

Confidential Information – Recurrent problems and recent developments

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1. Business Protection is an area of practice directed to preserving or deriving competitive business advantage. Confidential Information of the type which provides the basis for competitive business activity is central to the Business Protection practice area.
2. Confidential Information in the Business Protection context is confidential by reason of the relationship under which it comes to be communicated or shared. A wide range of business relationships may give rise to duties to maintain Confidential Information communicated during their course, whether by express or implied contractual term, a fiduciary obligation imposed by virtue of office or function or under the general law of confidence.
3. The most common is the employment relationship. As an aspect of the implied duty of fidelity during the currency of the employment relationship, the maintenance of Confidential Information enjoys wide protection and can be enforced by injunction:
 - a) to restrain breach or anticipated breach by an existing employee, including where necessary by a garden leave injunction to restrain an employee from moving to a rival or setting up in competition; or
 - b) by a former employee who seeks to exploit after employment ends the fruits of any breach during employment to gain a springboard competitive advantage.
4. The maintenance of Confidential Information is a legitimate interest of an employer capable of protection by covenants applying post-termination to restrain competitive activity.
5. Confidential Information (limited to where its character is that of true trade secrets) enjoys protection post-termination of employment under the general law of confidence and the tort of misuse of confidential information.
6. The maintenance of Confidential Information is an aspect of the fiduciary duty owed by directors and by employees whose functions give rise to fiduciary obligations.

7. The maintenance of Confidential Information may arise by contract or by fiduciary relationship in the course of transactions, advisory work, or joint venture relationships.
8. The remedies for the disclosure or misuse of Confidential Information are wide-ranging and include:
 - a) Negative Injunctions to restrain breach by disclosure, misuse, destruction or deletion;
 - b) Positive (mandatory) Injunctions to preserve, deliver-up, permit search or inspection, deletion or destruction, and disclose source or use;
 - c) Injunctions and Orders directed to the consequences of misuse so as:
 - i) to restrain competition by misuse by restricting competitive dealings;
 - ii) to trace the Confidential Information into property acquired by its misuse so that the property is treated as a substitute asset for the information (although this must, it is submitted, only be where the confidential information is misused by a fiduciary because unless there has been a breach of fiduciary duty, no proprietary claim arises).
 - d) an Account of Profits derived from disclosure or misuse, or gain based damages;
 - e) Damages

Recurrent problems

9. Despite the wide range of business relationships giving rise to Confidential Information and the wide range of remedies available to combat misuse, it is an area of law which causes practitioners hesitation for the following reasons:
 - a) the difficulty of definition: identifying what information is confidential is not straightforward. Clients have a tendency to exaggerate what is confidential and it is easy for clients and lawyers to lose perspective. The legal classification and the tests for identifying confidential information are obscure. However, As I will demonstrate, in many aspects of Business Protection this is not a real issue;
 - b) the related but separate need for precision. Precise identification of specific Confidential Information frightens practitioners. Again, this must be kept in proportion; it is necessary to understand when precision is actually required.

- c) The issue of whether Confidential Information is property and the confusion a proprietary analysis can cause: in Business Protection cases, the preferred analysis is whether the information arises under a duty of confidence.
 - d) Confidential Information is not inviolable: it may be defeated by publication, public interest, or freedom of speech. In Business Protection cases, publication is the most common issue.
 - e) Procedural traps: this area holds trapdoors for the ignorant or unwary.
10. This paper will examine how far these recurrent problems affect Business Protection cases in practice and identify noteworthy recent cases and developments.

The perennial problem of definition: a recent further potential test for Class 3

11. In Douglas & Ors. - v- Hello! Ltd [2007] 2 WLR 920, the HL reaffirmed the constituents of the tort of misuse of confidential information described in Coco v A.N. Clark (Engineers) Ltd:
- “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.”*¹
12. The *necessary quality of confidence* for the purposes of the tort in cases concerning commercial information is confidentiality of the highest order (sometimes called trade secrets) but it is important to remember that a wider body of information is protected where there is a pre-existing obligation to maintain the information which arises or arose under a current employment obligation of fidelity or fiduciary obligation. This is because the duty under which the obligation to maintain confidential information arises extends beyond confidentiality alone to a duty to work or act exclusively in the interests of the employer or principal.
13. In employment terms, this gives rise to the Faccenda three classes analysis where:
- a) Class 3 comprises specific trade secrets so confidential that, even though they may reside in the employee’s head after employment has ended, they cannot lawfully be

¹ In Campbell –v- MGN a new genus of the tort was defined which did not require a pre-existing confidential relationship, described as “misuse of private information”. The moulding of the original tort by reference to Art. 8 ECHR to provide a remedy for the breach of personal privacy falls outside the sphere of Business Protection. For a penetrating analysis of the differences between Confidential Information and Privacy, see Tim Pitt-Payne’s article: *Confidentiality and Privacy: What Is The Difference?* on 11KBW’s Panopticon blog.

used for anyone's benefit but the employers. This is the information which would be protected by the tort.

- b) Class 2 comprises information which the employee must treat as confidential (either because he is expressly told that it is confidential or because from its character it obviously is so) during employment when he must apply his knowledge to his employer's benefit but which becomes part of his own skill and knowledge by experience and application after employment ends. Absent an apt covenant there is no restriction on the employee using or disclosing it after termination. Such honestly acquired knowledge may include information in his head regarding the identity of the former employer's customers, contacts, product requirements or pricing policies provided it has been acquired honestly in the course of employment and not deliberately memorised for competitive purposes.
- c) Class 1 comprises trivial or public information which is not confidential and which an employee is free to disclose or use.

14. In PSM International PLC v Whitehouse [1992] IRLR 279, at 282 Lloyd L.J. described the distinction between class 2 and class 3 information to be merely a question of degree. In Lancashire Fires Ltd v SA Lyons & Co Ltd Lord Bingham MR (at 18) described the distinction between classes 2 and 3 as one which may often on the facts be very hard to draw. In the recent case of Thomas v Farr plc [2007] EWCA Civ 118, Toulson L.J. stated at [27] that drawing a line between category 2 information and trade secrets was a perennial and familiar problem. He stated that there was no universal formula for determining what is a trade secret or item of equivalent confidentiality.

15. Various tests have been propounded since Faccenda at first instance to identify Class 3 information:

- a) that adopted in Faccenda itself in the CA, requiring an "isolation" test: consider all the circumstances of the case including, but not limited to, the nature of the employment, the nature of the information, whether the employer impressed on the employee the confidentiality of the information and whether such information may be easily **isolated** from other information which the employee is free to use or disclose;
- b) the Printers & Finishers "reasonable man recognition" test:

*"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 in 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."

Note the use of a property analysis or analogy.

- c) The Lansing Linde "real harm" test:

*"a trade secret is information which, if disclosed to a competitor, would be liable to cause **real (or significant) harm** to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication... It can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods which they buy.*

Again note the use of the word "owner".

- d) The Herbert Morris "objective knowledge" test:

*'Trade secrets, the names of customers, all such things which in sound philosophical language are denominated **objective knowledge** – these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability – all those things which in sound philosophical language are not objective, but subjective – they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and maybe highly so for the country at large.'*

Again, note the reference to "property".

16. Another test now seems to be suggested by the majority in the HL in by Douglas (above) which they used to determine whether information about the famous Michael Douglas/Catherine Zeta-Jones closed wedding were confidential information. This was a "market value" or "commercial value" test applied by "following the money". Lord Hoffman said :

at [117] *"Provided that one keeps one's eye firmly on the money and why it was paid, the case is, quite straightforward..... it is simply information of commercial value";*

at [124]: *"The information in this case was capable of being protected, not because it concerned the Douglasses' image any more than because it concerned their private life, but simply because it was information of commercial value over which the Douglasses had sufficient control to enable them to impose an obligation of confidence."*

17. Lord Brown at [326] stated:

"How can one doubt that this was commercially confidential information or, if one prefers, a trade secret? It was, after all, secret information for which OK! had been prepared to pay £1 million, in the expectation, obviously, that it was to remain secret until they chose to make use of it.";

18. Interestingly, the monetary worth of the information was held by the majority to give the information in the photos the necessary quality of confidence even though the minority were influenced by the fact that at the time of publication of the information in the unauthorised photos taken by the interloper from Hello!, the information in the authorised photos had been made public by OK's own publication. The majority's view was that it was not the photos themselves that were confidential information but information about the wedding generally. Hello! and the Douglasses had gone to great lengths to make clear to all that it was a confidential occasion, compare Shelley Film Ltd-v-Rex Features (1994) EMLR 134.
19. The various tests, as to whether some item of information is a trade secret or not, are not sufficiently definite or specific to offer the same answer to everyone who poses them. Indeed, as Douglas shows even the members of the HL could not arrive at the same answer. That is obviously problematic for the law but it is important to be clear as to when it is necessary to address these tests and when it is not.
20. Where the employer is seeking injunctions during the currency of the employment contract or to restrain a breach which occurred during employment, for example, the memorising, copying, removal or improper use of the employer's material with a view to its subsequent use in competition to enable a springboard advantage to be obtained afterwards, the employer need only show that the misused information was Class 2 information, see Roger Bullivant-v-Ellis [1987] ICR 464, CA. In that case, the information removed was held by the court to be category 2 Faccenda information and not the equivalent of a trade secret (at p.474). Similarly, in Johnson and Bloy Holdings-v-Wolstenhome Rink plc [1987] IRLR 499 the CA regarded the fact that an employee had unlawfully removed Faccenda class 2 information during employment as sufficient to disentitle him from using it in the period of the injunction when it would otherwise have become part of his "know how". See also Thomas Marshall (Exports) Ltd -v- Guinle [1979] 1 Ch 227, Megary V.C.: Universal Thermosensors Ltd-v-Hibben [1992] 1 WLR 840,850 Sir Donald Nicholls.
21. Similarly, where an employer seeks a garden leave injunction, its justification on restraint of trade grounds should logically be capable of being made out by reference to class 2 information capable of protection during the duty of fidelity.
22. Where the employer has the benefit of a contractually binding post-termination restraint on competitive activity such as a non-compete or area covenant, the employer can have a legitimate interest in protecting confidential information which forms a mixture of class 2 and class 3 information. As Lord Denning stated in Littlewoods-v-Harris [1977] 1 WLR 1472, at 1479, it is because it is difficult to draw a line between what is truly confidential

and what is not and the difficulties of proving a breach of confidence when it has been carried away after employment in an senior executive's head that the only practicable solution is a non-compete covenant limited to a short duration:

23. There is also no reason why a contract cannot define the information which the parties agree to treat as confidential both during and after employment more widely than Class 3 trade secrets so long as the resulting restriction is not so unreasonable as to amount to an unenforceable restraint of trade by, for example, so restricting what is only skill and knowledge so as to effectively restrict employment opportunities.
24. So, it is only where the employer is seeking to restrain the use of information in a former employee's possession which cannot be traced to a breach of fidelity and there is no valid anti-competition covenant on which it can rely that the employer has to utilise the general law and shape his action under the tort. An example is the case of Lancashire Fires-v- Lyons [1997] IRLR 113. It is in those circumstances that the class 2 or Class 3 distinction can be problematic. So in that case the first instance Judge held that the ex-employee had not taken Class 3 trade secrets whereas the CA found he had.
25. It is easy to become diverted with the problem of identifying Class 3 information. In practice, the most common recurring issue in this field is not actually whether something is a Class 3 trade secret or only in Class 2. It is whether something is really only Class 1 public information. Client Lists are the archetypal example. Generally, the information they contain is accessible with skill and labour from public sources.
26. Just because a List is constructed solely from materials in the public domain does not necessarily mean it cannot be Class 2 information. It may still possess the necessary quality of confidence by reason of the compilation: Thomas Marshall (above) at 248. The value of such lists is that they are a ready and finite compilation of useful business contacts: Roger Bullivant (above) 474H per Nourse L.J. A type of list might also have the necessary quality by reason of the skill and knowledge that went into its creation: Coco-v- Clark (above) at 47. For example if the list is divided into categories involving an element of selection, or if the public information has been made into an active spreadsheet allowing for items of data to be manipulated or extracted.
27. However, the quality of confidence may be short-lived because a resourceful employee might be able to recreate the contents from public sources within a short time. The timing of any action to restrain use and the length of restriction sought to be imposed may then be very significant because:

- a) a “springboard advantage” must still exist and be continuing when the application is made: Sun Valley Foods Ltd-v-John Philip Vincent [2000] FSR 825, 834 Jonathan Parker J. and
 - b) an injunction granted on that basis cannot have a duration longer than the competitive advantage can reasonably be expected to continue: May L.J. in *Roger Bullivant* at 476, 481H.
28. The issue of whether such a list is public is often combined with issues about “ownership” 0- is it the employer’s list or the employee’s. In Douglas in the CA it was stated that there is no property in information. If that is right (see further below) then it is better to analyse these issues as being ones of duty, i.e. whether the compilation of the public information made using the skill and labour of the employee was expended as part of the employee’s duties in the course of employment and by reason of that was information of the employer or whether the employer impliedly consented to the employee making the compilation for himself.
29. A related question arose recently in the context of a pre-action disclosure application in Hays Specialist Recruitment -v-Ions [2008] EWHC 745 (Ch) which raises interesting issues for the future about employees’ use of networking web-sites whilst at work and the confidentiality of the information stored.
30. The court considered whether an ex-employee could be required to disclose before action information held on his personal profile on networking website LinkedIn. The employer believed the information would be relevant to its allegations of breach of confidence and breach of a non-solicitation covenant against the ex-employee. The alleged confidential information was business contact details contained on the employee’s personal network held on the LinkedIn professional networking web-site. Mr. Ions had continued to make use of the contacts post-employment in his own business.
31. The contract of employment defined as confidential information the “client database” of Hays (but not client identities or contact details, i.e. it protected the compilation) and there was a “whole time and attention” clause but the evidence was that Hays had encouraged its employees to use personal networking facilities on LinkedIn. The way the site worked meant that contacts were only added to the personal network if the contact personally accepted an invitation from the member and once accepted the contact information was available to all other contacts on the network. Mr. Ions therefore argued that the information on the site could not be information confidential to Hays and must be treated as public once the contact accepted the invitation and made his details available to all on the personal network. The court discounted these arguments because there was some

evidence of a widespread uploading of Hays' client details prior to and for the purposes of initiating the invitation process. As Hays only needed to demonstrate possible claims, they had done enough to show a potential misuse at that stage and to justify disclosure, albeit of a much restricted class of documents.

32. The case rehearses arguments which may well arise in the use of such networking sites by employees in future. Employers would be wise to address this contractually so as to ensure the information is expressly defined to be and to remain the confidential information of the employer. Provisions for the surrender of the network or its deletion will need to be incorporated.

Precision

33. Related to but different from the problem of definition is the issue of precision. It is notorious to claimants that the courts have required employers to define with precision the confidential information which they seek to protect. However, once again it is important to properly understand when and where the need for such precision arises.

34. It is well-known that in Lawrence David v Ashton [1989] IRLR 22, Balcombe L.J. stated:

"I have always understood it to be a cardinal rule that an injunction must be capable of being framed with sufficient precision so as to enable a person enjoined to know what it is he is to be prevented from doing. After all, he is at risk of being committed for contempt if he breaks an order of the court. The inability of the plaintiffs to define, with any degree of precision, what they sought to call confidential information or trade secrets militates against an injunction of this nature. That is indeed a long recognised practice."

What is less recalled about that case is that whilst the absence of precision resulted in the CA declining to order an injunction prohibiting the use of confidential information under the general law, it did not prevent the court upholding an area non-compete covenant.

35. In Lock-v-Beswick [1989] Ch.1268 a notorious Anton Piller injunction case Hoffman.J. stated at 1274:

"It is... of the essence of a claim against an employee for misuse of confidential information that the employer should be able to identify with particularity the trade secret or similar confidential information to which he lays claim. The terms of any injunction must also be capable of being framed in sufficient detail to enable the Defendant to know exactly what information he is not free to use on behalf of his new employer".

So the precision required was in the pleading and in the drafting of the Order for the Injunction.

36. In Ocular Sciences Ltd-v- Aspect Vision Care [1997] RPC 289, 359-360 it was again the precision required in the pleading of confidential information which was emphasised. It was said that courts are astute to ensure claimants give full and proper particulars of all

the confidential information on which they intend to rely because confidence claims can be used to oppress and harass competitors; the normal approach of the court is to ensure that the defendant knows what confidential information is in issue; the defendant must know what case he has to meet. He may wish to show what items of information relied upon are matters of public knowledge. His ability to defend himself will be compromised if the claimant can rely on matters of which no proper warning was given; a claim based even in part on wide and unsupportable claims of confidentiality can be used as an instrument of oppression or harassment. It can be used to destroy an ex employee's ability to obtain employment; the wider the claims the longer and more expensive the litigation. The defendant is likely to feel he has no alternative but to challenge the confidentiality of everything; failure to give proper particulars may therefore be a particularly damaging abuse of process.

37. In FSS Travel-v-Johnson [1998] IRLR 382, CA, such strict requirements of precision were applied to the determination of whether an employer had shown a legitimate interest in confidential information justifying a non-compete covenant. Mummery L.J. stated that if an employer relies on the necessity of protection of confidential information to justify a covenant, it must first identify the precise information which is said to be confidential and in the employee's possession. It is not sufficient for the employer to assert a claim to an accumulated mass of knowledge which it regards as confidential. The employer must show precisely identifiable objective knowledge constituting confidential information of the employer which the employee has become acquainted with and which is distinguishable from the subjective knowledge and acquired skill, experience and know-how of the employee. That approach appeared to depart from Lawrence David.

38. In Thomas v Farr plc [2007] EWCA Civ 118, the necessity for such precision to justify the enforcement of a non-compete restriction was doubted. Toulson L.J. held that in order to establish that the inclusion of a non-competition clause in an employment contract was reasonably necessary for the protection of the employer's interest in confidential information, the first matter which the employer obviously needs to establish is that at the time of the contract the nature of the proposed employment was such as would expose the employee to information of the kind capable of protection. Sufficient detail must be given to enable that to be decided but no more is necessary. Provided that the employer overcomes that hurdle, it is no argument against a restrictive covenant that it may be very difficult for either the employer or the employee to know where exactly the line may lie between information which remains confidential after the end of the employment and the information which does not. Littlewoods-v-Harris shows that the very fact that the distinction can be very hard to draw may support the reasonableness of a non-competition clause.

39. It is important, however, not to assume that the court will therefore not examine the confidential information alleged by the employer in judging the reasonableness of the non-compete restriction. For example, in the recent case of Duarte-v-Black & Decker [2008] All ER (Comm) 401 the court found the scope of the non-compete covenant went further than necessary to protect the type of confidential information to which the executive had been exposed.

Is it property?

40. Another fascinating though confusing aspect of the new test of commercial value in Douglas is its interaction with the intractable problem of whether confidential information is “property”.

41. The information about the Douglases’ wedding event was held to be confidential because of its commercial value on a sale to the celebrity rags. If they could sell the information, you or I would have thought it was their property. In the same way, clients come and tell us that “their” information has been “stolen”. We have seen above how the tests for identifying trade secrets resort to a proprietary analysis or property analogy. Even the law of restraint of trade tells us that the employer’s interest in the protection of Confidential Information is a legitimate “proprietary” interest. Yet, the CA in Douglas would have us believe that there is no property in Confidential Information.

42. Although the Douglases’ interest in the confidential information about events at their wedding could be bought and sold just as trade secrets can be bought or sold, according to the CA [2005] EWCA Civ. 595, that information was not an item of property that the Douglases owned and could recover. Lord Walker in the HL apparently agreed, see [263] Nor was it an intellectual property right giving the Douglases the right to sue a third party for infringing use. So when Hello! (a third party) published the information following its receipt from the unauthorised photographer, there was no proprietary claim to its return. There was only a right to restrain its further transmission if the conscience of Hello! was affected by it having received it knowing it was passed on in breach of a duty of confidence, see [126] – [128]. In other words there was an equity in it, not a property right.

43. The CA said the Judge had slipped up twice by making proprietary analyses. Poor Lindsey J! Most of us would not recognise that something that is bought and sold is not property. Although the CA cited Boardman-v-Phipps [1967] 2 AC 46, 127-128 per Lord Upjohn as their authority for the proposition that confidential information was not property, the members of the HL in Boardman did not in fact agree on whether Confidential

Information may or may not amount to property or trust property, see 90-91, 102,107,115, 128-129.

44. There was still disagreement by the time the case was being decided in the HL as to what it was that there was a claim to confidentiality in or over. So much for precision! The claimants claimed that the secret comprised photographic information about the entire wedding as an event. Lord Hoffman accepted that. Lord Walker accepted that at least so far as agreeing it did not help the case of *OK!* to analyse it in property terms because if there was property, it could only be in the authorised photos whereas *Hello!* had published different unauthorised ones. He concluded [287] that the claimants *did not claim any quasi-proprietorial rights in the spectacle of the wedding. They claimed non-proprietorial rights of confidence in wedding photographs as a generic class regardless of who owned the copyright in those photographs.* One can see the readers of *OK!* and *Hello!* debating this with fascination under their hairdryers! It may bemuse them, you or me but not Lord Nicholls who thought it led nowhere because there was no difference between the 2 sets of photos published-authorised and unauthorised -and the publication of the authorised destroyed any confidentiality.

45. The CA and the HL did not have to deal in Douglas with other proprietary aspects of Confidential Information such as shared rights, partnership rights, its susceptibility to being the subject of a trust and its transfer on insolvency. It would have been interesting if the unauthorised photographer had been a fiduciary. The courts have yet to properly grapple with the ability of Confidential Information to be traced into property acquired by its use where the property is treated as a substitute asset for the information, a matter to which Business Protection cases can give rise, see:
 - a) Satnam Investments Ltd-v- Dunlop Heywood [1999] 1 BCLC 385, CA where S's agents DH passed confidential information to S's competitor M, which used it to acquire a development site which S had wanted to purchase. The CA did not doubt the right to trace existed but held that there was an insufficient nexus between the confidential information misused and the property acquired.

 - b) In United Pan-Europe Communications NV -v- Deutsche Bank [2000] 2 BCLC 461: the CA found it arguable that a constructive trust might be imposed on the recipient of property derived through the misuse of confidential information, see 482 per Morritt LJ referring to *LAC Minerals Ltd-v-International Corona Resources Ltd* (1989) 61 DLR (4th) 14, [1990] FSR 441 at 469 LaForest J. This could be so even if the claimant never himself had an interest in the property so long as the property would have accrued to his benefit had it not been intercepted by means of the breach of confidence. It was said that it need not be shown that the breach of confidence was

central to the acquisition of the property by the defendant and that relevance was enough.

Loss of secrecy

46. Confidential Information is not inviolate. The obligation to maintain confidentiality ought not logically to survive the information entering the public domain. As the quality of confidence depends on it not being information of a public character, its wide publication, ought to destroy its confidentiality and the duty to protect it. However, once again the position is not straightforward.

47. Lord Hoffman summarised the legal position in Douglas at [122]:

My Lords, it is certainly the case that once information gets into the public domain, it can no longer be the subject of confidence. Whatever the circumstances in which it was obtained, there is no point in the law providing protection. But whether this is the case or not depends on the nature of the information. Whether there is still a point in enforcing the obligation of confidence depends on the facts.

48. What are the rules?

- a) If the confider (i.e. the person to whom the duty of confidence is owed) puts the information in the public domain that will destroy any obligation owed by any confidants of his. So Lord Nicholls in Douglas felt that publication of authorised photos of the wedding by OK! destroyed its confidentiality.
- b) If the publication is by the confidant owing the duty of confidence or with his consent, then he can still be restrained from use either because a person cannot free himself from a duty of confidence by breaking it or so as not to profit from his own breach or on springboard principles;
- c) If a third party puts the information into the public domain, it is possible that a court might continue to restrain the defendant's use of the information if he arrived at the information by breach of a duty of confidence or received it from someone acting in breach of confidence in circumstances where it was known to be imparted to him in breach of confidence and still has a competitive or market advantage because of it even though the information is now public see Speed Seal-v-Paddington [1985] 1 WLR 1327 approved in Attorney General –v- Guardian Newspapers (No.2) [1990] 1 AC 109, at 268D by Lord Griffiths but disapproved (in part) at 285G per Lord Goff.

49. Where the obligation of confidence derives from contract rather than the general law, the fact of the information being in the public domain may not discharge the obligation. This depends on the nature of the contractual bargain.

50. When information has become public domain information is also a question of degree. So, in the recent case of Barclays Bank Plc –v- Guardian News & Media Ltd [2009] EWHC 591 Barclays maintained its without notice injunction to prevent the Guardian's publication of leaked documents relating to Barclays' tax avoidance transactions even though there was evidence before the Court that, apart from the Guardian's own website, the documents had already been published on at least one other internet site which would not itself be subject to an application for injunctive relief and, further, that there had already been a degree of 'internet chatter' about the injunction process. Blake J. found that the bank had a realistic chance of persuading the trial court that the dissemination of the documents to date had not destroyed the confidentiality of the material.

Procedural Traps

51. It is easy to forget "shelf-life". Confidential Information does not retain its quality of confidence forever. What makes it confidential is its inaccessibility to others and/or its novelty. It may lose inaccessibility by becoming public or it may become obsolete. So for example, account information may lose the quality of confidence by becoming part of published financial statements or because it is so old as to have no value to any competitor. As we have seen, shelf-life type problems can create difficulties for claimants in springboard cases where the confidential information can be recreated from public sources.

52. Imprudent lawyers can themselves destroy the quality of confidence. In Utopia UK –v- Julian Wright & Ors Utopia UK Ltd v Wright [2007] EWHC 321, the Claimant set out the 58 email addresses of its suppliers and customers which it alleged to be confidential in the Particulars of Claim (a public document) thereby destroying any vestige of confidentiality.

53. Search Orders are now positively discouraged as a matter of principle and by practice (the costs including those of using a supervising solicitor militate against them) in all but the most extreme cases. Fear of the costs and burden of obtaining search orders can lead claimants to look to "self –help" solutions. A recent case demonstrates the need for caution because of the interference this entails in rights of confidence. In L-v-L and H (a firm) [2007] EWHC 140 (QB), a divorce financial provision case, the wife suspected her husband would conceal financial information to evade full financial provision. She therefore retained a computer expert to remove her husband's laptop from his home office and image it. Tugendhat J. was critical of this self-help measure which interfered with the husband's rights of privacy and confidentiality and LPP. Whilst privacy and

confidentiality rights in relevant documents might be overridden by the competing public interest that any trial must be conducted on full evidence, LPP could not. Not all the computer's contents were relevant to financial provision. His LPP was sacrosanct. A claimant ought not to be able by self-help to put herself in a position which she would not have occupied if she had used the procedures of the court. If a search order had been sought, the husband would have been protected by safeguards in the Order. Self-help offered the husband no safeguards. The image was ordered to be delivered up to the husband's solicitors.

54. Another aspect of self-help is retention. Often in employment cases where the employee claims constructive dismissal and a lost performance related benefit, there is a tendency for the employee to retain documents or computer files containing confidential information of employer and its client with a view to their use in the claim. Solicitors for Claimants often seek to justify this as maintaining the material for disclosure in the action. In legal terms, they are arguing that confidentiality is overridden by the public interest in a trial proceeding with the benefit of all relevant evidence. In Friis and Zennstrom-v-Colburn [2009] EWHC 903 (Ch), the Skype case, Peter Smith J. criticised the ex-employee who had retained Skype's confidential documents for use in proceedings against her employer, stating that he could see no justification for her retention or copying of any of the confidential documents. She was not using the documentation for the purposes for which it was supplied to her namely to carry out work on behalf of the client (Skype) but using it and seeking to retain it for the purpose of the litigation she had with her former employers. Any confidentiality basis upon which the Claimants might have given documents to her could not conceivably be said to subsist after her employment had terminated.

May 2009

