of the appropriate level at which to set the threshold can be assisted by reference to other thresholds that are well established in fiduciary law; for example, a "real or appreciable risk" of disclosure.<sup>27</sup>

The policy of the law with respect to breach of confidence is to hold confidences sacrosanct. The standard for a threshold that would best serve this policy is to ask whether a reasonable person would suspect that there was a real risk that the defendant had saved themselves labour by appropriating the fruits of the plaintiff's original process of mind. However, the needs of the law of confidences must be balanced against the needs of commerce. The threshold as outlined would unduly stifle and restrict the taking of business opportunities by business people acting honourably. Removing the reference to suspicion and replacing it with a reference to belief can ameliorate the severity of this threshold. However, the reference to risk should remain in recognition of the public interest in the maintenance of confidences.

Accordingly, the threshold advocated is as follows: if a reasonable person would believe that there was a real risk that the defendant had saved themselves the labour of going through a creative process of mind by appropriating the fruits of the plaintiff's process of mind, then the defendant will be held to have used the plaintiff's confidential information in breach of the obligation of confidence owed by the defendant to the plaintiff.

Despite references to 'process of mind' and 'creative thought', this test is intended to cover situations where computer technology has been applied to use a plaintiff's confidential information. While the use of a computer programme is not actually 'a process of a defendant's mind', it

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<sup>26</sup> Ibid 256.

<sup>27</sup> For example, *Russell McVeagh McKenzie Bartlett & Co v Tower Corporation* [1998] 3 NZLR 641, 651.

is nonetheless a substitute for it. It must be deemed to be a process of mind in order to encourage the maintenance of relationships of confidence.

The test advocated does not cover merely being galvanised into action. Where galvanisation has occurred, it will still be necessary to ask whether use has also occurred.

In my opinion, this is the correct result. There is no reason to censure or prohibit from acting those who are galvanised into action unless they have actually committed some wrong, such as a breach of confidence.

Nevertheless, while being galvanised into action and using confidential information are distinct concepts, they may overlap where a confidant's breach of confidence provides a stimulus to act.

In some cases galvanisation may cross the threshold into use. This will occur if the galvanisation in question would lead a reasonable person to believe that there was a real risk that appropriation of the confidant's creative process of mind had occurred. Thus, galvanisation may lead to an assumption that use has actually occurred.

This result can be justified by analogy to cases concerning assumptions as to breach of fiduciary duty. In *Boardman v Phipps*,<sup>28</sup> the House of Lords compelled the trustees to account for profits made through their trusteeship, despite finding that the trustees had acted honestly throughout the transactions. Viscount Dilhorne stated that if the fiduciaries had "entered into engagements in which they had *or could have had* a personal interest conflicting with the interests of those they were bound to protect"<sup>29</sup> then they would be liable to account. A similar approach was taken in *Russell McVeagh v Tower Corp.*<sup>30</sup> In that case the majority of the Court of Appeal considered that the question of whether a breach of confidence had occurred in the course of a fiduciary relationship depended, inter alia, on "whether in the particular factual circumstances, viewed objectively there is a *real or appreciable risk* that the confidential information will be disclosed".<sup>31</sup>

These judgments show that it is acceptable that censure may occur where no actual prohibited conduct has taken place, if there is a real risk of such conduct occurring. This approach may be justified by the necessity to maintain public confidence in the relationship in question (as in the law on bias), and in removing the temptation from those occupying positions of trust to engage in prohibited conduct.

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<sup>28</sup> [1966] 3 All ER 721.

<sup>29</sup> *Ibid* 733 (emphasis added).

<sup>30</sup> *Supra* note 27.

<sup>31</sup> *Ibid* 651 (emphasis added).

As a result, cases where galvanisation is clear-cut (and in fact overlaps with misuse of confidential information) will be covered by the test and threshold that has been proposed. Cases where there has been some galvanisation, the extent and source of which is unclear, will not cross the threshold.

Many cases where galvanisation has occurred will not be clear-cut. For example, it will very often be difficult to prove that the confidential information in question was a stimulus. In such cases, proving that use of confidential information has occurred will be highly problematic, and it will therefore be impractical to attempt to do so. Thus, practicality also supports the conclusion that being galvanised should not, of itself, be regarded as use of confidential information.

It may be argued that the policy of holding confidences sacrosanct would be better served by redefining 'use' to include galvanisation. However, for the purposes of practicality mentioned above, this proposition must fail. It must also fail because were it to succeed, the obligation of confidence would become so onerous that it would be impossible to maintain. As a result, no one would want to become a confidant for fear of exposure to legal liability.

#### 4. Use Where There is Only a Single Prize

This section considers whether a distinction should be drawn between cases where a single prize is at stake as a result of a breach of confidence - as in *Lac Minerals*<sup>32</sup> - and cases where what is at stake is not a unique, identifiable asset; for example, a position in the market. It can be argued that it would be practical, and good public policy, to accord greater protection to a confider when her confidential information assists in the attainment of some unique, concrete and easily identifiable asset. A greater degree of protection could be provided by the adoption of a lower threshold for the test of whether confidential information has been used.

Nonetheless, the nature of what is at stake does not answer the question of whether confidential information has been used, nor does it justify conceptually any modification of the test for use. Therefore, the test for use outlined in the previous section, and the threshold that must be crossed to meet that test, should apply in all cases where misuse of confidential information is alleged.

In *Lac Minerals*,<sup>33</sup> *La Forest J* considered that:<sup>34</sup>

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<sup>32</sup> Supra note 10.

<sup>33</sup> *Ibid.*

Imposing a disability on a party in possession of confidential information from participating in a market in which there is room for more than one participant may be unreasonable, such as where the information relates to a manufacturing process or a design detail. In such cases, it may be that the obligation on the confidant is not to use the confidential information in its possession without paying compensation for it or sharing the benefit derived from it. Where, however, as in the present case, there is only one property from which Lac is being excluded, and there is only one property that Corona was seeking, the duty of confidence is a duty not to use the information.

While this may seem contrary to the proposition stated above, La Forest J was addressing the question of whether the use of confidential information could be adequately compensated for by an award of damages. The question of compensation is entirely different from the question of use, and in deciding what compensation is appropriate the uniqueness of the asset at stake is unquestionably a proper consideration.<sup>35</sup> However, this does not justify a conclusion that the uniqueness of the prize alters the standard by which use is judged to have occurred.

## 5. Conclusion

Whether confidential information has been used will be obvious in many cases, or at least will be able to be implied from the facts. However, these are unlikely to be the cases that make their way to court, at least not on the issue of use. When it is not clear whether use has occurred, the test proposed in this article will provide a concise answer to the issue. Furthermore, the adoption of this test would enable disputing parties to resolve the question of use between themselves without the delay and expense of court proceedings.

The exclusion of galvanisation from the definition of use will allow confidants and agents to conduct business without fear that their every act may be attributed by litigious former clients to the stimulus of confidential information received by them at some time in the past.

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<sup>34</sup> Ibid 643.

<sup>35</sup> For instance, in contract law when specific performance is requested, uniqueness of the asset may be determinative of the request. See Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (2000), 868-869.

## IV. AVAILABILITY OF A CONSTRUCTIVE TRUST REMEDY

The general focus of this section is on when and in what circumstances a constructive trust may be imposed. Specifically, the focus is on how the courts analyse the wrong, and the link between the wrong and the remedy. This issue is explored through a discussion of the various grounds on which the availability of a constructive trust remedy is justified or denied.

The leading case in which a constructive trust was held to be available for a breach of confidence is *Lac Minerals*.<sup>36</sup> The facts of the case were that International Corona Resources (a junior mining company) carried out an extensive exploration programme, following which it made arrangements to attempt to acquire a particular property (“the Williams property”). Representatives of a senior mining company, Lac Minerals, read of the test results and entered into discussions with Corona regarding development and financing options for the Williams property. In the course of these discussions Corona revealed to Lac confidential geological findings, which included disclosure of the geological theory of the site and importance of the Williams property. Detailed private information was also left with Lac officials. Lac subsequently acquired the Williams property for itself without at any time informing Corona of its intention to do so. Corona sought to have ownership of the Williams property, which had proved to be very valuable, transferred to itself. A majority of the Supreme Court of Canada imposed a constructive trust over the property in favour of Corona.

### 1. Jurisdictional Basis

Are the jurisdictional bases invoked for a cause of action and for a remedy necessarily the same, or even linked? Or can the cause of action and the remedy be treated as separate conceptual enquiries? Opinion is divided as to the correct reply to these questions.

One possible answer is that the jurisdictional basis of the cause of action and of the remedy cannot be treated as separate, and therefore jurisdictional source is important in deciding whether a proprietary remedy is available. If this is the case, then it will be necessary to show a cause of action in property or equity for a constructive trust to be

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<sup>36</sup> Supra note 10.

available. However, if breach of confidence is regarded as *sui generis*, then any remedy could potentially be available once the cause of action is established.

If it is possible to separate the jurisdictional basis of the cause of action and that of the remedy, then what needs to be shown to justify a proprietary remedy in the absence of a proprietary cause of action? If cause of action and remedy are jurisdictionally and conceptually separate, then even if a proprietary cause of action is established, it will not guarantee the availability of a proprietary remedy.

Alternatively, it could be argued that jurisdictional source does not matter and that breach of confidence law is based solely on a policy of enforcing or maintaining relationships of confidence. If this were the case, to make a proprietary remedy available it would need to be shown that the award of a proprietary remedy will be the best way of serving this policy, and the public interest, in the maintenance of relationships of confidence. However, such an approach engenders uncertainty.

The prevailing judicial view in New Zealand seems to be that a full range of remedies is available for breach of confidence, regardless of the jurisdictional source of a particular action:<sup>37</sup>

As law and equity are now mingled ... it does not seem to matter whether the duty [of confidence] be classified as equitable or not. The full range of remedies deriving historically from either common law or equity should be available.

In the Supreme Court of Canada decision of *Cadbury Schweppes Inc v FBI Foods Ltd*,<sup>38</sup> Binnie J was of the view that in a breach of confidence action the Court could grant a remedy as required by the facts and was not constrained by doctrine.

The Supreme Court adopted the view that a remedy can be distinguished from the cause of action. Thus, even if confidential information were akin to property, the Supreme Court considered that a proprietary remedy would not follow automatically. Also, a proprietary remedy could be awarded despite the lack of a prior property interest<sup>39</sup> or a fiduciary relationship.<sup>40</sup>

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<sup>37</sup> *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 172; *Aquaculture Corp v NZ Mussel Co Ltd* [1990] 3 NZLR 299, 301.

<sup>38</sup> (1999) 167 DLR (4<sup>th</sup>) 577.

<sup>39</sup> *Ibid* 599.

<sup>40</sup> *Ibid* 603.

Some commentators have questioned whether this is correct, stating that “[t]he plaintiff obtains a right by establishing a cause of action. The remedy should protect that right.”<sup>41</sup>

Gurry claims that the courts’ approach in breach of confidence cases is that jurisdictional source is secondary to the protection of confidences.<sup>42</sup> The courts are concerned, he submits, primarily with the policy that underlies the action for breach of confidence; that is, holding confidences sacrosanct.<sup>43</sup>

The approach in *Cadbury Schweppes v FBI Foods*<sup>44</sup> can be contrasted with references made in *Coco v AN Clark (Engineers) Ltd*<sup>45</sup> to “the pure equitable doctrine of confidence”<sup>46</sup> and the “equitable obligation of confidence”.<sup>47</sup> It was also said in *Coco* that:<sup>48</sup>

In case of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being ...

In *Lac Minerals*,<sup>49</sup> Sopinka J considered that a constructive trust is ordinarily reserved for those situations where a right of property is recognised.<sup>50</sup> In the same case, Wilson J was concerned to give the innocent party the benefit of the most appropriate remedy, regardless of whether the cause of action originated at common law or in equity.<sup>51</sup>

As the authorities are in conflict, it seems impossible to conclude that the jurisdictional basis of the cause of action pleaded will determine whether or not a proprietary remedy is available. Thus, it would be unwise to attempt to justify the imposition of a constructive trust following a breach of confidence solely on this basis.

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<sup>41</sup> See Abdullah and Hang, “To Make the Remedy Fit the Wrong” (1999) 115 LQR 376, 377.

<sup>42</sup> Supra note 4, 43.

<sup>43</sup> Ibid 59.

<sup>44</sup> Supra note 38.

<sup>45</sup> Supra note 1.

<sup>46</sup> Ibid 46.

<sup>47</sup> Ibid 48.

<sup>48</sup> Ibid 47.

<sup>49</sup> Supra note 10.

<sup>50</sup> Ibid 615.

<sup>51</sup> Ibid 631.

## 2. Confidential Information as Property

The availability of a proprietary remedy for breach of confidence is often justified on the basis of a proprietary link. This may occur with the characterisation of information as property, as in *Boardman v Phipps*.<sup>52</sup> In that case the House of Lords held that confidential information could be characterised as a property interest for the purposes of the law of trusts. A proprietary link may also take the shape of copyright and other intellectual property rights.

It might appear that the ruling in *Boardman v Phipps* settles the debate over whether confidential information is property. However, Gurry states that *Boardman v Phipps* is essentially different from a breach of confidence case. This is because the reason for the court's intervention and the remedies available differ in each. In a *Boardman*-type case, the court is concerned with the need to prevent a fiduciary making a profit out of a conflict of duty and interest. The protection of confidential information is the focus only because it is the medium by which a pre-existing duty is breached. In a breach of confidence case, the court focuses on the protection of confidential information because this was the means by which the relationship of confidence was created.<sup>53</sup>

Even if confidential information is characterised as property, it does not necessarily follow that a constructive trust will be imposed to remedy a breach of confidence.<sup>54</sup>

It would be contrary to the authorities in this Court already mentioned to allow the choice of remedy to be driven by a label ('property') rather than a case-by-case balancing of the equities.

While there has been much debate in the past over whether confidential information can be characterised as property, the issue is far from settled. Many courts have emphasised that the basis of the breach of confidence action is the relationship of confidence, rather than the legal characteristics of the information confided.<sup>55</sup> Thus, it would be unwise for a plaintiff to attempt to argue for the imposition of a constructive trust as a remedy on the basis that the information misused was his property.

This leads to the issue of whether a proprietary remedy is justified in the absence of a proprietary link; that is, without characterising the

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<sup>52</sup> Supra note 28.

<sup>53</sup> Supra note 4, 161-162.

<sup>54</sup> Supra note 38, 599.

<sup>55</sup> Ibid 596.

confidential information in question as property. To determine this issue fully would require an in-depth examination of the unresolved debate over the availability of constructive trusts in a purely remedial context. If there were a more general acceptance of remedial constructive trusts, it would be easier to obtain a proprietary remedy in the absence of a proprietary cause of action. However, difficult issues then arise such as when, and in what circumstances, a remedial constructive trust would be available.

### 3. Policy Arguments

This section examines the practicality of the constructive trust as an available remedy for breach of confidence. The argument in favour of the constructive trust is that precision of remedy and full compensation is thereby provided, with no need to speculate about the quantum of damages. It also prevents a wrongdoer benefiting from his or her wrongdoing.<sup>56</sup>

However, that precision of remedy will be provided may only be a valid justification if there is only one unique, identifiable asset at stake. In contrast, if what is involved is the use of confidential information to gain entry into a competitive marketplace, a constructive trust may be an impractical and unsuitable remedy.

In other areas of the law, the courts are quite prepared and equipped to speculate about the quantum of damages,<sup>57</sup> and arguments against damages as being a speculative measure to compensate a plaintiff have been given short shrift.

In addition, an account of profits is available as a remedy for a breach of confidence and provides some measure of precision in calculating a remedy. However, it will not always be a suitable remedy, particularly in cases where the defendant's profit is less than the plaintiff's loss. In such a situation, the plaintiff will most probably elect compensatory damages as a remedy, which again invokes the arguments of speculation.

The availability of a constructive trust remedy may unduly hinder the ordinary course of business (although this objection may not prevail where there is only one asset at stake). This may lead to business stagnating rather than flowing. However, it may be that such stagnation is an appropriate outcome as it will encourage people not to attempt to benefit or profit from a breach of confidence and to respect relationships

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<sup>56</sup> See *Lac Minerals*, supra note 10, 631-632 per Wilson J.

<sup>57</sup> See, for example, *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 56.

of confidence:<sup>58</sup>

The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences .... The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect.

Birks<sup>59</sup> comments that the reason given by La Forest J for granting the proprietary remedy - that there was a strong need to buttress the practice of good faith bargaining - has a great deal to be said for it. However, he goes on to say that while this may have been a good and sufficient reason to explain the availability of personal restitution, there was no need to go one step further and award a proprietary remedy. In his opinion, the best remedy would have been an account with a *Boardman*<sup>60</sup> allowance for input and reasonable profit.

In *Frank W. Snepp III v United States*,<sup>61</sup> the majority of the United States Supreme Court upheld the imposition of a constructive trust over the profits arising from the sale of a book published in breach of confidence by a former agent of the CIA, Frank Snepp. The majority considered that a failure to impose a constructive trust would leave the United States with no reliable deterrent against similar breaches of security. This reasoning was reinforced by the conviction felt by the majority that damages in any form would be an inappropriate remedy.<sup>62</sup>

However, in the same case, the minority of the Supreme Court considered that punitive damages were clearly the preferable remedy, stating that a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment.

Imposing a constructive trust to deter breaches of confidence arguably places too high a burden on the developer or recipient of the property in question. They too may have contributed something to the property; alternatively, the confider may only have suggested a minor improvement that the recipient may well have discovered in due course. This suggests that the adoption of a threshold that must be crossed before a constructive trust is available. This is reinforced by the statement of

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<sup>58</sup> Supra note 10, 672-673 per La Forest J.

<sup>59</sup> Birks, "The Remedies for Abuse of Confidential Information" [1990] LMCLQ 460.  
<sup>60</sup> *Boardman v Phipps*, supra note 28.

<sup>61</sup> 62 L Ed 2d 704 (1980).

<sup>62</sup> Ibid 711-712.

Sopinka J in *Lac Minerals*<sup>63</sup> that “[w]hen the extent of the connection between the confidential information and the acquisition of the property is uncertain, it would be unjust to impress the whole of the property with a constructive trust.”<sup>64</sup> Perhaps a constructive trust should be available only when, viewed objectively, it is reasonable to believe that the confidential information played a significant part in the acquisition of the property in question.

In response to an article by Davies,<sup>65</sup> in which he encourages the remedial flexibility asserted by the Supreme Court of Canada in *Lac Minerals*,<sup>66</sup> Birks comments that “the advantages gained by certainty as to liability are nullified if the courts assert a free discretion as to remedy”.<sup>67</sup> He claims that:<sup>68</sup>

The greatest difficulty with the approach used by the Canadian Supreme Court, and advocated by Mr Davies, is to be found in the assertion that even as between personal and proprietary remedies the court has a free choice. This must lead to surprising and undeserved priorities in the event of insolvency.

Birks goes on to point out the need for certainty and predictability in the law of remedies, stating that the law is not intellectually respectable if it takes refuge in “an inscrutable case to case empiricism”.<sup>69</sup>

Abdullah and Hang note that while remedial flexibility “may allow the courts the necessary degree of flexibility to do justice [this] does produce a conflict with the aim of simplifying the process of reaching a settlement”.<sup>70</sup>

#### 4. Existence of a Fiduciary Relationship

Appellate courts have made it clear that the commercial world and commercial transactions are not exempt from the principles of fiduciary law. It has been stressed that fiduciary relationships are not necessarily incompatible with commerce.<sup>71</sup> An important and unresolved issue is

<sup>63</sup> Supra note 10.

<sup>64</sup> Ibid 618-619 per Sopinka J.

<sup>65</sup> Davies J D, “Duties of Confidence and Loyalty” [1990] LMCLQ 4.

<sup>66</sup> Supra note 10.

<sup>67</sup> Ibid 460.

<sup>68</sup> Supra note 59, 460-461.

<sup>69</sup> Ibid 465.

<sup>70</sup> Supra note 41, 380.

<sup>71</sup> See, for example, *MacLean v Arklow Investments Ltd*, supra note 8, 723 per Thomas J; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 100 per Mason J.

whether it is necessary, before a constructive trust is available as a remedy for breach of confidence, to show that a fiduciary relationship exists and has been breached by the breach of confidence.

*(a) Is the existence of a fiduciary relationship a necessary pre-requisite to the availability of a constructive trust remedy?*

If it is necessary to establish that a fiduciary relationship exists for a constructive trust to be available as a remedy, then it must be asked whether the enquiry into the existence of a fiduciary relationship and the enquiry into the existence of a relationship of confidence are separate enquiries. In other words, can these two relationships exist independently of each other?

Lord Woolf MR, in *A-G v Blake*,<sup>72</sup> stated that there is a difference between the fiduciary relationship of trust and confidence and the fiduciary relationship of confidentiality. The core obligation of the relationship of trust and confidence is the obligation of loyalty and the duties arising from this relationship last only as long as the relationship lasts. A duty of confidentiality arises in the course of a relationship of confidentiality. This duty will survive the termination of that relationship, because it is not derived from the relationship. These two fiduciary relationships are not mutually exclusive, but they impose different obligations and may endure for different lengths of time.<sup>73</sup> Lord Woolf MR considered it impermissible to attach to one relationship an obligation that is properly derived from the other.

Sopinka J, in *Lac Minerals*,<sup>74</sup> states "the fact that confidential information is obtained and misused cannot of itself create a fiduciary obligation".<sup>75</sup> Later, he says that "[i]f confidential information was disclosed and misused, there is a remedy which falls short of classifying the relationship as fiduciary."<sup>76</sup> These statements suggest that questions of breach of confidence and breach of fiduciary duty are separate. So too does the judgment of Wilson J in the same case: "Lac's conduct may also

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<sup>72</sup> *Attorney-General v Blake* [1998] 1 All ER 833, 842 per Lord Woolf MR (CA). Cited with approval by the Court of Appeal in *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680, 688-689, 690-691, 733.

<sup>73</sup> *Ibid* 843.

<sup>74</sup> *Supra* note 10.

<sup>75</sup> *Ibid* 600.

<sup>76</sup> *Ibid* 607.

be characterized as a breach of confidence *at common law* with respect to the information concerning the Williams property.”<sup>77</sup>

La Forest J stated that:<sup>78</sup>

[T]he law of confidence and the law relating to fiduciary obligations are not coextensive. They are not, however, completely distinct ... I agree with the view of both courts below that the law of confidence and the law of fiduciary obligations, while distinct, are intertwined.

An alternative view, espoused by Wilson J is that the existence of a relationship of confidence creates a fiduciary duty independently of the existence of any fiduciary relationship.<sup>79</sup>

Wheeldon comments that the approach taken by Wilson and La Forest JJ suggests the concept of a “continuum between fiduciary and non-fiduciary relationships, rather than the dichotomy generally seen”.<sup>80</sup> She considers that the dichotomy approach has the disadvantage of a gross difference in the available remedies, with the result that an ‘all or nothing’ award is the norm in breach of confidence cases.<sup>81</sup>

A further alternative is that the existence of a relationship of confidence creates a fiduciary relationship.<sup>82</sup> Even if a fiduciary relationship is shown to exist,<sup>83</sup> that is not the end of the matter. The following caveat was issued by Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd*: “The phrase ‘fiduciary duties’ is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case.”<sup>84</sup>

*(b) If the availability of a constructive trust remedy does not depend on the existence of a fiduciary relationship*

If the availability of a constructive trust remedy does not depend on the existence of a fiduciary relationship, does the existence of a

<sup>77</sup> Ibid 631 (emphasis in original). Her Honour had previously concluded that Lac was in breach of a fiduciary duty owed to Corona.

<sup>78</sup> Ibid 656-657.

<sup>79</sup> Ibid 630-631.

<sup>80</sup> Wheeldon, “Reflections on the Concept of ‘Property’ with Particular Reference to Breach of Confidence” (1997) 8 Auckland U L Rev 353, 370.

<sup>81</sup> Ibid.

<sup>82</sup> See McDougall, “The Relationship of Confidence” in Waters (ed) *Equity, Fiduciaries and Trusts 1993* (1993), 157-171.

<sup>83</sup> Indicia of a fiduciary relationship can be found in *Lac Minerals*, supra note 10, 598-599, 643-653, 656; *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680, 691, 722-723, 724 (CA), [2000] 2 NZLR 1, 5-6 (PC).

<sup>84</sup> [1995] 2 AC 145, 206.

relationship of confidence justify the remedy of a constructive trust in the absence of any fiduciary relationship? *Lac Minerals* is “authority for the proposition that the availability of equitable remedies in a breach of confidence action does not now turn on the presence or absence of a fiduciary duty”.<sup>85</sup>

Gurry states that whether a confidant is a fiduciary will only be relevant in determining if an obligation of confidence exists when the confidant has received the confidential information in his or her capacity as a fiduciary.<sup>86</sup>

In *MacLean v Arklow Investments Ltd*,<sup>87</sup> it was claimed that when the facts disclose an obligation of confidence, the appropriate cause of action is breach of confidence, not breach of fiduciary duty. However, Thomas J considered that while this may be so in some circumstances, it is not necessarily the case. “The two causes of action,” he said, “are not mutually exclusive.”<sup>88</sup>

## 5. The Springboard Doctrine

The Springboard doctrine prevents anyone who has obtained information in confidence from using it as a springboard for activities that are detrimental to the confidant. Even when the confidential information has been published or is available to the public, the springboard effect is not spent.<sup>89</sup>

This doctrine was formulated by Roxburgh J in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd*,<sup>90</sup> adopted by Roskill J in *Cranleigh Precision Engineering Ltd v Bryant*,<sup>91</sup> and subsequently approved by the English Court of Appeal in *Seager v Copydex Ltd*.<sup>92</sup>

How is this doctrine to be factored into the availability of a constructive trust as a remedy? If the defendant obtained a springboard, does this justify the imposition of a constructive trust? The Springboard doctrine works best in cases of people entering a market, as the essence of the doctrine is that a person should not obtain an advantage by using information received in confidence; at least not without paying for it.<sup>93</sup>

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<sup>85</sup> Supra note 38, 603.

<sup>86</sup> Supra note 4, 160.

<sup>87</sup> Supra note 8.

<sup>88</sup> Ibid 733.

<sup>89</sup> *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 128, 130.

<sup>90</sup> Ibid.

<sup>91</sup> [1965] 1 WLR 1293.

<sup>92</sup> Supra note 11.

<sup>93</sup> Ibid 931-932.

However, if there is only one piece of property, the payment of damages by a confidence-breaker may be of very little consolation to the confider thus deprived of the opportunity to acquire the property for themselves.

## 6. Existence of a Contractual Obligation of Confidence

Although an obligation of confidence may arise in the absence of a contract,<sup>94</sup> many such obligations are the product of a contractual arrangement. This raises a question as to the availability of a constructive trust remedy in a contractual context.

In *A-G v Blake*,<sup>95</sup> Lord Nicholls considered the remedies available for the breach of a contractual obligation of confidence. His Lordship's judgment suggests support for the imposition of a proprietary remedy following breach of a contractual obligation of confidence. This comes with the proviso that in the absence of a contractual obligation, the property rights in question would attract the same degree of protection:<sup>96</sup>

Property rights are superior to contractual rights in that, unlike contractual rights, property rights may survive against an indefinite class of persons. However, it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights.

Parties to a contract can agree that certain information is confidential or that circumstances of confidence exist.<sup>97</sup> They may also negate the general obligation of confidentiality that would otherwise be imposed by equity.<sup>98</sup>

An interesting issue is whether parties to a contract could provide that if the obligation of confidence was breached, the remedy is to be that one party holds a certain item of property in trust for the other. It is clear that contracting parties may place parameters on the compensation payable

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<sup>94</sup> See, for example, *Salman Engineering v Campbell Engineering*, supra note 18, 211: "The main part of the claim is based on breach of confidence, in respect of which a right may be infringed without the necessity of there being any contractual relationship."

<sup>95</sup> [2000] 3 WLR 625 (HL).

<sup>96</sup> Ibid 637 per Lord Nicholls of Birkenhead.

<sup>97</sup> Lord Goff stated in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281, [1988] 3 All ER 545, 658, that the "duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential." Clearly this covers contractual relationships.

<sup>98</sup> Supra note 38, 595.

through the contractual context.<sup>99</sup> There are some obvious parallels with the law on liquidated damages and penalties. It is well established that parties to a contract may agree in advance what sum shall be payable by way of damages in the event of a breach. A clause fixing the damages may be a genuine pre-estimate of the loss that will be caused to one party if the contract is breached. In this case the quantum is called liquidated damages. However, such a clause may be in the nature of a threat held over the other party in *terrorem*; that is, as a means of forcing an offending party to perform the contract. A sum of this nature is called a penalty. A clause providing for liquidated damages is enforceable, while a penalty is not.<sup>100</sup>

Whether a sum is a penalty or liquidated damages depends on the terms and circumstances of the particular contract. Thus it is a matter of construction, judged at the time the contract was made.<sup>101</sup> Considerations similar to these would no doubt apply if contracting parties attempted to ensure in advance that a constructive trust would result from a breach of the contractual obligation of confidence.

The minority in *Snepp v US*<sup>102</sup> said “[n]or does either of the contracts Snepp signed with the Agency provide for any such remedy [that is, a constructive trust] in the event of a breach.”<sup>103</sup> This passage suggests that it is possible for contracting parties to provide that a constructive trust be available as a remedy in the event of a default.

In *Snepp v US*, it was stated that “[i]f the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness.”<sup>104</sup> This passage implies that the constructive trust is available as a remedy both for breach of confidence and breach of contract. Note that in this case the trust imposed was over the profits gained from the sale of the book, not the book itself. In *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd*,<sup>105</sup> a contractual right was held to have created a trust.

The minority in *Snepp v US* considered that no breach of confidence occurred because the information in question was not confidential, as it was not classified.<sup>106</sup> As an incident of the employment relationship

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<sup>99</sup> Ibid.

<sup>100</sup> Burrows, Finn and Todd, *Law of Contract in New Zealand* (1997) 751-752.

<sup>101</sup> *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, 86-87.

<sup>102</sup> Supra note 61.

<sup>103</sup> Ibid 713.

<sup>104</sup> Ibid 712.

<sup>105</sup> [1912] AC 555, 559.

<sup>106</sup> Supra note 61.

between Snepp and the CIA, Snepp possessed fiduciary obligations arising out of his duty of loyalty to his employer, the CIA. One of those obligations, recognised even in the absence of a written employment agreement, is the duty to protect confidential information. If Snepp had breached this obligation, the common law would support the imposition of a constructive trust upon the benefits derived from his misuse of confidential information,<sup>107</sup> because the profits would be the direct result of the breach.<sup>108</sup> This is both a fiduciary and a contractual issue, as the employment relationship is a recognised fiduciary relationship.

The existence of a single, unique prize is regarded in contract law as a potential justification for the grant of specific performance of a contract. Thus, a proprietary interest in a particular asset that is a subject of the contract may be obtained. By analogy, this could be regarded as a justification for the imposition of a proprietary remedy for a breach of confidence if there is a single, unique asset at stake.

## 7. Other Cases where what Appears to be a Proprietary Remedy has been Granted

Laster points out that “one novel remedy for breach of confidence may be that copyright in any work generated in breach of confidence vests in equity in the confider”.<sup>109</sup> Such a remedy, he claims, is “strongly suggested” in *Spycatcher*.<sup>110</sup>

In *Pre-Cam Exploration & Development Ltd v McTavish*,<sup>111</sup> an employee used confidential information obtained in the course of his employment to stake certain claims, which would otherwise have been staked by his employer. The Supreme Court of Canada held the employee to be a trustee of the claims for his employer.<sup>112</sup> However, Sopinka J did not believe that that decision laid down any principle rendering a constructive trust an appropriate remedy for misuse of confidential information, except in very special circumstances.<sup>113</sup>

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<sup>107</sup> Ibid 713-714.

<sup>108</sup> Ibid 715.

<sup>109</sup> Laster, “Commonalities between Breach of Confidence and Privacy” (1990) 14 NZULR 144, 170.

<sup>110</sup> Lords Keith, Brightman, Griffiths and Goff in *Spycatcher A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

<sup>111</sup> [1966] SCR 551 (SC of Canada).

<sup>112</sup> *Supra* note 10, 617

<sup>113</sup> Ibid 617.

In *Shellmar Products Co v Allen-Qualley Co*,<sup>114</sup> the defendant acquired a patent through a conscious breach of confidence. The Court balanced the competing equities of the parties by requiring the defendant to assign the patent to the plaintiff on payment of the purchase price.<sup>115</sup> This decision put the plaintiff, as far as possible, in the position it would have otherwise been in had the information not been disclosed to the defendant.<sup>116</sup>

In *British Syphon Co Ltd v Homewood*,<sup>117</sup> Roxburgh J held that the defendant employee be ordered to assign a patent for which he had applied. This was not a case of abuse of confidential information. Instead, the ground of the order was that the 'duty of good faith' owed to his employer bound him to avoid conflicts of interest. The defendant was in breach of that duty in seeking to patent for himself an invention within the sphere of his employer's business. The order made was an order to assign the patent, rather than an injunction against seeking it. Davies and Birks both agree that this order was tantamount to a constructive trust.<sup>118</sup> However, Birks cautions that the propriety of the order is suspect until the House of Lords finally decide the *Lister v Stubbs*<sup>119</sup> controversy. Even if the order is proper, it may have been granted not on the basis that the defendant held it on a constructive trust, but that he was merely under a personal equitable obligation to assign.<sup>120</sup>

Both *Shellmar Products Co v Allen-Qualley Co*<sup>121</sup> and *British Syphon Co v Homewood*<sup>122</sup> were cases concerning patents, and are recognised as providing property rights of the sort sufficient to justify the imposition of a proprietary remedy. Thus, these cases do not assist in determining whether such a remedy is available in the absence of a proprietary cause of action.

## 8. Insignificance of the Information

In *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd*,<sup>123</sup> the Court considered that "[n]o doubt the comparative insignificance of some

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<sup>114</sup> 36 F 2d 623 (1930).

<sup>115</sup> See Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 LQR 463, 488.

<sup>116</sup> Wheeldon, *supra* note 81, 372.

<sup>117</sup> [1956] 1 WLR 1190.

<sup>118</sup> *Supra* note 61, 463.

<sup>119</sup> (1890) 1 Ch D 1.

<sup>120</sup> *Supra* note 59, 463.

<sup>121</sup> *Supra* note 115.

<sup>122</sup> *Supra* note 118.

<sup>123</sup> [1978] 2 NZLR 515.

kinds of confidential material would be reflected in the Court's consideration of the remedy to be given, if any."<sup>124</sup> This suggests that a threshold concept would be a useful tool in determining the remedy available for a particular breach of confidence. Information would need to have some threshold level of significance before a remedy was available for its misuse and a higher threshold would need to be crossed before a proprietary remedy was available. The former threshold could, for example, be that the information was 'not insignificant' in reaching the result achieved by the defendant, or that it was 'of material assistance'. The latter threshold could be dependent on whether the defendant would have inevitably acquired the property in question.

La Forest J said in *Lac Minerals*<sup>125</sup> that "but for the actions of Lac in misusing confidential information, and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy",<sup>126</sup> which La Forest J held to be a constructive trust. His analysis appears to be related to unjust enrichment and restitutionary arguments. Smith considers that the real reason to inquire whether the plaintiff would have acquired the property in question is to select the mode by which the defendant will be forced to disgorge the property she has obtained.<sup>127</sup> Generally disgorgement will be effected by the award of an account of profits. However, sometimes a plaintiff will want a constructive trust. This, says Smith, will only be awarded rarely, as it gives the plaintiff a priority over the defendant's unsecured creditors that may be impossible to justify. It is easiest to justify where the plaintiff originally held a proprietary interest of which he or she has somehow been deprived.<sup>128</sup>

## 9. Impact on the Confider

In *AB Consolidated v Europe Strength Food Co*,<sup>129</sup> the trial judge took into account, amongst other things, "the diminished value to Europe [Strength Food Co] of its quasi-proprietary right if the knowledge obtained by ABC could be used after the lapse of some defined period

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<sup>124</sup> Ibid 521.

<sup>125</sup> Supra note 10.

<sup>126</sup> Ibid 668-669.

<sup>127</sup> Smith, "Breach of Confidence -Constructive Trusts -Punitive Damages -Disgorgement of the Profits of Wrongdoing: *Ontex Resources Ltd v Metalore Resources Ltd*" (1994) 73 Canadian Bar Review 259.

<sup>128</sup> Ibid 266.

<sup>129</sup> Supra note 124.

without the need to obtain a licence".<sup>130</sup> Allowing a confidant to merely breach his obligation and pay damages, or to only suffer an (temporary) injunction, may have a highly detrimental effect on the confider and seems particularly unjust if a single prize is at stake. In such a case it will be poor consolation to the confider to obtain an award of damages or an account of profits if the confidence-breaker is then able to keep the unique asset that is at stake. In addition, the confidence-breaker may be insolvent, in which case an award of damages or an order for an account is likely to be of little practical benefit to the confider.

This rebuts the contention of those who would advocate, on the grounds of practicality and along the lines of the 'efficient breach' doctrine of contract law, that a confidence-breaker should be able to use confidential information and pay only damages for the breach. The statement of the Court of Appeal in *AB Consolidated v Europe Strength Food Co* reinforces this conclusion:<sup>131</sup>

[T]hose who seek and accept information which they know has been given in confidence for a limited purpose ought not to be able to misuse it feeling that a monetary payment will sufficiently balance the present and future injury thereby caused to their informant.

To conclude otherwise would also have the likely consequence of encouraging confidants to breach their obligations of confidence when they could do so for financial gain. This would unreasonably contradict the policy of the law that attempts to hold confidences sacrosanct.

## 10. Conclusion – A Way Forward?

One may well question whether a constructive trust should be available as a remedy for a pure breach of confidence<sup>132</sup> at all. It seems difficult to justify conclusively on any ground. Policy arguments perhaps provide the most convincing justification for the availability of this remedy; however, policies change over time, and policy arguments will very seldom be clear-cut and are usually highly contentious, involving as they do value-laden and subjective judgments. A floodgates argument may well apply here. As it will be very difficult for lawyers to advise their clients the likely decision of a court on policy grounds, the amount

<sup>130</sup> Ibid 525.

<sup>131</sup> Ibid.

<sup>132</sup> By a 'pure' breach of confidence the author means a breach which does not involve some other jurisdictional basis for which a constructive trust is traditionally available as a remedy, for instance the existence of a property right.

of litigation in this area will no doubt increase dramatically. Not only would this be an undesirable consequence from the judiciary's point of view, but it would also be highly undesirable and impractical from the point of view of business people who rely on clear-cut obligations of confidence in their everyday dealing.

While contract may seem to provide a way forward by allowing agreement between business parties as to the availability of a constructive trust, the spectres of unequal bargaining strengths and duress are raised, as are issues concerning liquidated damages and penalties.

A constructive trust is well established as a remedy for the misappropriation of a property right. The ground of inevitable acquisition, which formed the basis of *La Forest J's* decision in *Lac Minerals*<sup>133</sup> to impose a constructive trust, seems to be no more than a way of creating, or deeming to exist, a property interest which can then be used as a more orthodox justification for the imposition of a constructive trust, without being acknowledged as such.

A constructive trust is also an accepted and established remedy for a breach of fiduciary duty. Whether a duty of confidence is independent of, an incident of, or a type of fiduciary duty is highly contentious. However, in England<sup>134</sup> and New Zealand<sup>135</sup> the judicial view is that they are independent, albeit sometimes overlapping, duties. If this is accepted as the correct position, the mere existence of a relationship of confidence does not justify the imposition of a constructive trust on fiduciary grounds.

Canadian courts have a reputation for being much more willing to find and impose fiduciary relationships and constructive trusts in situations that are not typical trust circumstances than courts in other jurisdictions. To some, this suggests that Canadian authorities declaring that relationships of confidence are fiduciary in nature should be treated with care. However, others regard this view as the way forward.<sup>136</sup>

On the spectrum of remedies, damages are at one extreme and a constructive trust is at the other. It may be that the way forward for proprietary remedies in the law of confidences is to adopt a middle position on the spectrum, and to eschew attempts to justify the imposition

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<sup>133</sup> *Supra* note 10.

<sup>134</sup> *A-G v Blake*, *supra* note 71 per Lord Woolf MR (CA).

<sup>135</sup> *MacLean v Arklow Investments Ltd*, *supra* note 8 (CA).

<sup>136</sup> See, for instance, the comments of McDougall, *supra* note 83, on no longer reserving the fiduciary standard of protection for certain highly important or socially valued relationships. But note also Lord Browne-Wilkinson's warning concerning the "reach me down a fiduciary syndrome" in "Equity in a Fast Changing World", 1996 New Zealand Law Conference Papers, vol 2, 170, 172, and referred to in *MacLean v Arklow Investments Ltd*, *supra* note 8, 723.

of a proprietary remedy on the basis of doctrines which were never meant to accommodate the provision of such relief. Finn J has suggested that we may have been too blinkered in our thinking about proprietary relief in equity because of a preoccupation with the constructive trust.<sup>137</sup> He proposes that the equitable lien to secure a personal liability be given more consideration as a remedy. This would provide the middle position between damages and a constructive trust to which I have referred. It would also have the advantage of removing the possibility of undeserved and unexpected priorities in the event of insolvency, which is regarded as a major stumbling block to the imposition of a constructive trust. However, the pace of change in the law is slow, and moves to abandon the constructive trust as an unsatisfactory remedy for breach of confidence are unlikely to occur within the near future. For now, it seems likely that academics and the judiciary will continue to attempt to justify the availability of a constructive trust as a remedy for breach of confidence on the basis of a mishmash of jurisdictional, doctrinal and policy grounds; to the confusion of students and practitioners everywhere.

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<sup>137</sup> "Modern Equity" in Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (1997) 89.