The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?

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INTRODUCTION

Information is like fire. Both enhance our lives, yet both hold the potential to wreak havoc by spreading out of control. This phenomenon demands that the circulation of information be harnessed in a sensible manner.

In Anglo-Australian law, one of the most important juridical devices for controlling the flow of information is the breach of confidence action. This action may be contractual or non-contractual. A contractual action may be brought where a contracting party has breached or threatened to breach an express or implied term that certain information be kept confidential. A non-contractual action may be brought where information with the 'necessary quality of confidence' was imparted in circumstances importing an obligation of confidence, and the confidant[1] used or threatened to use that information in an unauthorised manner.[2]

The enforcement of confidences through the breach of confidence action *serves* the public interest by encouraging trust, candour and good faith in those relationships that constitute the fabric of our society. In some situations, however, enforcing confidentiality may *stifle* the public interest by preventing the disclosure of matters of serious public concern. Thus a duty of confidence must be subjected to certain limitations, the most important of which is the public interest exception.

This exception, which allows a confidant to justify[3] what would otherwise amount to a breach of confidence, assumes importance when there is a clash between the public interest in confidentiality and a countervailing public interest in disclosure. This fact is illustrated by the following example. A company director discovers that the company has been dumping large quan-

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[1] In this article, 'confidant' includes the original confidant and third parties who are caught by the web of confidentiality.

[2] *Coco* v *AN Clark (Engineers) Ltd* [1969] RPC 41. The juridical basis of the non-contractual action is unclear. Property, equity, and tort have all been suggested. In *Moorgate Tobacco Co Ltd* v *Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438, Deane J stated that the basis of the action was equitable. I will assume that Justice Deane's view represents the current position for the purposes of this article.

[3] This article is only concerned with whether a disclosure is *justified*. Despite occasional dictum to the contrary, it will be assumed that the confidant is not under a *duty* to disclose. Cf *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1, 27 per Shaw LJ; *Lion Laboratories Ltd* v *Evans* [1985] QB 526, 536 per Stephenson LJ; *Duncan* v *Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, 521 per Jeffries J. However, it should be noted that non-disclosure may result in liability under statute, or for negligence: see *Tarasoff* v *Regents of the University of California* 17 Cal 3d 425 (1976).

tities of toxic waste into a nearby stream. The Board informs her, in confidence, that the company plans to continue this practice because there is a loophole in the relevant environmental legislation. Should this confidence be protected? Or should the information be disclosed in order to prevent further harm to the environment? If so, to whom? These questions underlie the central issue of the first part of this article: when will a confidant be able to rely on the public interest exception to justify disclosure?

This issue will be examined within a three-tiered structure in order to demonstrate that, in determining the *scope* of the exception, the Anglo-Australian courts have been influenced by three distinct yet cumulative inquiries. The first of these inquiries is whether or not the disclosure advances a recognisable public interest. The second, whether or not all the relevant circumstances favour disclosure. And the third is whether or not the public interest in disclosure outweighs or overrides the public interest in confidentiality. Unfortunately, an awkward level of uncertainty taints all three inquiries.

The aim of the second part is to explore the consequences of concluding that a confidant may rely on the public interest exception. Regrettably, the Anglo-Australian courts have neglected to identify the precise conceptual and remedial consequences that flow from a finding that the public interest is best served by disclosure. Thus an unfortunate degree of uncertainty also surrounds the question of the *effects* of applying the exception.

These uncertainties stem mainly from the piecemeal approach that has been adopted by the Anglo-Australian courts. But some pieces are falling into place. In the third part of this article, which involves a critical overview and rationalisation of the exception, it will be seen that a significant measure of consistency is creeping into this area of the law. This consistency may be identified with the assistance of what I have defined as the 'Red Light' and 'Green Light' theories of confidentiality. Red Light theorists believe that confidences must be enforced unless there is a very strong reason for disclosure. Green Light theorists, by contrast, start from the premise that all information must be freely available unless there is a compelling need for secrecy.

The aim of the third part is to demonstrate that, although the impact of these two theories on the public interest exception appears to be haphazard, the threads of the theories may be drawn together to form a coherent whole. Indeed, it will be shown that the courts have inadvertently stumbled upon a workable regime that accords perfectly with the underlying justifications for protecting the different types of confidential information.

PART ONE: THE SCOPE OF THE EXCEPTION

The question of whether or not the public interest exception may be invoked is one for the courts to decide.[4] In approaching this question, the Anglo-Australian courts have been guided by the following simple inquiry: how is the public interest best served — by disclosure or non-disclosure?[5] Unfortunately, however, the simplicity of this inquiry masks the fact that the precise scope of the exception remains unclear.

Historically, the exception operated within a fairly limited compass. This fact is illustrated by the seminal public interest case of *Gartside* v *Outram*.[6] In this case, the plaintiffs sought to prevent their former employee from disclosing information, obtained in the course of employment, which revealed that the plaintiffs were conducting their wool broking business in a fraudulent manner. In a preliminary hearing, Wood V-C stated that

> there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist.[7]

As will be seen below, the English courts have significantly broadened the scope of the exception to extend beyond the exposure of iniquitous conduct. By contrast, the Australian judiciary has adopted a narrower approach. In *Corrs Pavey* v *Collector of Customs*, for example, Gummow J traced the origins of the exception and concluded that

> the truth as to what *Gartside* v *Outram* decided is . . . that any court of law or equity would have been extremely unlikely to imply in a contract between master and servant an obligation that the servant's good faith to his master required him to keep secret details of his master's gross bad faith to his customers.[8]

His Honour continued:

> If there be some other principle of general application inspired by *Gartside* v *Outram*, it is . . . that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent

[4] *British Steel Corporation* v *Granada Television Ltd* [1981] AC 1096, 1202 per Lord Fraser; *A* v *Hayden (No 2)* (1984) 156 CLR 532, 549 per Gibbs CJ; *W* v *Egdell* [1990] Ch 359, 422 per Bingham LJ; *Attorney-General* v *Guardian Newspapers (No 2)* [1990] 1 AC 109 ('The *UK Spycatcher* case (No 2)'), 205 per Dillon LJ (CA), 268–9 per Lord Griffiths (HL).

[5] See, eg, *Attorney-General (UK)* v *Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341, 380 per Powell J ('The *NSW Spycatcher* case').

[6] (1856) 26 LJ Ch 113. For an excellent summary of the origins of the exception, see S Ricketson, 'Public Interest and Breach of Confidence' (1979) 12 MULR 176, 181–6.

[7] (1856) 26 LJ Ch 113, 114. Note: it is unclear whether the matter went to a final hearing.

[8] *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428, 449.

disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.[9]

The major difficulty with this formulation is that it is unnecessarily narrow. In my view, the question of whether the exception may be invoked should be considered in three separate steps. First, the courts should determine whether or not a public interest is advanced by disclosure.[10] Second, assuming that a public interest *is* advanced, they should examine the circumstances surrounding the disclosure. And third, in the light of these circumstances, the courts should assess whether or not the public interest in disclosure overrides or outweighs the public interest in enforcing confidentiality.

1. The Public Interest Advanced by Disclosure

The public interest exception cannot be invoked unless the disclosure advances a recognisable public interest.[11] Tantalising titillation is not enough. The courts have demanded that the disclosure be *in* the public interest and not merely *of* public interest.[12] Yet this begs the question: when will a disclosure be in the public interest?

It is impossible to reduce the public interest to a fixed, inflexible formula. Indeed, the inherent dynamism of the public interest demands that the law be sufficiently flexible to keep pace with changing social attitudes. This flexibility is enshrined in the following broad identifiable categories:

(1) The prevention of harm;
(2) The improvement of the administration of justice; and
(3) The realisation of the democratic ideal.

These categories will be examined in order to identify the circumstances in which a disclosure will be held to advance a recognisable public interest.

1.1 *The Prevention of Harm*

The public interest in the prevention of harm will be advanced by the disclosure of confidential information that relates to a continuing or proposed iniquitous activity. The 'iniquity' rule, by definition, focuses on the gravity of the misconduct sought to be exposed. The modern restatement of this rule is found in *Initial Services Ltd* v *Putterill* where Lord Denning MR, after noting *Gartside*, stated that 'the exception should extend to *crimes, frauds and mis-*

[9] Id 450. His Honour also rationalised *Gartside* on the basis that the plaintiffs were refused relief because they had not come to the Court with clean hands. For a discussion of the relationship between this defence and the public interest exception, see Part One, 1.1 (ii) infra.

[10] In the first two stages, 'disclosure' includes a *proposed* disclosure. The distinction between actual and proposed disclosures assumes importance at the third stage.

[11] But the discloser may still be liable for breach of confidence where a public interest *is* advanced. In all the circumstances, the public interest in confidentiality may prevail.

[12] See, eg, *Lion Laboratories Ltd* v *Evans* [1985] 1 QB 526, 537 per Stephenson LJ, 553 per Griffiths LJ; *British Steel Corporation Ltd* v *Granada Television* [1981] AC 1096, 1189 per Lord Salmon.

deeds ... provided always — and this is essential — that the disclosure is justified in the public interest'.[13]

(i) *The Gravity of the Conduct: 'Crimes, Frauds and Misdeeds'*

The disclosure of information that would lead to the discovery of projected and continuing crimes advances the strong public interest in preventing harm caused by criminal activity.[14] Similarly, the public interest in the prevention of harm is advanced by disclosures relating to the contemplated or continued commission of civil or statutory wrongs.[15] Disclosures exposing misleading conduct, however, are more problematic.

In *Woodward* v *Hutchins*,[16] the plaintiff rock stars sought to restrain their former public relations officer from disclosing details of their private lives. Although there was no suggestion that the plaintiffs had committed a criminal or civil offence, the Court of Appeal discharged the injunction granted at trial on the basis that the disclosure exposed misleading conduct. In the course of his judgment, Lord Denning stated:

> If a group of this kind seek publicity which is to their advantage, ... they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. ... The public should not be misled.[17]

A similar approach was taken in *Church of Scientology of California* v *Miller*.[18] In this case the Court of Appeal refused to prevent the publication of the diaries of the founder of Scientology on the basis that publication would correct an image that had been falsely projected.

This 'correcting a false image' approach has been trenchantly criticised[19] and is, by itself, unlikely to justify a breach of confidence in Australia. In *Castrol Australia Pty Ltd* v *EmTech Associates Pty Ltd*, Rath J stated that the courts 'must have regard to matters of a more weighty and precise kind than a

[13] [1968] 1 QB 396, 405 (emphasis added).

[14] *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344, 377. But as Lord Denning implicitly suggested, this public interest is not absolute. Not every criminal offence may be disclosed because the countervailing public interest in confidentiality may prevail: *A* v *Hayden (No 2)* (1984) 156 CLR 532, 545–6 per Gibbs CJ. See also *Attorney-General* v *Wellington Newspapers Ltd* [1988] 1 NZLR 129, 178 per McMullin J.

[15] *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, 406 per Lord Denning. See also *Allied Mills Industries Pty Ltd* v *Trade Practices Commission (No 1)* (1981) 55 FLR 125. It appears, however, that a confidant may not invoke the exception to justify the disclosure of an activity that would undermine the 'spirit' of a piece of legislation: *Bacich* v *Australian Broadcasting Corporation* (1992) 29 NSWLR 1, 17 per Brownie J.

[16] [1977] 1 WLR 760.

[17] Id 763–4. See also *Lennon* v *News Group Newspapers Ltd and Twist* [1978] FSR 573; *Khashoggi* v *Smith* (1980) 124 *Sol J* 149.

[18] Unreported, Court of Appeal, 22 October 1987, endorsing the earlier decision of Vinelott J; unreported, Chancery Division, 9 October 1987.

[19] Ricketson, op cit (fn 6) 200–1; F Gurry, *Breach of Confidence* (1984) 339; M Thompson, 'Breach of Confidence and Privacy' in L Clarke (ed), *Confidentiality and the Law* (1990) 76.

public interest in the truth being told.'[20] This is a sensible approach. The public interest in preserving confidentiality would be reduced to a sham if a breach of confidence could be justified on the basis of having spoken the truth.[21] Something more is required. A disclosure that exposes hypocrisy should only be justified where the public interest in the prevention of harm is advanced.[22] To find otherwise comes perilously close to excusing disclosures that merely titillate the public — a position that subsequent courts have sought to avoid.[23]

In determining whether or not the disclosure of hypocrisy advances the public interest in the prevention of harm, the courts should examine the relationship between the public and the actions of the hypocritical confider. In most cases, the hypocrisy of a group of musicians or sportspeople, for example, will relate to some private matter, and thus be unlikely to harm the public. Accordingly, such hypocrisy should not be disclosed in breach of confidence.

Where, however, the group solicits large amounts of money from the public by advocating a pattern of behaviour which they themselves fail to observe, the public clearly has a right to be informed. In this situation, there is a sufficient nexus between the confider's actions and the harm to the public. Where this nexus is present, disclosing the hypocrisy advances the public interest in the prevention of harm caused by misleading and deceptive conduct.[24]

(ii) *Iniquity and Clean Hands*

The iniquity rule's emphasis on the misconduct of the confider echoes the equitable maxim that a 'person who comes to equity must come with clean hands'.[25] Although the two rules overlap,[26] the 'clean hands' doctrine is necessarily narrower because the impropriety in question must have an

[20] (1980) 51 FLR 184, 216 cited with implicit approval in *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428, 446.

[21] D Laster, 'Commonalities Between Breach of Confidence and Privacy' (1990) 14 *New Zealand Universities Law Review* 144, 162.

[22] Where the hypocrisy has finished, the relevant public interest is the 'administration of justice'. This public interest will only be advanced where the hypocrisy amounts to an offence.

[23] Footnote 12 supra and accompanying text.

[24] R Vague, 'Comment on Intellectual Property: Considerations for Resources Industries' [1989] *Australia Mining and Petroleum Law Association Law Journal* 406, 410. Gurry suggests that misconduct in the nature of *deceit* or *fraud* is required: op cit (fn 19) 340. See also C Francis and B Patten, 'Privacy, the Press and the Public Interest' in R Plender (ed), *Legal History and Comparative Law: Essays in Honour of Albert Kiralfy* (1990) 52.

[25] The information may relate to the misconduct of another. It is possible that a confider who seeks to keep such information confidential will not come to the court with clean hands.

[26] See *Hubbard* v *Vosper* [1972] 2 QB 84, 99–101 per Megaw LJ; *Church of Scientology* v *Kaufman* [1973] RPC 635; *Castrol Australia Pty Ltd* v *EmTech Associates Pty Ltd* (1980) 51 FLR 184, 216 per Rath J; *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428, 451–2 per Gummow J; The *NSW Spycatcher* case (1987) 8 NSWLR 341, 383–4 per Powell J.

'immediate and necessary relation to the equity sued for'.[27] In the context of the breach of confidence action, this relationship will only be present if the obligation of confidence arose when the misconduct occurred.[28] Therefore, while wrongdoing that occurred after the establishment of the obligation of confidence may amount to iniquity, it will not sully the confider's hands sufficiently to invoke the equitable defence.

The difference between the public interest exception and the clean hands defence was brought into sharp focus by Lord Denning when he freed the exception from the shackles of iniquity in *Fraser* v *Evans*: 'I do not look upon the word "iniquity" as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence.'[29] In England this statement heralded a significant shift in emphasis from 'the gravity of the *conduct* in question to the gravity of its *consequences*.'[30] In other words, the public interest exception, unlike the clean hands defence, has become more concerned with the *effect* that an action has on the community, rather than its *cause*. This shift in emphasis is best illustrated by disclosures of medically dangerous information.

(iii) *The Gravity of the Consequences: Medically Dangerous Information*

In *Hubbard* v *Vosper*[31] and *Church of Scientology* v *Kaufman*,[32] the Church of Scientology sought to restrain the publication of books that exposed its nefarious practices. The courts allowed the books to be published even though they were written in defiance of an express contractual clause of confidentiality.[33] Interestingly, the courts did not focus exclusively on the 'unfavourable odour of wrongdoing'[34] that pervaded the Church's activities — ie, the gravity of the conduct — but also examined the impact that these activities had on the public — ie, the gravity of its consequences. In *Hubbard's* case, for example, Lord Denning stated that 'there is good ground for thinking that these courses contain such *dangerous* material that it is in the public interest that it should be made known'.[35]

In *Kaufman's* case, Goff J specifically endorsed this 'dangerousness' test and found that it was satisfied in the case before him. There was considerable evidence that the Scientology courses contained references to disorientation, physical and mental illness, and death. More importantly, there was evidence of actual harm being done to people who did the courses: indeed, some had

[27] *Meyers* v *Casey* (1913) 17 CLR 90, 123–4 per Isaacs J.
[28] The *NSW Spycatcher* case (1987) 8 NSWLR 341, 383–4 per Powell J.
[29] [1969] 1 QB 349, 362.
[30] P Finn, 'Confidentiality and the Public Interest' (1984) 58 ALJ 497, 507 (emphasis added).
[31] [1972] 2 QB 84.
[32] [1973] RPC 627 (interlocutory application), 635 (trial).
[33] In *Hubbard's* case, an injunction was awarded at first instance but this was overturned on appeal. In *Kaufman's* case, Goff J refused to award an interlocutory or a final injunction.
[34] Ricketson, op cit (fn 6) 191. Indeed, Megaw LJ in *Hubbard's* case and Goff J in *Kaufman's* case found that the 'clean hands' defence was made out.
[35] [1972] 2 QB 84, 96 (emphasis added).

suffered nervous breakdowns. Since the Scientologists planned to continue running their courses, it was held that the 'medical quackeries'[36] contained within them constituted a present and future threat to the welfare of the community. In other words, the disclosures were justified on the basis that they advanced the public interest in preventing harm to members of the public.[37]

(iv) *The Gravity of the Consequences: Information not Revealing Misconduct*

The precise ambit of the public interest in the prevention of harm remains unclear. In *Kaufman's* case, for example, Goff J held that it could not be advanced by a disclosure that was simply *beneficial* to the public:

> It might well be in the public interest to have a valuable chemical formula or the secrets of an invention disclosed, but that could *never* justify a breach of confidence.[38]

Others, particularly in Australia, have sought to confine the public interest in the prevention of harm to the exposure of continuing or future misconduct.[39] The judicial reluctance to travel beyond misdeeds may reflect the fear of being forced to conduct wide-ranging inquiries into the economic and social justifications that underlie the protection of confidences. Or, alternatively, it may reflect a reluctance to separate the public interest exception from the clean hands defence.

Yet subsequent English courts have recognised that the public interest in the prevention of harm may be advanced even where the confider is not guilty of misconduct. In *Malone* v *Metropolitan Police Commissioner*, for example, Megarry V-C cultivated the seeds of the 'just cause' formulation that Lord Denning had planted in *Fraser*, by stating that

> there may be cases where there is no misconduct or misdeed but yet there is a just cause or excuse for breaking confidence. The confidential information may relate to some apprehension of an impending chemical or other

[36] Ibid.

[37] For a more recent example, see *Re Smith Kline and French Laboratories Ltd* [1990] 1 AC 64 where the House of Lords held that safeguarding the public health overrode the confidentiality of commercial information given to a drug licensing authority. See also the dictum in *Beloff* v *Pressdram* [1973] 1 All ER 241, 260.

[38] [1973] RPC 635, 649 (emphasis added). Cripps describes the use of the word 'never' as 'unfortunate': Y Cripps, *The Legal Implications of Disclosure in the Public Interest* (1987) 62. See *Williams* v *Williams* (1817) 3 Mer 157, 160; 36 ER 61, 62 (disclosure of unpatented eye medicine justified); *Hughes Tool Co* v *Gillcraft Aviation Co* 54 F Supp 348 (1943) (disclosure and use of confidential plans and drawings of ammunition boosters to assist the war effort justified).

[39] *Beloff* v *Pressdram* [1973] 1 All ER 241, 260 per Ungoed-Thomas J. See also *British Steel Corporation* v *Granada Television Ltd* [1981] AC 1096, 1169 per Lord Wilberforce, 1200–2 per Lord Fraser; *Castrol Australia Pty Ltd* v *EmTech Associates Pty Ltd* (1980) 51 FLR 184, 214 per Rath J; *David Syme & Co Ltd* v *General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 306 per Hutley AP; *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428, 450 per Gummow J.

disaster, arising without misconduct . . . which ought in the public interest to be disclosed to [the authorities].[40]

This statement provides further evidence of the judicial shift in emphasis from examining the gravity of the misconduct to the gravity of the consequences of non-disclosure.

The Court of Appeal adopted a similar approach in *Lion Laboratories Ltd* v *Evans*.[41] In this case, a newspaper was permitted to publish confidential memoranda that cast doubts on the accuracy of a breathalyser used by the police. Although the Court held that iniquity was not a prerequisite of the exception,[42] it stressed that the mere possibility of a *benefit* to society would not, by itself, suffice. Importantly, the Court emphasised that a disclosure that did not reveal misconduct would only be justified if it advanced the public interest in the prevention of harm.[43]

The public interest in the prevention of harm is, by definition, primarily concerned with activities that are occurring or will occur. By contrast, disclosures relating solely to past activities may advance the broad public interest in facilitating the proper administration of justice.[44]

1.2 *The Improvement of the Administration of Justice*

The public interest in the administration of justice will be advanced by disclosures that lead to the 'detection and prosecution of criminals'.[45] Indeed, the courts have recognised that there is a very strong public interest in the proper administration of the criminal law.[46]

By contrast, the public interest in disclosure is not as potent when the information relates to past civil wrongs. In *Weld-Blundell* v *Stephens*,[47] for example, the Court of Appeal held that although the disclosure of a libel

[40] [1979] Ch 344, 362 (emphasis added). Thus the disclosure of information concerning an impending financial disaster may be justified: see the comments of Marks J in *Protestant Alliance Friendly Society* v *Australian Financial Press* (unreported, Victorian Supreme Court, 8 December 1988) 7. A disclosure revealing financial mismanagement, however, may not be justified: *British Steel Corporation* v *Granada Television Ltd* [1981] AC 1096; *Westpac Banking Corporation* v *John Fairfax Group Pty Ltd* (1991) 19 IPR 513.

[41] [1985] 1 QB 526, 538 per Stephenson LJ, 550 per Griffiths LJ.

[42] Ibid. Stephenson LJ (id 538) gave the example of where the plaintiff manufacturer had told the police about the machine's unreliability, but the police insisted on using it. In this situation the plaintiff would not be guilty of misconduct but the information could still be disclosed in the public interest.

[43] This was clearly satisfied. The disclosure concerned a faulty device that, if used, could lead to the wrongful conviction of a number of people: id 546.

[44] As Moore points out, drawing a distinction between past and future conduct is philosophically justifiable in this context: N J Moore, 'Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics' (1985–6) 36 *Case Western Reserve Law Review* 177, 234–7.

[45] *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344, 377. See also *A* v *Hayden (No 2)* (1984) 156 CLR 532; *Tournier* v *National Provincial and Union Bank of England* [1924] 1 KB 461; *Khashoggi* v *Smith* (1980) 124 *Sol J* 149.

[46] But this public interest is not absolute. In *Weld-Blundell*, for example, Bankes LJ stated that the public interest in maintaining confidentiality in the solicitor-client relationship might prevail even where a client informs his or her solicitor that he or she has committed a crime.

[47] [1919] 1 KB 520.

would give the defamed person evidence for proving a *private* right of action, the *public* interest would not be best served by disclosure.

This conclusion, however, should not be read as excluding past civil wrongs from the ambit of the public interest exception. As Lord Denning recognised in *Initial Services Ltd* v *Putterill*,[48] the public interest in the administration of justice *will* be advanced by disclosures revealing past civil wrongs. It will, however, be more difficult to prove that this public interest outweighs or overrides the public interest in confidentiality so as to justify disclosure.[49]

Distillers Co (Biochemicals) Ltd v *Times Newspapers Ltd*[50] should be read in this light. In this case, the plaintiff marketing company sought to restrain the defendant newspaper from using or disclosing information about the thalidomide tragedy. Despite Justice Talbot's acknowledgment that 'the public have a great interest in the thalidomide story',[51] his Honour held that negligence 'could not . . . constitute an exception to the need to protect confidentiality.'[52] This statement is too broad. Admittedly, there is usually only a weak *public* interest in disclosing information relating to the commission of a *private* wrong. But that does not mean that the exception could never be invoked to justify disclosure.[53]

The public interest in the administration of justice may also be advanced in a procedural sense. For example, a disclosure may ensure that relevant information is available at a trial. Yet this will rarely be the sole public interest. In *Marcel* v *Commissioner of Police of the Metropolis*, for example, Browne-Wilkinson V-C held that the public interest in ensuring a fair trial on full evidence was outweighed by the public interest in maintaining the confidentiality of information that a public authority obtained from a citizen under compulsion.[54]

In *Marcel's* case, the government agency held confidential information relating to a private citizen. Where, by contrast, the confidential information is *about* the government, its disclosure may advance a different public interest: the realisation of the democratic ideal.

1.3 *The Realisation of the Democratic Ideal*

The notion of democracy embraces the fundamental principle that the workings of government remain open to scrutiny and criticism. Thus the public interest in the realisation of the democratic ideal will be advanced by a

[48] His Lordship held that the exception encompassed civil wrongs 'actually committed as well as those in contemplation' so long as the disclosure was 'justified in the public interest': [1968] 1 QB 396, 405.

[49] This problem arises at the *third* stage of the three-stage process.

[50] [1975] QB 613.

[51] Id 625.

[52] Id 622.

[53] The courts must recognise that the public interest in the administration of justice is strengthened where a large number of people are affected by the private wrong.

[54] [1992] Ch 225, reversed on appeal [1992] Ch 241. In *Re X and Ors (minors)* [1992] 2 All ER 595, Waite J held that the public interest in securing relevant evidence was outweighed by the public interest in maintaining the confidential nature of the wardship jurisdiction. See also *Re Barlow Clowes Gilt Managers Ltd* [1992] 2 WLR 36.

disclosure that provokes public discussion about government activity. Mason J (as he then was) noted this fact in *The Commonwealth of Australia* v *John Fairfax & Sons Ltd*:

> It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.[55]

Mason J held that the importance of the fundamental democratic right to criticise and oppose was sufficient to require the judiciary to view the disclosure of governmental information 'through different spectacles.'[56] This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure.[57]

His Honour went on to state that this onus will not be satisfied if the information simply 'throws light on' the workings of the government or how its powers are being exercised. The disclosure must *obstruct* the government. Merely *illuminating* patterns of governmental behaviour will not suffice. Although what constitutes an 'obstruction' is open to debate, it is clear that information that would prejudice relations with foreign countries[58] or harm national security[59] will qualify. Indeed, some judges have indicated that merely claiming that the disclosure threatens national security will discharge the burden of proving that the public interest demands non-disclosure.[60]

Surprisingly, the democratic flavour of the *John Fairfax* approach did not appeal to the majority of the House of Lords in *British Steel Corporation* v *Granada Television Limited.*[61] In this case, an employee of the BSC disclosed confidential documents to Granada Television. The documents revealed the BSC's internal mismanagement and the fact that the government had intervened during a national steel strike. The majority stated (in obiter)

[55] *The Commonwealth of Australia* v *John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52. *Attorney-General* v *Jonathan Cape Ltd* [1976] QB 752; *Director General of Education* v *Public Service Association of NSW* (1985) 4 IPR 552, 556–7 per McLelland J; The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 150–2 per Scott J (Ch D); 202–3 per Dillon LJ, 221 per Bingham LJ (CA); 257–8 per Lord Keith, 270 per Lord Griffiths, 283 per Lord Goff (HL); *Lord Advocate* v *Scotsman Publications Ltd* [1990] 1 AC 812, 821 per Lord Keith, 828 per Lord Jauncey; *Derbyshire County Council* v *Times Newspapers Ltd* [1993] AC 534, 549 per Lord Keith; The *NSW Spycatcher* case (1987) 8 NSWLR 341, 381–2 per Powell J; (1987) 10 NSWLR 86, 101–2 per Street CJ, 156 per Kirby P, 191–2 per McHugh JA (CA). For a useful summary of this area of the law, see L Tsaknis, 'The Jurisdictional Basis, Elements, and Remedies in the Action for Breach of Confidence — Uncertainty Abounds' (1993) 5 *Bond Law Review* 18, 27–34.

[56] (1980) 147 CLR 39, 51.

[57] For non-governmental confidences, the *confidant* must establish that the public interest demands disclosure: *A* v *Hayden (No 2)* (1984) 156 CLR 532, 546 per Gibbs CJ; The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 269 per Lord Griffiths (HL).

[58] *The Commonwealth of Australia* v *John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52.

[59] Ibid; *Attorney-General* v *Jonathan Cape Ltd* [1976] 1 QB 752, 770; The *UK Spycatcher* case (No 2) [1990] 1 AC 109.

[60] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 186–90 per Donaldson MR (CA); 279–80 per Lord Griffiths, 282–3 per Lord Goff (HL); *Lord Advocate* v *Scotsman Publications Ltd* [1990] 1 AC 812, 828 per Lord Jauncey.

[61] [1981] AC 1096.

that although disclosure was *of* public interest, it was not *in* the public interest.[62]

This approach sits uncomfortably with the *John Fairfax* decision. It would probably have been decided differently had the democratic principles outlined in that case been extended to cover statutory authorities such as the BSC.[63] Indeed, there is no overwhelming policy reason for carving an exception for statutory authorities: in the public sector, the 'need is for compelled openness, not for burgeoning secrecy.'[64] This need is particularly strong where the information relates to mismanagement or corruption.[65]

As has been seen, the first stage of the three-tiered approach requires the courts to examine whether the disclosure would advance the public interest in the prevention of harm, the administration of justice, or the realisation of the democratic ideal. The confidant will clearly be liable for breach of confidence if this preliminary hurdle is not overcome. But if one of these public interests *is* advanced, the courts must then go on to examine the circumstances surrounding the disclosure.

2. The Circumstances Surrounding the Disclosure

It was initially thought that the courts' examination of the circumstances surrounding the disclosure could operate to 'destroy' the public interest exception once it had been established.[66] This led Ricketson[67] and Cripps[68] to suggest that these circumstances could not be examined if the exception operated to remove the obligation of confidence completely.[69] Put simply, there would be nothing left to 'destroy'.

The courts have now recognised, however, that the circumstances surrounding the disclosure are relevant to the question of whether the exception can be invoked in the first place.[70] Thus, under this approach, the availability of the public interest exception depends on whether all the circumstances support disclosure. This subtle shift from 'destroyer' to 'prerequisite' has

[62] Id 1169. Lord Salmon, in a strong dissent, highlighted the sharp distinction between a statutory authority and a private company: 'there are no shareholders, and [the authority's] losses are borne by the public which does not have anything like the same safeguards as shareholders' (id 1185). He concluded that the public was 'morally entitled' to know why the BSC was in such a parlous condition.

[63] Finn, op cit (fn 30) 505; J Stuckey-Clarke, 'Freedom of Speech and Publication in the Public Interest' in L Clarke (ed), *Confidentiality and the Law* (1990) 141, 150.

[64] Finn, op cit (fn 30) 505. This need for openness may also extend to ensuring that the public is adequately informed about the suitability of a person seeking public office.

[65] See *Cork* v *McVicar, The Times*, 31 October 1984, 27.

[66] *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, 405–6 per Lord Denning. This would occur if the circumstances did not favour disclosure.

[67] Ricketson, op cit (fn 6) 179.

[68] Cripps, op cit (fn 38) 23.

[69] For an examination of the effects of applying the exception, see Part Two below.

[70] See, eg, *Distillers Co (Biochemicals) Ltd* v *Times Newspapers Ltd* [1975] QB 613, 625; *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428, 450; The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 161 per Scott J (Ch D), 177 per Donaldson MR (CA), 269 per Lord Griffiths (HL); The *NSW Spycatcher* case (1987) 8 NSWLR 341, 382 per Powell J; *W* v *Egdell* [1990] Ch 359, 389; *In re A Company's Application* [1989] Ch 477, 481.

meant that, irrespective of the effect of the exception's application, the courts will have regard to:

(1) The identity of the discloser;
(2) The identity of the disclosee;
(3) The timing of the disclosure; and
(4) The discloser's beliefs at the time of disclosure.

It is unclear whether the courts will also consider the discloser's motives and the mode of the information's acquisition.

2.1 *The Identity of the Discloser*

The scope of the exception in a particular case may depend on the identity of the discloser. Professionals, for example, may owe a more extensive duty so as to encourage their clients to make full and frank disclosures in the course of the professional relationship.[71] In addition, the breadth and nature of the original confidant's duty of confidence will not necessarily be the same as the duty imposed on third parties. As Donaldson MR stated in the *UK Spycatcher* case (No 2):

> The third party recipient may be subject to some additional and conflicting duty which does not affect the primary confidant or may not be subject to some special duty which does affect that confidant. In such situations the equation is not the same ... and accordingly the result may be different.[72]

Thus the public interest 'equation' may involve different considerations where the disclosure is by a third party rather than the original confidant. One such consideration is the right to exercise free speech.

An agent of the Secret Service, for example, may not be entitled to inject this interest into the public interest equation: that agent may be taken to have waived, by contract or otherwise, his or her right to free speech to that extent.[73] The media, by contrast, has a legitimate role in 'bringing before the public information which might not otherwise be accessible to the public'.[74]

Lord Denning, a staunch advocate of freedom of the press, went even further than this. He suggested that the media should rarely be restrained from publishing information:

> It can "publish and be damned". [It can be penalised.] But always afterwards. Never beforehand. Never by previous restraint. ... Prior restraint is

[71] *Ott* v *Fleishman* [1983] 5 WWR 721; *Duncan* v *Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513; *X* v *Y* [1988] 2 All ER 648, 653; *T* v *Broadcasting Corp of New Zealand* (unreported, New Zealand High Court, 1 December 1988) 28–9.

[72] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 183 per Donaldson MR (CA). See also *Lord Advocate* v *Scotsman Publications Ltd* [1990] 1 AC 812, 822 per Lord Keith; *W* v *Egdell* [1990] Ch 359, 388–9, 399–400 per Scott J.

[73] E Barendt, 'Spycatcher and Freedom of Speech' [1989] *Public Law* 204, 206. As stated above, the assessment of the public interest equation is the third stage of the three-stage process.

[74] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 156 per Scott J (Ch D).

> such a drastic interference with the freedom of the press that it should only be ordered when there is a substantial risk of grave injustice.[75]

Others, however, have stressed that the media must not enjoy special privileges.[76] The media, as the eyes and ears of the general public, must act for the public's benefit. Therefore, even if it retains its full rights to free speech, the media must not publish information where the public interest is not served by the widespread dissemination of that information.

In addition, the courts are acutely aware that widespread disclosures will often serve the media's interest without advancing the *public* interest. They have stressed that these interests do not always 'march hand in hand' and that the media are 'peculiarly vulnerable' to confusing the two interests.[77] Thus a widespread media disclosure will be analysed very closely before it is countenanced.

2.2 *The Identity of the Disclosee*

In *Initial Services*, Lord Denning stated (in obiter) that 'the disclosure must ... be to one who has a proper interest to receive the information.'[78] This controlling device is a useful tool for ensuring that the disclosure in question actually serves (rather than frustrates) the public interest. Despite the dictum's pragmatism, however, the courts initially seemed reluctant to acknowledge that the scope of the exception should be affected by the identity of the disclosee.[79]

Nevertheless, it is now settled that whilst a disclosure to the proper authority may be justified, a wider disclosure may not be.[80] The identity of the 'proper authority' will depend on the nature of the information. Generally speaking, crimes should be disclosed to the police,[81] statutory breaches to the appropriate regulatory body,[82] and civil wrongs to the individual(s) affected.[83]

There may be grounds for justifying a widespread disclosure to the public — through the media or by publication of a book — if the information in

[75] *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1, 17, 23.

[76] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 183 per Donaldson MR, 201 per Dillon LJ (CA). As Dane notes, Lord Denning's dissent in *Schering* is the only indication that the press will be treated any differently in this regard: P M Dane, 'The *Spycatcher* Cases' (1989) 50 *Ohio State Law Journal* 405, 414.

[77] *Francome* v *Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 898 per Donaldson MR; *Lion Laboratories Ltd* v *Evans* [1985] QB 526, 537 per Stephenson LJ.

[78] *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, 405.

[79] Bryan described it as being of 'precarious' authority: M W Bryan, 'The Law Commission Report on Breach of Confidence: Not in the Public Interest?' [1982] *Public Law* 188, 190.

[80] See, eg, *Francome* v *Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 902; *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428, 450; *W* v *Egdell* [1990] Ch 359, 389.

[81] *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, 406; *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344, 362; *Francome* v *Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 902.

[82] *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, 405; *Allied Mills Industries Pty Ltd* v *Trade Practices Commission (No 1)* (1981) 55 FLR 125; *In re A Company's Application* [1989] Ch 477, 481.

[83] *Gartside* v *Outram* (1856) 26 LJ Ch 113.

question affects the community as a whole.[84] This can occur in two ways. First, the event or practice may affect a significant proportion of the community. In *Kaufman's* case, for example, Goff J allowed the publication of a book that exposed the dangerous practices of the Scientologists because these practices had affected (and would continue to affect) a large number of people.[85] *Initial Services*,[86] *Woodward* v *Hutchins*,[87] and *Church of Scientology of California* v *Miller*[88] provide further examples.

Second, a widespread disclosure may be justified where the proper authority has an interest in restraining the disclosure. In *Cork* v *McVicar*,[89] the information related to allegations of police corruption and miscarriages of justice. Scott J held that the press was the appropriate vehicle for disclosure because this would ensure that the corruption was exposed. Similarly, in the *Lion Laboratories* case, the Court of Appeal held that the press was an appropriate recipient of information relating to defective breathalysers. Since the Home Office had publicly committed itself to supporting the machine (and was thus an 'interested and committed party')[90] it was inappropriate to disclose the information to them or, presumably, the police.[91]

2.3 *The Timing of the Disclosure*

The timing of the disclosure may affect the scope of the exception in at least three ways. First, the information may have already entered the public domain *before* the disclosure. This will generally mean that the disclosure can be allowed because there is no confidentiality left to protect.[92] It is important to note, however, that the Court of Appeal in *Schering Chemicals Ltd* v *Falkman Ltd* suggested that republication of information may constitute a breach if such action would harm the confider.[93]

[84] However, the courts may consider whether the widespread disclosure was the discloser's last resort. See S Zifcak, 'Secrecy, Disclosure and the Public Interest: The Disclosure of Official Information in Australia (Part 2)' [1989] *Freedom of Information Review* 50; S Bok, *Secrets: On the Ethics of Concealment and Revelation* (1984) 221, 225. For the preliminary steps that should be taken for government 'leaks', see Dane, op cit (fn 76) 443–4. For AIDS-related disclosures, see *Bradley* v *Jones* (1991) *Commonwealth Law Bulletin* 875, 879 (moot court 'decision' of Kirby P).

[85] *Church of Scientology* v *Kaufman* [1973] RPC 635. The disclosure was allowed despite the fact that the government had already established the Foster Commission to investigate the questionable practices of the Church.

[86] *Initial Services Ltd* v *Putterill* [1968] 1 QB 396.

[87] [1977] 1 WLR 760.

[88] Unreported, Court of Appeal, 22 October 1987. See also *Sun Printers Ltd* v *Westminister Press Ltd* (1982) 126 *Sol J* 260.

[89] *The Times*, 31 October 1984, 27.

[90] *Lion Laboratories Ltd* v *Evans* [1985] 1 QB 526, 553 per Griffiths LJ.

[91] See Cripps, op cit (fn 38) 92.

[92] *O Mustad & Son* v *Dosen* [1964] 1 WLR 109; *Attorney-General* v *Guardian Newspapers Ltd* [1987] 1 WLR 1248 ('The *UK Spycatcher* case (No 1)'), 1262 per Browne-Wilkinson V-C (Ch D), 1286 per Lord Bridge (HL); The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 285 per Lord Goff (HL). But the defendant may be subjected to a 'springboard' injunction: see *Terrapin Ltd* v *Builders' Supply Co (Hayes) Ltd* [1967] RPC 375.

[93] [1982] QB 1, 28 per Shaw LJ, 37 per Templeman LJ. See also The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 271 per Lord Griffiths. For an analysis of this issue, see Laster, op cit (fn 21) 152–7; P Birks, 'A Lifelong Obligation of Confidence' (1989) 105 LQR 501, 507.

Second, a considerable period of time may have elapsed since the information originally became the subject of an obligation of confidence. This fact, as the UK Law Commission recognised,[94] is capable of strengthening or weakening a claim for disclosure. In *Attorney-General* v *Jonathan Cape*,[95] for example, Lord Widgery CJ considered that the public interest in preserving the confidentiality of Cabinet Discussions from 1964 to 1966 could no longer justify non-disclosure in 1976. Similarly, the public interest in the disclosure of beneficial trade secrets may be stronger where the period of protection has extended beyond the period conferred under the patent regime. On the other hand, the public interest in revealing personal information may diminish in time.

Third, the confider may have died before the disclosure. Where a considerable period of time has elapsed between the obligation's creation and the confider's death, the principles outlined above should govern the situation. Where such a period has not elapsed, however, the relevant question is whether the ambit of the obligation was expressly or impliedly confined to the confider's lifetime. In the absence of an express agreement, the courts should be reluctant to imply a posthumous obligation because the public interest in non-disclosure will usually be significantly weaker.[96]

2.4 *The Discloser's Beliefs*

The courts will also consider the discloser's beliefs in determining the scope of the exception. A discloser cannot make a wild and unsubstantiated allegation that the public interest is best served by disclosure: the allegation must have substance and the discloser must reasonably believe that it is true.[97] Therefore, the courts will not allow a disclosure unless

> following such investigations as are reasonably open . . . and having regard to all the circumstances of the case, the allegation in question can *reason-*

[94] The UK Law Commission, *Breach of Confidence*, Report No 110 (1981) 46.

[95] [1976] QB 752.

[96] Laster, op cit (fn 21) 157–8. The UK Law Commission suggested that a doctor-patient duty of confidence should cease on the patient's death (id 160–1). Cf the Declaration of Geneva ('I will respect the secrets which are confided in me, even after the patient has died') cited in H Lesser and Z Pickup, 'Law, Ethics and Confidentiality' (1990) 17 *Journal of Law and Society* 17.

[97] The genesis of this requirement lies in *Gartside*, where Wood V-C stated that a 'mere roving suggestion' of fraud was not sufficient: (1856) 26 LJ Ch 113, 114. See also *Butler* v *Board of Trade* [1971] 1 Ch 680, 689; *A* v *Hayden (No 2)* (1984) 156 CLR 532, 547 per Gibbs CJ; *In re A Company's Application* [1989] Ch 477, 481–2 per Scott J; The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 262 per Lord Keith (HL); *Grofan Pty Ltd* v *KPMG Peat Marwick* (1993) 27 IPR 215, 222. Cf *Initial Services* [1968] 1 QB 396, 408 where Salmon LJ stated that 'whether or not the information was true is of no consequence'. Stewart and Chesterman argue that the discloser's beliefs should be irrelevant where the disclosure is to 'an authority whose function is to investigate' allegations that the public interest is best served by disclosure: A Stewart and M Chesterman, 'Confidential Material: The Position of the Media' (1992) 14 *Adel LR* 1, 20–1.

ably be regarded as being a credible allegation from an apparently reliable source.[98]

Presumably this means that an honest but unreasonable belief that the allegation is true will not justify disclosure. This is a sensible approach. The courts should only be concerned with the advancement of real, and not imaginary, public interests.[99]

2.5 *The Discloser's Motives*

In *Initial Services*, Lord Denning implicitly suggested that the discloser's motives were a relevant consideration:

> I say nothing as to what the position would be if [the ex-employee] disclosed [the information] out of malice or spite or sold it to a newspaper for money or for reward. That indeed would be a different matter. It is a great evil when people purvey scandalous information for reward.[100]

Yet subsequent cases have not embraced this approach. Indeed, Lord Denning himself was quite prepared to overlook the fact that an ex-Scientology student and a rock group's former public relations officer were paid handsomely for their disclosures.[101] In the *British Steel Corporation* case, Lord Fraser went further and pronounced that the discloser's motives were completely irrelevant[102] — a view Stephenson LJ repeated four years later in the *Lion Laboratories* case.[103]

However this view is not universally held. More recently, for example, Scott J stated that the discloser's motives were irrelevant where a 'narrow' disclosure is contemplated.[104] This leaves open the possibility of examining the discloser's motives where a widespread disclosure is envisaged. By contrast, the Ontario Law Reform Commission recommended that motivation be immaterial where the disclosure relates to serious crime. In all other cases, it suggested, the discloser should act in good faith.[105] Ricketson and Gurry represent yet another viewpoint: they both suggest that the discloser's motives should only be taken into account in 'borderline' cases.[106]

These proposed limitations should not be adopted for three reasons. First, focusing on the discloser's motives may deflect attention from the pivotal inquiry: is the public interest best served by disclosure or non-disclosure? If

[98] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 283 per Lord Goff (emphasis added). See also *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344, 377. What is 'reasonable' will depend on the circumstances. For example, it may be difficult to substantiate an allegation where government secrets are concerned: The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 223 per Bingham LJ (CA).

[99] See Cripps, op cit (fn 38) 88.

[100] *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, 406.

[101] *Hubbard* v *Vosper* [1972] 2 QB 84, and *Woodward* v *Hutchins* [1977] 1 WLR 760 respectively.

[102] *British Steel Corporation* v *Granada Television Ltd* [1981] AC 1096, 1202.

[103] *Lion Laboratories Ltd* v *Evans* [1985] 1 QB 526, 536.

[104] *In re A Company's Application* [1989] Ch 477, 482.

[105] Ontario Law Reform Commission, *Political Activity, Public Comment and Disclosure by Crown Employees* (1986) cited in J Starke, 'The Protection of Public Service Whistleblowers — Part I' (1991) 65 ALJ 205, 217.

[106] Ricketson, op cit (fn 6) 206–7; Gurry, op cit (fn 19) 344.

the public interest *is* advanced by disclosure, it is difficult to see how this can be affected by the discloser's ulterior motives.[107]

Second, the 'impurity' of the discloser's motives may be accounted for in other ways. The discloser may, for example, incur costs penalties.[108] Or the discloser may have to account for any profits made from the disclosure.[109]

And third, investigating motives involves immense practical difficulties.[110] This arduous task is unnecessary and should not affect the scope of the public interest exception.

2.6 *The Mode of the Information's Acquisition*

The relevance of how the discloser acquired the information is equally contentious. The UK Law Commission recommended that the courts take this factor into account.[111] This recommendation is unfortunate for two reasons. First, it sits uncomfortably with the fact that information obtained by reprehensible means may not be the legitimate subject of an obligation of confidence in the first place.[112] To hold that information acquired through industrial espionage is the subject of an obligation of confidence[113] stretches and strains the umbrella of confidentiality that, as Laster correctly points out, heralds an 'original confidential *relationship*' as its central tenet.[114]

Second, even if this conceptual extension were to be made, the mode of the information's acquisition should not affect the strength of any public interest in disclosure. The two issues must be kept separate.[115] Stephenson LJ recognised this fact in the *Lion Laboratories* case, where he noted that the public interest may demand disclosure 'even if the information ha[d] been *unlawfully obtained* in flagrant breach of confidence'.[116] Similarly, the fact that the discloser in *Cork* v *McVicar* had obtained the information by secretly rec-

[107] Cripps, op cit (fn 38) 86; E Lomnicka, 'The Employee Whistleblower and His Duty of Confidentiality' (1990) 106 LQR 42, 44–5.

[108] *Church of Scientology of California* v *Kaufman* [1973] RPC 635, 660.

[109] See Part Two infra.

[110] Queensland Electoral and Administrative Review Commission, *Protection of Whistleblowers*, Issues Paper No 10 (December 1990) 67 cited in J Starke, 'The Protection of Public Service Whistleblowers — Part II' (1991) 65 ALJ 252, 261–2.

[111] UK Law Commission, op cit (fn 94) 139.

[112] This issue is beyond the scope of this article. See D Laster, 'Breaches of Confidence and of Privacy by Misuse of Personal Information' (1989) 7 *Otago Law Review* 31, 36, 51–6; A Coleman, 'Breach of Confidence: The Law Commission Report (No 110)' [1982] 3 *European Intellectual Property Review* 73, 75; cf G Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 LQR 463; The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 281 per Lord Goff (HL); G Wei, 'Surreptitious Takings of Confidential Information' [1992] *Legal Studies* 302.

[113] As was held in *Franklin* v *Giddons* [1978] 1 Qd R 72.

[114] Laster, 'Breaches', op cit (fn 112) 36 fn 40 (emphasis added).

[115] Coleman, 'Breach of Confidence', op cit (fn 112) 75; A Coleman, 'Cork v McVicar: Confidential Information and the Public Interest in Disclosure' [1985] 8 *European Intellectual Property Review* 234, 235; R Wacks, *Personal Information: Privacy and the Law* (1989) 113.

[116] *Lion Laboratories Ltd* v *Evans* [1985] 1 QB 526, 536 (emphasis added).

ording an 'off-the-record' conversation did not prevent the disclosure from going ahead.[117]

A person who used reprehensible means to obtain information should be entitled to rely upon the exception to disclose it. As will be seen in Part Two, the preferable solution, if the courts wish to discourage future wrongdoing, is to penalise the discloser in some other way.[118]

As has been shown, the second stage of the three-tiered approach requires the courts to examine all the relevant circumstances surrounding the disclosure. The third stage requires the courts, in the light of these circumstances, to assess whether or not the public interest in disclosure should prevail so that the exception may be invoked.

3. The Assessment of the Public Interest Equation

The scope of the public interest exception will be influenced by the test applied to assess the public interest equation. More disclosures will be allowed under a pro-disclosure test than under a pro-confidentiality test. Unfortunately, however, there is some uncertainty as to which test will be applied where a remedy is sought at trial. Similar yet distinct problems arise where a confider seeks to restrain a disclosure by way of an interlocutory injunction.

3.1 *The Test at Trial*

The confider's choice of remedy at trial is largely influenced by whether or not the disclosure has occurred. A permanent injunction will be sought to restrain future disclosures because this will ensure that the value of the confidence is preserved. Generally speaking, however, an injunction would be pointless where the disclosure has already occurred. In this situation, the confider will seek pecuniary relief because the value of the confidence has been lost: the 'genie cannot be put back into the bottle'.[119]

In determining whether or not to grant injunctive or pecuniary relief, a court must assess the public interest equation. This assessment involves the application of one of two tests. The first test embodies a strong presumption that confidences should be protected: a disclosure will only be justified if it fulfils a 'higher duty' that 'overrides' the duty of confidentiality. The second test is not so constrained: a disclosure will only be justified if, after 'balancing' all the relevant public interests, the public interest in disclosure 'outweighs' the public interest in maintaining confidentiality.

[117] *Cork* v *McVicar, The Times*, 31 October 1984, 27. It has also been held that information that has been overheard may be disclosed: *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344, 361,377.

[118] Y Cripps, 'The Public Interest Defence to the Action for Breach of Confidence and the Law Commission's Proposals on Disclosure in the Public Interest' (1984) 4 *Oxford Journal of Legal Studies* 361, 388.

[119] Thompson, op cit (fn 19) 78.

(i) *The Higher Duty Test*

Under the higher duty test, a confidant will be able to rely on the public interest exception if, in the light of all the relevant circumstances, the public interest in disclosure *overrides* the public interest in confidentiality. The underlying tenet of this test is that there is a very strong public interest in the preservation of confidences. A confidence may only be broken if, as Viscount Finlay stated in *Weld-Blundell* v *Stephens*,[120] a 'higher' or 'public' duty demands it. Rath J cited this dictum with approval in the *Castrol Australia* case, and confined the scope of this 'duty' to revealing misconduct.[121] In the *Corrs Pavey* case, Gummow J criticised the balancing test as being 'picturesque but somewhat imprecise', but did not expressly endorse the 'higher duty' test.[122]

In *Smith Kline & French Laboratories (Australia) Ltd* v *Secretary, Department of Community Services and Health*, however, it is possible to discern Justice Gummow's preference for the 'higher duty' test from the following oblique passage:

> Equitable principles are best developed by reference to *what conscionable behaviour demands of the defendant* not by 'balancing' and then overriding those demands by reference to matters of social or political opinion.[123]

This reference to 'conscionable behaviour' accords with the fact that the 'higher duty' test focuses on the morality of the *defendant's* behaviour in breaking confidence. By contrast, by adopting the 'balancing' approach, the courts may shift their focus to the morality of the *plaintiff's* case in seeking to prevent a disclosure.[124]

(ii) *The Balancing of Public Interests Test*

Under the balancing of public interests test, a confidant will be able to rely on the public interest exception if, in the light of all the circumstances, the public interest in disclosure *outweighs* the public interest in confidentiality. Lord Denning first penned this test in *Woodward* v *Hutchins*: 'it is a question of balancing the public interest in maintaining the confidence against the public interest in [disclosure].'[125] This test has been widely accepted in England: it

[120] [1920] AC 956, 965. See also *Tournier* v *National Provincial and Union Bank of England* [1924] 1 KB 461, 473 per Bankes LJ.

[121] *Castrol Australia Pty Ltd* v *EmTech Associates Pty Ltd* (1980) 51 FLR 184, 214. Whether the public interest in the prevention of harm only extends to misconduct is an issue that arises at the *first* stage, irrespective of the test applied at the *third* stage. See Part One, 1.1 (ii)–(iv) supra (cf Finn, op cit (fn 30) 507).

[122] *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428, 445.

[123] (1990) 95 ALR 87, 125 (emphasis added).

[124] Except where government secrets are concerned, this shift in focus does not involve a reversal of the onus of proof: the confidant must prove that the public interest is best served by disclosure: fn 57 supra and accompanying text.

[125] [1977] 1 WLR 760, 764.

has been invoked where the disclosure involved a breach of a personal, commercial or public sector confidence.[126]

By contrast, its reception in Australia has been poor. Despite receiving tacit support in a handful of decisions,[127] it has been fiercely opposed in others for being 'an invitation to judicial idiosyncrasy'.[128] Several commentators share this view. Jones, for example, colourfully suggests that the courts should not be 'encouraged to ride the unruly horse of public policy'.[129] Injecting naked inconsistency into the law is obviously a dangerous pursuit. But the burning issue is: can the unruly horse be tempered to produce consistent results? As will be seen in Part Three, the English experience suggests that the odds are encouragingly strong.

The most attractive feature of the 'balancing' test is that it forces the judiciary to examine why confidentiality should be protected. This question is neatly sidestepped under the 'higher duty' test: the courts are led to presume — in fact strongly presume — that there is an overwhelming public interest in maintaining confidentiality. In reality, however, there are different justifications for preserving personal, trade and government secrets. As will be seen in Part Three, these differences highlight the inappropriateness of the 'blind' protection conferred under the 'higher duty' test.

Despite its appeal, however, it is unclear whether or not the balancing test will be accepted in Australia. Similar uncertainties plague the question of which test should be applied for interlocutory injunctions.

3.2 *The Test for Interlocutory Injunctions*

The issue of whether a court should grant an interlocutory injunction to prevent a proposed public interest disclosure is 'complex and controversial'.[130] The source of this complexity is the uncertainty as to which test should be applied.

In *In re A Company's Application*, Scott J refused to grant an interlocutory injunction on the basis that a 'narrow' disclosure was contemplated.[131] In this case, the plaintiff's ex-employee sought to inform the appropriate regulatory bodies about the plaintiff's commercial improprieties. Since the allegations

[126] For personal secrets, see *Woodward* v *Hutchins* [1977] 1 WLR 760, 764; *X* v *Y* [1988] 2 All ER 648; *W* v *Egdell* [1990] Ch 359. For commercial secrets, see *British Steel Corporation* v *Granada Television Ltd* [1981] AC 1096; *Marcel* v *Commissioner of Police of the Metropolis* [1992] Ch 225. For public sector secrets, see the *UK Spycatcher* case (No 2) [1990] 1 AC 109.

[127] See, eg, *David Syme & Co Ltd* v *General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 306 per Hutley AP, 309 per Samuels JA; The *NSW Spycatcher* case (1987) 10 NSWLR 86, 170 per Kirby P; *Protestant Alliance Friendly Society* v *Australian Financial Press* (unreported, Victorian Supreme Court, 8 December 1988) 7 per Marks J; *Westpac Banking Corporation* v *John Fairfax Group Pty Ltd* (1991) 19 IPR 513, 525 per Powell J.

[128] *Smith Kline & French Laboratories (Australia) Ltd* v *Secretary, Department of Community Services and Health* (1990) 95 ALR 87, 125. See also *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428; *Bacich* v *Australian Broadcasting Corporation* (1992) 29 NSWLR 1.

[129] G Jones, 'The Law Commision's Report on Breach of Confidence' [1982] CLJ 40, 47. See also Finn, op cit (fn 30) 507; Wacks, op cit (fn 115) 102–3.

[130] Wacks, op cit (fn 115) 92 fn 181.

[131] *In re A Company's Application* [1989] Ch 477, 482–3.

fell within the proper scope of the functions of the regulatory bodies in question, Scott J considered that he did not need to examine the substance of the allegation, and refused to award the interlocutory injunction. This is a sensible solution: the regulatory bodies could assess the strength of the allegations. No harm would be done if the allegations turned out to be groundless.

But where the disclosure would be 'harmful', the law is far from settled. Lord Denning, after leaving the question open in *Fraser* v *Evans*,[132] suggested that public interest disclosures be treated in the same way as defamation actions where justification or fair comment is pleaded:

> We never restrain a defendant in a libel action who says he is going to justify.... Nor in an action for breach of confidence, if the defendant has a reasonable defence of public interest. The reason is because the defendant, if he is right, is entitled to publish it; and the law will not intervene to suppress freedom of speech except when it is abused.[133]

Lord Denning echoed these sentiments ten years later when he launched his powerful dissent in the *Schering* case:

> Freedom of the press is of fundamental importance in our society.... It is not to be restricted on the ground of breach of confidence unless there is a "pressing social need" for such restraint.[134]

This obvious bias in favour of disclosure has been extensively criticised, primarily on the basis that the defamation and breach of confidence actions must be treated differently.[135] Further, Lahore suggests that this approach undermines the underlying tenet of the breach of confidence action: 'that information learnt in confidence *should not* be disclosed without the consent of the owner.'[136] But others have argued that the stricter pro-disclosure test must be adopted (at least) where governmental secrets are concerned.[137]

Nevertheless, as Goff J noted in *Kaufman's* case, Lord Denning was not laying down a binding rule. The courts enjoy a wide discretion to award interlocutory injunctions, and there is 'no absolute rule that in confidence cases an injunction must be refused where a reasonable case is made out of

[132] *Fraser* v *Evans* [1969] 1 QB 349, 360–1. Lord Denning noted that there are differences between breach of confidence and libel.

[133] *Hubbard* v *Vosper* [1972] 2 QB 84, 96–7. However, Lord Denning did emphasise the importance of maintaining flexibility in this area. See also *Woodward* v *Hutchins* [1977] 1 WLR 760.

[134] [1982] QB 1, 22. The 'pressing social need' formulation was borrowed from art 10 of the European Convention on Human Rights.

[135] UK Law Commission, op cit (fn 94) 154; Lomnicka, op cit (fn 107) 46; Wacks, op cit (fn 115) 121; R Dean, *The Law of Trade Secrets* (1990) 291; M P Thompson, 'Confidence in the Press' [1993] *The Conveyancer and Property Lawyer* 347, 355. Cf N V Lowe and C J Willmore, 'Secrets, Media and the Law' (1985) MLR 592, 595.

[136] J Lahore, J J Garnsey, and J W Dwyer, *Patents Designs and Trade Marks Law* (Intellectual Property in Australia Service), Vol I, 2124 (emphasis in original).

[137] *The Observer Ltd & Ors* v *United Kingdom* (1992) 14 EHRR 153, 179 (the Commission), 212 per Martens J (in dissent). See also S Coliver, 'Spycatcher — the Legal and Broader Significance of the European Court's Judgment' [1992] *Media Law & Practice* 142, 146.

disclosure in the public interest'.[138] Goff J interpreted Lord Denning's passage in *Hubbard* as merely suggesting that a reasonable claim that the public interest is best served by disclosure was 'a very telling factor' weighing against awarding an injunction.[139]

But subsequent courts have outrightly rejected Lord Denning's approach. The Court of Appeal in the *Lion Laboratories* case, for example, expressly disapproved of the pro-disclosure approach and endorsed the *American Cyanimid* 'balance of convenience' formulation.[140] Under this approach, the court must firstly ask whether there is a serious question to be tried at the final hearing — it must be satisfied that the confider's claim is not vexatious or frivolous.[141]

In assessing whether there is a serious question to be tried, the court must determine whether the proposed disclosure would amount to a breach of confidence. Assuming that this is satisfied, and that damages would not be an appropriate remedy for either party, the court must then ask where the 'balance of convenience lies'.

This determination involves a balancing of the competing public interests involved.[142] Since interlocutory injunctions are designed to maintain the status quo until trial, the courts generally resolve this conflict in favour of non-disclosure. An injunction may be refused, however, where the discloser establishes a 'serious defence of public interest [that] is *very likely* to succeed at trial'.[143]

This is clearly an 'anti-disclosure' test. In light of the need to maintain the status quo until trial, the public interest in disclosure will only outweigh the

[138] [1973] RPC 627, 631.

[139] Ibid.

[140] *American Cyanimid Co* v *Ethicon Ltd* [1975] AC 396. See *Lion Laboratories Ltd* v *Evans* [1985] QB 526, 538 per Stephenson LJ, 550 per Griffiths LJ. See also *Khashoggi* v *Smith* (1980) 124 *Sol J* 149; *Francome* v *Mirror Group Newspapers Ltd* [1984] 1 WLR 892; *Church of Scientology* v *Miller* (unreported, Court of Appeal, 22 October 1987); *Attorney-General* v *Guardian Newspapers Ltd* [1989] 2 FSR 3, 9 per Millett J (endorsed on appeal: [1989] 2 FSR 15, 19 per Donaldson MR); The *UK Spycatcher* case (No 1) [1987] 1 WLR 1248, 1266–7 per Browne-Wilkinson V-C (Ch D).

[141] This 'serious question to be tried' test was adopted in substance but not formally endorsed in *Murphy* v *Lush* [1986] 60 ALJR 523. See also *Australian Coarse Grain Pool Pty Ltd* v *Barley Marketing Board of Queensland* (1982) 57 ALJR 425 per Gibbs CJ; *A* v *Hayden (No 1)* (1985) 59 ALJR 1, 4–5 per Dawson J; *Castlemaine Toohey's Ltd* v *South Australia* (1986) 60 ALJR 679, 681 per Mason ACJ. Nevertheless, there is still some doubt about whether the 'prima facie case' test outlined in *Beecham Group Ltd* v *Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 has been abandoned in Australia.

[142] *Distillers Co (Biochemicals) Ltd* v *Times Newspapers Ltd* [1975] QB 613, 623 per Talbot J; *Sun Printers Ltd* v *Westminster Press Ltd* (1982) 126 *Sol J* 260; *Lion Laboratories Ltd* v *Evans* [1985] QB 523, 538 per Stephenson LJ; *Church of Scientology* v *Miller* (unreported, Court of Appeal, 22 October 1987) 20 per Fox LJ; *Attorney-General* v *Observer Ltd* [1989] 2 FSR 3, 9 per Millett J (endorsed on appeal: [1989] 2 FSR 15, 18–19 per Donaldson MR). Thus this test may be described as a pre-trial 'balancing of the public interests' test. It is important, however, to bear Justice Powell's caveat in mind — he suggested that this balancing exercise can 'rarely, if at all, be satisfactorily carried out at an interlocutory stage of proceedings': *Westpac Banking Corporation* v *John Fairfax Group Pty Ltd* (1991) 19 IPR 513, 525.

[143] *Attorney-General* v *Observer Ltd* [1989] 2 FSR 15, 18 per Donaldson MR (emphasis in original). In *Lion Laboratories Ltd* v *Evans* [1985] QB 526, 538, Stephenson LJ indicated that a defence that *may* succeed would tilt the balance in favour of disclosure.

public interest in confidentiality in extraordinary circumstances. Such circumstances may exist where non-disclosure poses an urgent, immediate and serious danger to the public,[144] although a reasonably foreseeable risk of extreme danger may also suffice.[145]

It is unclear whether this test will be accepted in Australia. This problem may therefore be added to the list of uncertainties that surround the scope of the public interest exception.

PART TWO: THE EFFECTS OF THE EXCEPTION'S APPLICATION

The first part of this article highlighted the fact that the *scope* of the public interest exception remains unclear. A similar aura of uncertainty surrounds the *effects* of the exception's application. Indeed, a disturbing degree of judicial agnosticism surrounds the conceptual and remedial consequences that flow from a conclusion that the public interest is best served by disclosure.[146] This is an unfortunate phenomenon. The consequences that flow from applying the exception deserve close attention.

1. The Conceptual Consequences

The conceptual consequences of the exception's application may be analysed in two ways. Under the first analysis, the exception operates to deny the existence of a duty of confidentiality. In other words, the information in question is not classified as 'confidential' because the public interest is best served by disclosure.

Under the second analysis, the exception operates as a defence to the alleged breach of confidence. Thus, unlike the first approach, the courts recognise that the confidant owes a duty of confidentiality. However, this duty is not enforced because the public interest is best served by disclosure. It is unclear whether this defence is 'complete' or whether it only acts as a 'discretionary bar' to the injunctive relief sought.

From a practical perspective, there is usually little difference between the two approaches. Indeed, if the defence is 'complete', the two conceptual

[144] *Duncan* v *Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, 521. For an analysis of the requirement of 'immediacy of harm', see R J Paterson, 'AIDS, HIV Testing, and Medical Confidentiality' (1991) 7 *Otago Law Review* 379, 394–5, and Bok, op cit (fn 84) 215.

[145] *W* v *Egdell* [1990] 2 WLR 471, 493 per Bingham LJ.

[146] The practical consequences of 'whistleblowing', particularly for public and private sector employees, have been examined elsewhere. See B M Debelle, 'Protecting Whistleblowers' (1993) 67 ALJ 249; J Starke, 'The Protection of Public Sector Whistleblowers' (1991) 65 ALJ 205 (Part I), 252 (Part II); Queensland Electoral and Administrative Review Commission, op cit (fn 110); Cripps, *Legal Implications*, op cit (fn 38) 221–47, 258–64; Bok, op cit (fn 84) 210–13.

alternatives effectively merge into one: the confider is left without a remedy because the public interest is best served by disclosure.[147]

However, the theoretical distinction between the approaches assumes practical significance if the defence operates as a 'discretionary bar'. Under this approach, an injunction restraining disclosure will be refused, but the confider may be entitled to a pecuniary remedy. This remedial 'half-way house' is clearly not possible if a duty of confidence did not arise in the first place.

The Anglo-Australian courts have oscillated between these two conceptual approaches.

1.1 *The First Analysis: No Obligation of Confidentiality*

In *Gartside* v *Outram*, Wood V-C stated that 'there is *no confidence* as to the disclosure of iniquity'.[148] But there is no logical reason to confine the 'no confidentiality' approach to cases involving iniquity. In *Fraser* v *Evans*, where the notion of iniquity was subsumed within the notion of 'just cause or excuse', Lord Denning stated that

> there are some things which may be required to be disclosed in the public interest, in *which event no confidence can be prayed in aid to keep them secret.*[149]

This passage is clearly consistent with the notion that no obligation of confidence will arise with respect to information that should be disclosed in the public interest.[150]

In *Malone* v *Metropolitan Police Commissioner*, Megarry V-C endorsed the 'just cause or excuse' formulation, and stated (in obiter) that if the disclosure of otherwise confidential information advanced the public interest then it was 'subject to *no duty* of confidence.'[151] More recently, Scott J expressed his preference for the no confidentiality approach by seeking to define the breadth of the obligation of confidence by reference to the public interest. His Honour stated that a confidant would not be fixed with 'an obligation of conscience, an equitable obligation' with respect to information that ought to be disclosed in the public interest.[152]

In Australia, Gummow J has embraced the 'no confidentiality' approach:

[147] Ricketson and Cripps suggest that the 'no confidentiality' approach is different because it precludes an examination of the circumstances surrounding disclosure. However, later cases do not endorse this approach: see Part One, 2 supra.

[148] (1856) LJ Ch 113, 114 (emphasis added).

[149] [1969] 1 QB 349, 362 (emphasis added).

[150] P M North, 'Breach of Confidence: Is There a New Tort?' (1972) *Journal of Society of Public Teachers of Law* 149, 169; Ricketson, op cit (fn 6) 191; R Meagher, W Gummow and J Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) 882; cf Cripps who states that Lord Denning supported the second approach: Cripps, *Legal Implications*, op cit (fn 38) 22.

[151] [1979] Ch 344, 377 (emphasis added). The fact that Megarry V-C examined the circumstances of the disclosure does not indicate that he preferred the 'discretionary bar' approach (cf Ricketson, op cit (fn 6) 204).

[152] *W* v *Egdell* [1990] Ch 359, 394; see also *In re A Company's Application* [1989] Ch 477, 482; The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 159–60 (Ch D).

> It is not a question of whether there is some "public interest" defence to the alleged breach . . . but rather one of the *content of any such obligation in its inception.*[153]

However a number of authorities cast some doubt on this view. These authorities, which view the exception as a defence to a breach of an existing obligation, will now be examined.

1.2 *The Second Analysis: A Defence*

Griffith LJ in the *Lion Laboratories* case,[154] Jenkinson J in the *Corrs Pavey* case,[155] and Powell J in the *NSW Spycatcher* case[156] confidently pronounced that the modern authorities conclusively establish a public interest 'defence'. This confidence, however, is somewhat misplaced. Upon closer inspection, it appears that nearly all of the authorities relied upon are either ambiguous or simply unhelpful.

In *Initial Services*, for example, Salmon LJ preferred the 'no confidentiality' approach, whilst Lord Denning's view was ambiguous. His Lordship referred to a 'defence' that excused disclosure, yet stated that 'there is an argument at least that such information was *not within the realm of confidence* to which the master could hold his servant'.[157]

The uncertainty surrounding this issue is confounded by Lord Denning's approach in subsequent cases. As noted above, for example, his judgment in *Fraser* lends support for the 'no confidentiality' approach,[158] and yet he suggested that the exception operated as a defence in *Hubbard* v *Vosper*.[159]

Woodward v *Hutchins*[160] is equally unhelpful. Although his Lordship outlined the balancing test to be applied, he failed to describe the conceptual consequences of its application. Lawton and Bridge LJJ offered no assistance here. Similarly, most of the judges in the *British Steel Corporation* case focused their attention on the balancing test and overlooked the exact ramifications of its application. Only Lord Wilberforce and Viscount Dilhorne suggested that the public interest was a defensive consideration that the courts must take into account when exercising their discretion to award a remedy.[161]

The earlier Australian cases also fail to provide substantial support for the view that the exception operates as a defence. Although Rath J in *Castrol*

[153] *Smith Kline & French Laboratories (Australia) Ltd* v *Secretary, Department of Community Services and Health* (1990) 95 ALR 87, 125 (emphasis added). See also *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428.

[154] *Lion Laboratories Ltd* v *Evans* [1985] 1 QB 526, 550.

[155] *Corrs Pavey* v *Collector of Customs* (1987) 74 ALR 428, 432 (Sweeney J agreed).

[156] The *NSW Spycatcher* case (1987) 8 NSWLR 341, 380.

[157] *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, 406 per Lord Denning (emphasis added), 409–10 per Salmon LJ.

[158] Footnote 149 supra and accompanying text.

[159] [1972] 2 QB 84, 96. Megaw and Stephenson LJJ did not consider the issue. In *Beloff* v *Pressdram* [1973] 1 All ER 241, 260 Ungoed-Thomas J also treated the exception as a defence. See also *Church of Scientology* v *Kaufman* [1973] RPC 627, 631 per Goff J.

[160] [1977] 1 WLR 760.

[161] [1981] AC 1096, 1174–5 per Lord Wilberforce, 1184 per Viscount Dilhorne.

referred to a 'defence' that would 'excuse' publication,[162] Sheppard J in *Allied Mills* merely stated that the 'public interest in the disclosure . . . of iniquity will always *outweigh* the public interest in the preservation of . . . confidential information.'[163] References to 'balancing' and 'outweighing' are ambiguous. It remains unclear whether the public interest operates as a defensive consideration or whether it prevents the obligation of confidence from arising.

Despite its apparently shaky foundations, the view that the public interest exception operates as a defence received tacit approval when the *Spycatcher* saga reached the Australian appellate courts. Kirby P referred to a public interest 'defence' on several occasions,[164] and the High Court assumed, without discussion, that the exception acts as a defensive consideration.[165] Thus, assuming that the public interest exception is a defence, the issue remains: is it a 'complete' defence, or merely a discretionary bar?

(i) *A Complete Defence or Discretionary Bar?*

In *Attorney-General for the United Kingdom* v *Wellington Newspaper Ltd*, Cooke P held that the public interest defence was a complete defence.[166] This means that if a court refuses to award an injunction because the public interest is best served by disclosure, it cannot require the defendant to pay compensation for loss or account for any profits resulting from disclosure. In other words, like the 'no confidentiality' approach, the defence completely extinguishes the confider's rights under the breach of confidence regime.

This approach has not been universally embraced. Other cases have not treated the defence as a complete answer to a breach of confidence action, but as a discretionary bar to the injunctive relief sought. Accordingly, the confider may still be entitled to pecuniary relief.

The origins of the discretionary bar theory can be traced to *Weld-Blundell* v *Stephens*, where Warrington LJ interpreted *Gartside* as merely an 'expression of the opinion . . . against the exercise of the equitable jurisdiction' to award an injunction.[167] More recent support can be found in *Church of Scientology* v *Kaufman* where Goff J stated that 'a reasonable case of defence of disclosure in the public interest is a very telling factor weighing against the grant of an interlocutory injunction.'[168] At the trial, Goff J felt that damages would be an appropriate remedy, even though the harm alleged was 'problematical and speculative in the extreme'.[169] Similarly, in *Woodward* v *Hutchins*, two members of the Court of Appeal adverted to the possibility of awarding a pecuniary

[162] *Castrol Australia Pty Ltd* v *EmTech Associates Pty Ltd* (1980) 51 FLR 184, 214–16.
[163] *Allied Mills Industries Pty Ltd* v *Trade Practices Commission (No 1)* (1981) 55 FLR 125, 166 (emphasis added).
[164] The *NSW Spycatcher* case (1987) 10 NSWLR 86, 166–71 (CA).
[165] *Attorney-General (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40.
[166] [1988] 1 NZLR 129, 177.
[167] [1919] 1 KB 520, 534. This is a creative interpretation. In *Corrs Pavey* (1987) 74 ALR 428, 450, Gummow J noted that there was 'little in what Wood V-C said [that] supports it'.
[168] [1973] RPC 627, 631.
[169] [1973] RPC 635, 658.

remedy after refusing an injunction to prevent a public interest disclosure.[170] In addition, Lord Griffiths in the *UK Spycatcher* case (No 2) assumed that the exception operated as a defence, and stated:

> There may be sound reasons for not granting an injunction after a breach of a *commercial* confidence when it may be possible to provide recompense by way of damages.[171]

His Lordship did not, however, elaborate on what those reasons might be. One reason may be that although the public interest is best served by disclosure, there is a need to deter future wrongdoing — a need that may be satisfied by requiring the discloser to pay a pecuniary sum to the confider.[172]

The judiciary must not countenance blatant unconscionability by over-extending the umbrella of the public interest exception. The courts should not, for example, encourage people to commit criminal acts to acquire information that they merely suspect to be in the public interest.[173] Nor should the courts encourage confidants to make scandalous profits. A balance must be struck between the competing interests involved. A sensible solution would be to penalise the confidant where that would deter similar confidants from behaving unconscionably in the future.

The following example illustrates the problem. After breaking into a police computer system, a voyeuristic computer hacker scans a number of sensitive documents. She stumbles over a document revealing police corruption and sells its contents to the media for $10 000. The police seek an injunction to prevent disclosure. Assuming that a court finds a duty of confidence and does not award an injunction because the public interest is best served by disclosure, should the hacker be entitled to keep the $10 000?

It is arguable that the hacker should not have to disgorge the money because confidants should not be discouraged from advancing the public interest.[174] But surely the law should not reward such behaviour. A person whose sole desire is to make a scandalous profit should not be entitled to keep the benefits from a disclosure that also happens to advance the public interest. This fact, coupled with the fact that the courts may seek to deter whistleblowers from

[170] [1977] 1 WLR 760, 764 per Lord Denning, 765 per Bridge LJ. See also *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1, 17 per Lord Denning MR; *Lion Laboratories Ltd* v *Evans* [1985] 1 QB 526, 553 per Griffiths LJ.

[171] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 271 (HL) (emphasis added). This passage echoes Justice Megarry's dictum that, in the industrial and commercial sphere, 'the essence of the duty seems more likely to be that of not using without paying, rather than of not using at all': *Coco* v *A N Clark (Engineers) Ltd* [1969] RPC 41, 50.

[172] This reasoning applies irrespective of the nature of the secret.

[173] See *Francome* v *Mirror Group Newspapers Ltd* [1984] 1 WLR 892. But as Wacks points out, the mode of acquisition should not influence a court's decision about whether an *injunction* should be granted: op cit (fn 115) 113. Similarly, even though *pecuniary* relief may be appropriate where the confidant sought to make a scandalous profit, the confidant's motives should not affect a court's decision about *injunctive* relief. The courts may also impose costs penalties to dissuade similar disclosures in the future.

[174] See Lord Goff of Chieveley and G Jones, *The Law of Restitution* (3rd ed, 1986) 681. See also G Jones, 'Breach of Confidence — After *Spycatcher*' (1989) 42 *Current Legal Problems* 49, 66.

making similar disclosures in the future, leads to the conclusion that the more satisfactory solution is to refuse injunctive relief but to force the hacker to account for the $10 000.

But to whom should this account be made — the confider or the third party who paid over the money? Admittedly, there is a strong argument that the courts should be reluctant to reward the 'guilty' confider with a remedy when the confidant has disclosed something which ought not to have been kept secret. But there may be circumstances where justice is better served by forcing the 'unconscionable' confidant to pay over the money to the 'guilty' confider. The flexibility of the discretionary bar theory allows the judiciary to deal with such a scenario in this manner.

Alternatively, the justice of the case may demand that the unconscionable confidant repay the money to the third party. The precise basis of such an order is unclear. Under general contractual principles, a party cannot recover money paid under a contract which is contrary to public policy — the loss is deemed to lie where it falls.[175] Thus, unless the third party can invoke an exception to this principle (for example, the parties were not *in pari delicto*)[176] he or she cannot recover the money via the contractual route. Under a restitutionary analysis, the third party may have difficulty in establishing that the confidant was unjustly enriched by the payment. Although a creative court may hold that the unjust factor is supplied by illegality, such a court may have some reservations about conferring a windfall benefit on a party who received all the information for which he or she contracted.

Needless to say, this is a complicated area that has not been considered by the courts. The view advocated here is one of flexibility: the courts should be able to award pecuniary relief to the confider (under the discretionary bar theory) or to the third party (under contractual or restitutionary principles) if the circumstances of the case so demand.

2. Remedial Consequences

The obvious remedy for a proposed breach of confidence is an injunction. However, as was seen in the first part, an interlocutory or final injunction will be refused if a court determines that the public interest is best served by disclosure.[177] Similarly, an injunction will not be ordered if the public interest exception is successfully invoked to justify a disclosure that has occurred.

The question that remains in both situations is whether or not the confider is entitled to pecuniary relief even though injunctive relief is refused. As was seen in the first section of this part, this solution is only conceptually possible if the courts adopt the 'discretionary bar' approach. Even if this approach is adopted, the courts will be reluctant to award a pecuniary remedy because that may discourage future public interest disclosures.

[175] For a general discussion, see J W Carter and D J Harland, *Cases and Materials on Contract Law in Australia* (2nd ed, 1993) ch 17. See also D W Greig and J L R Davis, *The Law of Contract* (1987) 1159–69.

[176] Ibid.

[177] See Part One, 3 supra.

Assuming, however, that the discretionary bar approach is adopted, and that a court wishes to deter future disclosures by awarding pecuniary relief, the question of whether such relief is available should be considered.

2.1 *The Availability of Relief: Damages*

Where the source of the obligation is an express contractual clause, the confider has a legal right to sue for damages for breach. By contrast, a cloud of ambivalence surrounds the issue of whether a court can award damages for a non-contractual breach of confidence.

In the *UK Spycatcher* case (No 2), Lord Goff concluded that the remedy of damages was now available, 'despite the equitable nature of the wrong', for any present or future harm caused by a non-contractual breach.[178] But other judges at the opposite end of the spectrum have concluded that damages were unavailable.[179] And there is a range of views in between. In *Malone's* case, for example, Megarry V-C concluded that damages were available for *future* harm, but not for harm already sustained.[180]

This division of opinion reflects the deeper problem of identifying the precise jurisdictional source of a compensatory remedy. Purists stress that Lord Cairns' 'damages' are unavailable because the reference to 'wrongful acts' in s 38 of the *Supreme Court Act* 1986 (Vic) does not encompass purely equitable wrongs. To award the common law remedy of damages in equity's exclusive jurisdiction, they allege, amounts to a blatant case of falling foul of the fusion fallacy.[181] But the prevailing view is probably that, under a 'beneficent' interpretation of the section, 'wrongful acts' should not be so narrowly construed.[182]

Nevertheless, the issue is far from settled. Thankfully, there is another possible jurisdictional source: the court's inherent equitable powers. As Spry notes, the courts should be more willing to exercise these powers where justice requires it, despite the fact that 'formerly this relief might have been refused as a matter of practice.'[183]

[178] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 286, 288 (HL).

[179] *Aquaculture Corporation* v *NZ Green Mussel Co (No 2)* (1986) 1 NZIPR 667, 673 per Prichard J. Note that Prichard J was overruled on appeal: *Aquaculture Corporation* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299.

[180] *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344, 360.

[181] *Aquaculture Corp* v *NZ Green Mussel Co (No 2)* (1986) 1 NZIPR 667, 673; *Concept Television Productions Pty Ltd* v *Australian Broadcasting Corporation* (1988) 12 IPR 129, 136 per Gummow J; Meagher, Gummow and Lehane, op cit (fn 150) 639–50; J Stuckey-Clarke, '"Damages" for Breaches of Purely Equitable Rights: The Breach of Confidence Example' in P Finn (ed), *Essays on Damages* (1992) 69, 72.

[182] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 286 per Lord Goff (HL); *Talbot* v *General Television Corporation Pty Ltd* [1980] VR 224; S Ricketson, 'Confidential Information — A New Proprietary Interest? Part II' (1978) 11 MULR 289, 294; S Ricketson, *The Law of Intellectual Property* (1984) 844; Gurry, op cit (fn 19) 429; Wacks, op cit (fn 115) 80 fn 131.

[183] I C F Spry, *The Principles of Equitable Remedies* (4th ed, 1990) 622. See also Meagher, Gummow and Lehane, op cit (fn 150) 887–9; I E Davidson, 'The Equitable Remedy of Compensation' (1982) 13 MULR 349, 396; J E Stuckey, 'The Equitable Action for Breach of Confidence: Is Information Ever Property?' (1980–82) 9 *Syd LR* 402, 430–3; P W Michalik, 'The Availability of Compensatory and Exemplary Damages in Equity: A

Irrespective of the source of the compensatory remedy, the question remains: what types of harm are compensable? In the breach of confidence cases that have not involved a public interest disclosure, damages have generally been awarded for commercially quantifiable losses.[184] Thus the courts may be reluctant to require the discloser to compensate the confider for a breach that caused mental distress, or harm to the confider's reputation.[185]

In the unlikely event that the plaintiff will be compensated for a public interest breach, the purpose of the remedy will be the desire to deter further 'borderline' disclosures. This purpose is best realised by awarding compensation for the loss suffered — even if that loss is difficult to quantify in monetary terms.[186] Any other approach would introduce unnecessary complexity into this difficult area of law.[187]

2.2 *The Availability of Relief: An Account of Profits*

The traditional view is that a plaintiff is not entitled to an account of the profits made from a defendant's breach of contract. Nevertheless, this view has recently been subjected to judicial and academic attacks.[188] This suggests that an account may be ordered for a breach of a contractual confidence.

By contrast, an account of profits is the traditional pecuniary remedy for a breach of an equitable obligation.[189] The remedy is based on the principle that a wrongdoer may not keep his or her 'ill-gotten gains'. Thus the confidant may be required to account for an amount that is proportionate to the profits made

Note on the *Aquaculture* Decision' (1991) 21 *Victoria University of Wellington Law Review* 391, 406.

184 See, eg, *Seager* v *Copydex* [1967] 1 WLR 923, 931–2. However, the fact that the assessment of 'damages' is difficult does not 'relieve the Court of its duty to assess them': *Talbot* v *General Television Corporation Pty Ltd* [1980] VR 224, 251 per Young CJ (FC).

185 Stuckey, op cit (fn 183). There is no authority to support an award of damages for mental distress caused by a breach of confidence: UK Law Commission, op cit (fn 94) 68. Damages for mental distress caused by breach of contract are recoverable if the parties expressly or implicitly agreed to prevent such harm: *Heywood* v *Wellers* [1976] QB 446, 461 per James LJ; *Baltic Shipping Company* v *Dillon* (1993) 176 CLR 344.

186 For a general discussion about the assessment of damages for breach of confidence, see Gurry, op cit (fn 19) 442–8. See also *Titan Group Pty Ltd* v *Steriline Manufacturing Pty Ltd* (1990) 19 IPR 353 and R Plibersek, 'Assessment of Damages for Breach of Confidence in England and Australia' [1991] 8 *European Intellectual Property Review* 283.

187 Victorian Legal and Constitutional Committee, *Privacy and Breach of Confidence* (1990) 46.

188 *Snepp* v *United States* 100 S Ct 763 (1980); *Hospital Products Ltd* v *United States Surgical Corporation* (1984) 156 CLR 41, 124–5 per Deane J; G Jones, 'The Recovery of Benefits Gained from A Breach of Contract' (1983) 99 LQR 443; P Birks, 'Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 421. Cf J W Carter and A Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract' (1993) 23 UWALR 49, 68.

189 It has been awarded in breach of confidence cases: *Peter Pan Manufacturing Corporation* v *Corsets Silhouette Ltd* [1964] 1 WLR 96; *Ansell Rubber Co Pty Ltd* v *Allied Rubber Industries Pty Ltd* [1967] VR 37; The *UK Spycatcher* case (No 2) [1990] 1 AC 109.

from the breach.[190] Since this remedy is usually cumbersome and plagued with immense practical difficulties, the courts will probably only order an account where it is 'practical and simple to do so'.[191]

In summary, therefore, a plaintiff confider may be entitled to pecuniary relief, notwithstanding the fact that the public interest is best served by disclosure, if:

(1) the discretionary bar approach is adopted;
(2) a court wishes to deter future whistleblowers; and
(3) the particular pecuniary remedy is available.

PART THREE: A CRITICAL OVERVIEW AND RATIONALISATION

Information is an instrument of power. By preserving confidences — by protecting secrecy — the law facilitates control over information. This controlling process is empowering because it allows the 'controllers' of information to influence what others know and therefore how they behave.[192] This process of empowerment is fundamental to our society. In the realm of personal confidences, individuals can maintain an acceptable level of autonomy and 'information' privacy by controlling the frequency and extent of disclosures about their private lives. In the commercial sphere, companies can retain a competitive advantage by keeping trade secrets from their competitors. And in the public sector, governments can protect national security by preserving the secrecy of sensitive information.

But power is dangerous when it is abused. Confidentiality can be used as a device to deflect legitimate public scrutiny if it is manipulated to mask a destructive or harmful practice. Thus the 'controllers' must be controlled to exercise their power in a non-destructive manner. In the context of the breach of confidence action, the primary controlling device is the public interest exception.

The scope of this exception — and thus of confidentiality — ultimately depends on one's initial premise.[193] One may believe that confidentiality must be maintained unless there is a compelling reason for disclosure. Or one may start from the other end of the spectrum and demand that all information be freely available unless there is a strong reason for secrecy. I will define these

[190] *Colbeam Palmer Ltd* v *Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 34; *Dart Industries Inc* v *Decor Corporation Pty Ltd* (1993) 116 ALR 385. See also F Patfield, 'The Remedy of Account of Profits in Industrial and Intellectual Property Litigation' (1984) 7 UNSWLJ 189.

[191] Gurry, op cit (fn 19) 423. See also *Aquaculture Corp* v *NZ Green Mussel Co (No 2)* [sic] (1986) 10 IPR 319, 332 per Prichard J.

[192] Confidentiality disempowers those outside the confidential relationship because they are *deprived* of information.

[193] Laster, 'Commonalities', op cit (fn 21) 163.

approaches as the 'Red Light' and 'Green Light' theories of confidentiality respectively.[194] The features of these theories will now be explored.

1. The Red Light Theory of Confidentiality

Red Light theorists herald the breach of confidence action as an invaluable instrument for controlling the distribution of information and for protecting confidences. Gurry is a Red Light theorist: 'the law's starting-point [is] that confidences will be enforced and [the courts must then] determine when and how other interests may effect [sic] their enforcement.'[195]

Thus, under this approach, the courts must start from the premise that confidences *will* be enforced unless the public interest is best served by disclosure. But this theory does not simply outline the legal 'starting point'; it also embodies a strong presumption that confidences will be protected. Red Light theorists support this stance by placing considerable weight on the various justifications for protecting personal, commercial and governmental confidences.

1.1 *Personal Secrets*

In the *UK Spycatcher* case (No 2), Donaldson MR recognised the 'inherent public interest' in protecting confidences, and opined that

> life would be intolerable in personal and commercial terms, if information could not be given or received in confidence and the right to have that confidence respected supported by the force of law.[196]

But *why* would life be intolerable? *Why* should personal secrets be protected? There are three main justifications for protection.

First, the right to restrict the spread of personal information is grounded in respect for the *individual*. Indeed, this right of 'information privacy'[197] is central to human dignity. It allows individuals to determine *what* will be known about them, *who* will know it, and *when* they will know it. Without this control, individuals may suffer ridicule, their reputation may be harmed, or their relationships may deterioriate. And, most importantly, they would lose their sense of autonomy, their sense of self.

The second reason is based on the respect for *relationships* of intimacy and trust. The protection of confidences serves an important social purpose: to protect the 'relationships which constitute the social and economic fabric' of society from the risk that one of the parties may abuse 'information naturally transmitted in the course of that relationship.'[198] Therefore, not only is an individual's right to keep information private recognised, the right to *share*

[194] This image was first used by Harlow and Rawlings in the context of judicial review of administrative action: C Harlow and R Rawlings, *Law and Administration* (1984) 1–59.
[195] F Gurry, 'Breach of Confidence' in P Finn (ed), *Essays in Equity* (1985) 110, 125.
[196] [1990] 1 AC 109, 177–8 (CA).
[197] 'This right to personal privacy is clearly one which the law should in this field seek to protect': The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 255 per Lord Keith (HL).
[198] W Wilson, 'Privacy, Confidence and Press Freedom: A Study in Judicial Activism' (1990) 53 MLR 43, 50, 54.

such information in certain relationships is legitimised. Put simply, confidences are enforced to encourage candour, trust, loyalty and good faith in these relationships.[199] This allows us to 'nurture the social bonds and co-operative efforts through which we express our individuality and pursue common purposes.'[200]

The third reason, which is inextricably linked with the second, is concerned with the probable long-term consequences to society if confidentiality was not respected in professional relationships. In the medical context, Rose J expressed this concern in the following way:

> In the long run, preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited as a source of education, for future individual patients "will not come forward if doctors are going to squeal on them".[201]

In general, fewer people would seek professional help — be it medical, legal, financial, religious or spiritual — if they knew that their personal secrets would not be respected. Thus confidentiality is said to benefit society in the long-term by encouraging the full and effective use of professional services.[202]

1.2 *Commercial Secrets*

The holder of a commercial secret wields economic power. This power is conferred for two reasons. First, it preserves 'personal' autonomy; and second, it enhances commercial relationships. The objective of autonomy is borrowed — somewhat crudely — from the realm of personal secrets.[203] In this context, it involves two related elements: one moral, the other economic. Morally, inventors should be entitled to reap the benefits from their secrets.[204] And economically, inventors should be given an incentive to create. If commercial information could be exploited by all after its creation, few would be prepared to bear the cost of its production. Thus, in order to avoid societal stagnation, the law grants protection to corporate secrets.[205]

The second justification for protection — enhancing commercial relation-

[199] In the marital relationship, for example, preserving confidentiality is a clear reflection of the public policy in maintaining conjugal trust and loyalty: *Argyll* v *Argyll* [1967] Ch 302. Other important relationships include: Doctor-Patient, Lawyer-Client, Banker-Client, Priest-Penitent etc.

[200] L Sharp Paine, 'Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger' (1991) 20 *Philosophy & Public Affairs* 247, 254.

[201] *X* v *Y* [1988] 2 All ER 648, 653. See also *T* v *Broadcasting Corp of New Zealand* (unreported, New Zealand High Court, 1 December 1988) 28–9 per Ellis J.

[202] Finn, op cit (fn 30) 502.

[203] Bok, op cit (fn 84) 141–2.

[204] Finn, op cit (fn 30) 500.

[205] The difficult question of whether trade secret protection conflicts with the patents regime is beyond the scope of this article. For an analysis of this question, see Gurry, *Breach*, op cit (fn 19) 10–12; E C Hettinger, 'Justifying Intellectual Property' (1989) 18 *Philosophy & Public Affairs* 31; Edmonton Institute of Law Research of Reform, *Trade Secrets*, Report No 46 (July 1986) 113–20; T Robison, 'The Confidence Game: An Approach to the Law about the Trade Secrets' (1983) 25 *Arizona Law Review* 347, 354.

ships — is also borrowed from personal secrets. This justification has two limbs. First, maintaining confidences encourages loyalty, trust, good faith and candour within commercial units,[206] which ensures that the commercial world is not divorced from social morality. And second, without such protection, the relationship within the unit would be distorted to an economically inefficient degree. Employers, for example, would be forced to seek other means to preserve the secrecy of commercially valuable information. But these measures would be artificial and inefficient because they would be motivated by security rather than production demands.[207]

1.3 *Governmental Secrets*

When considering the justifications for governmental confidentiality, it is important to draw a distinction between information *held* by the government, and information *about* the government.

Government agencies hold an enormous amount of confidential information about members of the public. The fact that this information may filter through various government agencies under the guise of 'administrative efficiency' poses a very real threat to an individual's privacy.[208] Preserving the confidentiality of such information (by demanding that it be used for limited purposes only) diminishes this threat.[209] Further, restricting the use of information in this way provides a framework of trust that facilitates the candid disclosures that are necessary for the flow of information to the organs of government.[210] Therefore, for information *held* by the government, both an extremely strong privacy interest and a relationship interest are advanced by preserving confidentiality.

Secrets *about* the government are protected for different reasons. First, the government — in its representative capacity — 'has no private life or personal feelings' that can be affected by the disclosure of confidential information.[211] Thus the 'autonomy' interest that underlies the protection of personal and commercial secrets is absent.

And second, the 'relationship' interest is fundamentally different. The 'workings of government should be open to scutiny and criticism'[212] because

[206] Typically, the employer-employee relationship (see *Lion Laboratories Ltd* v *Evans* [1985] 1 QB 526, 550 per Griffiths LJ). Joint venturers provide another example. See Finn, op cit (fn 30) 499; Laster, 'Breaches', op cit (fn 112) 34; Bok, op cit (fn 84) 145; Robison, op cit (fn 205) 354.

[207] Gurry, *Breach*, op cit (fn 19) 8; D Vaver, 'Trade Secrets — A Commonwealth Perspective' [1979] *European Intellectual Property Review* 301, 302.

[208] The impact of the *Privacy Act* 1988 (Cth) lies beyond the scope of this article. Nevertheless, it is important to bear in mind that, with a few exceptions, only Federal agencies fall within its ambit. Thus the breach of confidence action may be the only form of redress for a disgruntled confider (see s 91).

[209] Although government bodies owe duties of confidentiality to private citizens, it is their responsibility to act in the public interest rather than in their own interest or the interests of an individual. The scope of the duty is necessarily affected by this fact: The *NSW Spycatcher* case (1987) 10 NSWLR 86, 191 per McHugh JA.

[210] *Marcel* v *Commissioner of Police of the Metropolis* [1992] Ch 225.

[211] The *UK Spycatcher* case (No 2) [1990] 1 AC 109, 256 per Lord Keith, 283 per Lord Goff (HL).

[212] Id 283 per Lord Goff.

of its representative nature. Confidentiality insulates a government from criticism and interference. If a government operates in secret, there is a very real danger that illegitimate corners will be cut with impunity, and that corrupt activities will take place.

This danger may be minimised if the public has greater access to information about governmental activities.[213] An informed public is more likely to ensure that a government is accountable. But the government must be able to exert some control over the flow of information. National security and foreign relations must not be prejudiced by overzealous openness. Thus the preservation of public sector confidences protects the public from undesirable consequences.

2. The Green Light Theory of Confidentiality

Green Light theorists, such as the UK Law Commission, view the breach of confidence action as a restriction on the flow of information:

> Having regard to the importance . . . of the free circulation of information, we think it in principle right that the plaintiff should be required to establish that the balance of the public interest lies . . . in protecting the confidentiality of the relevant information.[214]

Thus the law's starting point is that confidences *will not* be enforced unless the public interest is best served by non-disclosure. In addition, the theory involves a presumption that the free flow of information must not be unnecessarily restricted.

In the context of commercial confidences (or trade secrets), Green Light theorists support this stance by emphasising the importance of the related values of the free flow of information, employee mobility and competition. As stated above, one aim of the breach of confidence action is the promotion of economic growth and increased productivity by providing an incentive to create new information. Yet by restricting the flow of information, the action limits the productive use that can be made of information. Thus, since economic growth and productivity increases both depend upon the efficient spread of information throughout the economy, the breach of confidence action holds the potential to defeat one of the aims it is designed to fulfil.[215] To avoid this situation, Green Light theorists stress the need to confine the action to strictly defined boundaries.

In addition, as the Edmonton Law Reform Institute noted in its report on Trade Secrets, extensive protection of Trade Secrets might restrict an employee's ability to change jobs, which in turn 'may be undesirable both from the personal view of that employee, and that of society.'[216] Mobile employees benefit society in the sense that they are likely to increase competition within

[213] An examination of the Freedom of Information regime — which is based on similar principles — lies beyond the scope of this article.
[214] UK Law Commission, op cit (fn 94) 140.
[215] Gurry, *Breach*, op cit (fn 19) 9.
[216] Edmonton Institute of Law Research and Reform, op cit (fn 205) 122.

an industry by using their skill and training for the benefit of competitors.[217] To encourage this possibility, Green Light theorists urge that confidentiality must not be wielded as an anti-competitive device.

As noted above, in the context of secrets about the government, Green Light theorists support their stance by stressing the fact that excessive confidentiality protects a government from criticism and interference.[218]

The impact of the Red and Green Light theories on the public interest exception will now be examined.

3. The Red Light/Green Light Theories and the Public Interest

3.1 *The Scope of the Exception: The Public Interest Advanced By Disclosure*

Red Light theorists invoke various techniques to confine the scope of the public interest exception. Their first technique — which has found favour in Australia — is to declare that a disclosure will not advance the public interest in the prevention of harm unless it exposes misconduct. The inelegance of this approach is striking. Focusing exclusively on misconduct casts the net of confidentiality too widely — the courts should also examine the *consequences* of non-disclosure. For example, the disclosure may relate to an event arising without misconduct that, if not disclosed, would cause serious harm to the public.[219] The public interest exception should be available to justify such a disclosure.

According to the second Red Light technique the exception may not be invoked where disclosure is merely a good thing — the consequences of non-disclosure must be 'positively undesirable'.[220] Thus the disclosure of information must not merely cast light on a tragedy,[221] titillate the public,[222] reveal the truth,[223] or disclose a valuable trade secret.[224] Continued protection of the information will only be sufficiently 'undesirable' if it harms the public or unreasonably obstructs the administration of justice.

By contrast, where the disclosure advances the public interest in the realisation of the democratic ideal, the impact of the Red Light theory has been slight. The judiciary tends to view these disclosures 'through different' — Green Light — 'spectacles', by determining the government's claim to

[217] Robison, op cit (fn 205) 348.
[218] Footnotes 211–13 supra and accompanying text.
[219] *Malone* v *Metropolitian Police Commissioner* [1979] Ch 344, 362. See also *Lion Laboratories Ltd* v *Evans* [1985] QB 526; *Protestant Alliance Friendly Society* v *Australian Financial Press* (unreported, Victorian Supreme Court, 8 December 1988).
[220] A M Tettenborn, 'Breach of Confidence, Publicity and the Public Interest' (1982) 98 LQR 5, 7.
[221] *Distillers Co (Biochemicals) Ltd* v *Times Newspapers Ltd* [1975] QB 613.
[222] *British Steel Corporation* v *Granada Television Ltd* [1981] AC 1096; *Lion Laboratories Ltd* v *Evans* [1985] 1 QB 526.
[223] *Castrol Australia Pty Ltd* v *EmTech Associates Pty Ltd* (1980) 51 FLR 184, 216. Cf *Woodward* v *Hutchins* [1977] 1 WLR 760, 763–4.
[224] *Church of Scientology* v *Kaufman* [1973] RPC 635, 649.

confidentiality in the following way: 'unless *disclosure* is likely to injure the public interest, [the information] will not be protected.'[225]

Thus the governmental confidence will not be preserved where non-disclosure is merely a good thing — the consequences of disclosure must be positively undesirable. Accordingly, it is not sufficient to show that the disclosure 'merely throws light' on the workings of the constitutional machinery or the exercise of governmental power. It must *obstruct* the proper working of that machinery or the proper exercise of that power.

The above analysis reveals the significant impact that the theories have had on the first stage of the three-stage process used to determine whether or not a confidant may invoke the exception. By contrast, the impact of the theories on the second stage is less noticeable.

3.2 *The Circumstances Surrounding the Disclosure*

There is definitely a Red Light 'feel' about the subtle judicial shift from viewing the circumstances surrounding the disclosure as factors that destroy an established exception, to prerequisites that must be satisfied to invoke the exception. This shift has enabled the courts to confine the *scope* of the exception irrespective of the precise *effect* of its application. Thus the courts now insist that the nature and degree of the disclosure be proportionate to the public interest being advanced. This notion of proportionality accords perfectly with the Red Light tenet of limiting any exception that detracts from the sacrosanctity of confidentiality.

3.3 *The Assessment of the Public Interest Equation*

The impact of the theories on the third stage of the process is more pronounced. At trial, a court may apply either the 'higher duty' test or the 'balancing of public interests' test. The 'higher duty' test is clearly a Red Light creature: it embodies a strong presumption that confidences will be protected. This presumption will only be rebutted by a compelling reason — a 'higher' or 'public' duty — which demands disclosure. The Australian courts have favoured this approach.

English courts, by contrast, have preferred the 'balance of public interests' approach. This test is best described as an 'Amber Light' device because, unlike the 'higher duty' test, it is not value-laden. The balancing operation does not require the courts to start from the position that confidences must be preserved or that the free flow of information must not be restricted. Indeed, it openly recognises that there may be more than one operative public interest in any particular case.

Nevertheless, the balancing approach does not *prevent* a court from choosing its initial premise. It may require that the public interest in disclosure outweigh the public interest in confidentiality or vice versa. Thus it is not surprising that, in the absence of an inherently Green Light test, Green Light theorists prefer this approach.

[225] *The Commonwealth of Australia* v *John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52 (emphasis added).

The clash between the Red and Green Light theories is highlighted by the controversy over which test should be applied to determine whether a public interest disclosure should be restrained by an interlocutory injunction. Red Light theorists demand that the courts adopt the *American Cyanimid* 'balance of convenience' approach. This is clearly a pro-confidence test, because allowing a disclosure will rarely preserve the status quo until trial.

Green Light theorists, by contrast, stress that freedom of speech and freedom of the press should only be restricted if there is a 'pressing social need' for such restraint. Proponents initially sought to justify this approach by drawing analogies with the law of defamation.[226] It is now recognised, however, that the principles of Human Rights law provide a more satisfactory justification.

In particular, art 10(1) of the European Convention on Human Rights proclaims the importance of the right to freedom of expression, including the right to 'receive and impart information and ideas without interference by public authority'. Article 10(2) outlines the exceptions to this principle: the freedom may be subject to restrictions that 'are prescribed by law and are *necessary* in a democratic society'.[227]

The European Court of Human Rights has interpreted the word 'necessary' as implying the 'existence of a pressing social need',[228] and has held that any interference with freedom of expression must be proportionate to that need.[229] Green Light theorists argue that this pro-disclosure test is particularly appropriate where a government seeks to protect its secrets because the freedom of political and public debate is a hallmark of democracy. Lord Bridge put it more emotively: 'freedom of speech is always the first casualty under a totalitarian regime'.[230] Green Light theorists emphasise that this freedom can only be protected adequately by requiring governments to establish a pressing social need for an injunction. Indeed, they consider the level of protection afforded by the *American Cyanimid* test to be woefully inadequate.[231]

This section has highlighted that, where the *scope* of the public interest exception is concerned, the Red Light and Green Light theories have exerted varying degrees of influence in different spheres. By contrast, the two theories have had little impact on the *effects* of the exception's application.

[226] For example, *Hubbard* v *Vosper* [1972] 2 QB 84, 96–7.

[227] Emphasis added. This is clearly a Green Light article because it assumes that all information must be freely available *unless* there is a strong need for secrecy.

[228] *The Sunday Times* v *The United Kingdom* (1979) 2 EHRR 245, 275. See also *The Observer Ltd & Ors* v *United Kingdom* (1992) 14 EHRR 153.

[229] *Dudgeon* v *United Kingdom* (1981) 4 EHRR 149, 165.

[230] The *UK Spycatcher* case (No 1) [1987] 1 WLR 1248, 1286 (HL). See also the landmark High Court decision in the Ban on Political Advertising case: *Australian Capital Television Pty Ltd* v *The Commonwealth of Australia (No 2)* (1992) 177 CLR 106.

[231] *The Observer Ltd & Ors* v *United Kingdom* (1992) 14 EHRR 153, 178–9 (the Commission), 202 per Martens J. The majority of the Court, however, refused to decide whether the *American Cyanimid* test itself was inconsistent with art 10, preferring to consider each case on its merits. See J Coliver, 'Spycatcher — the Legal and Broader Significance of the European Court's Judgment' [1992] *Media Law and Practice* 142, 146.

3.4 *The Effects of the Exception's Application: The Conceptual Consequences*

The alternative conceptual consequences that flow from a conclusion that the public interest is best served by disclosure — ie, that no obligation of confidence arose or that there is a defence to the alleged breach — are not directly connected with either theory. However, it may be argued that the discretionary bar approach is, indirectly at least, a Red Light phenomenon because it leaves the courts with the option of awarding a pecuniary remedy. This option could be used to deter future disclosures which would, in theory, lead to the preservation of more confidences.

4. The Impact of the Theories: A Rationalisation

Interestingly, neither the Red nor the Green Light theories of confidentiality have been wholeheartedly embraced by the Anglo-Australian courts. Indeed, the courts seem to have conspired to produce a peculiar mosaic that bears the unhappy stamp of uncertainty. Thankfully, however, this uncertainty is more apparent than real. The public interest exception has been moulded by strands of the two theories in order to form a coherent whole. As will be seen, this moulding process is inextricably linked with the underlying justifications for protecting confidentiality.

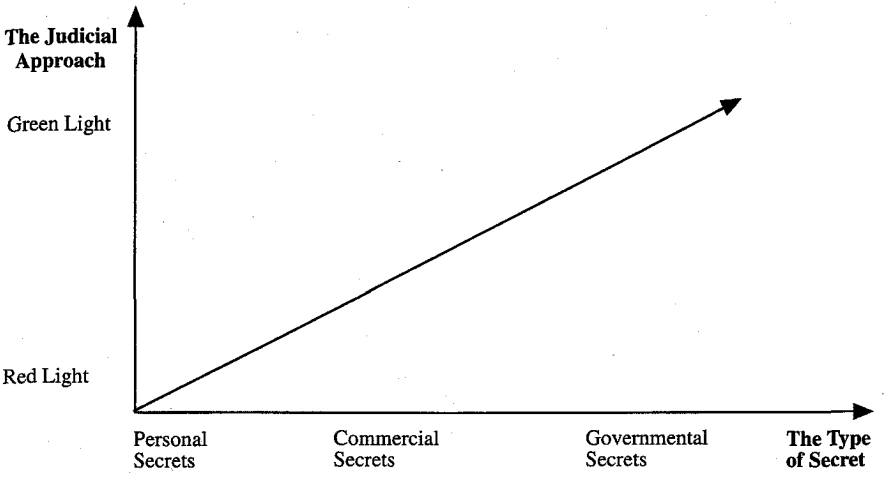
The fact that the law does not protect the intrinsically confidential *nature* of the information is the thread that unifies personal, commercial and governmental secrets.[232] The courts focus on the *source* of the information; it is the 'intangible notion of a confidence' that attracts protection.[233] In other words, the dominant rationale for protection is *relationship*-based rather than *information*-based. This raises the pivotal question: to what extent should the law discourage the disclosure of information acquired in the various types of confidential relationships?

Here we find the unifying thread diverging into distinct strands. In the personal sphere, the courts have consistently adopted a stringent Red Light approach — particularly where a professional seeks to disclose sensitive information.[234] In the realm of commercial secrets, the courts have lapsed into ambivalence by drawing on both theories. And for public sector secrets, the courts have embraced the Green Light approach. The following graph encapsulates this curious phenomenon:

[232] See, eg, Gurry in Finn, op cit (fn 195) 116; Laster, 'Breaches', op cit (fn 112) 34; Wacks, op cit (fn 115) 117; Sharp Paine, op cit (fn 200). Cf S Rickestson, 'Confidential Information — A New Proprietary Interest? Part I' (1977) 11 MULR 223.

[233] Gurry in Finn, op cit (fn 195) 116. See also S Wright, 'Confidentiality and the Public/Private Dichotomy' [1993] 7 *European Intellectual Property Review* 237. To ignore the fact that the basis for protection is predominantly relationship-based comes dangerously close to converting the action to a general right of information privacy: Laster, 'Breaches', op cit (fn 112) 36.

[234] *Ott* v *Fleishman* [1983] 5 WWR 721; *X* v *Y* [1988] 2 All ER 648, 653; *Duncan* v *Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513; *T* v *Broadcasting Corp of New Zealand* (unreported, New Zealand High Court, 1 December 1988) 28–9 per Ellis J.



Thus there is a direct association between the nature of the confidential relationship and the judicial approach for resolving whether the public interest exception may be invoked to justify disclosure. But why should this occur?

The answer is power. When confidentiality (which facilitates control over information) is placed in the hands of the powerful, the risks of corruption and destruction are magnified. The corresponding need for accountability increases dramatically. And since accountability is directly linked with the availability of information, the breach of confidence action must not be manipulated to impede the free flow of information unless there is a compelling need for non-disclosure. Accordingly, government secrets are viewed through Green Light spectacles.

As Lord Salmon emphasised in his powerful dissent in the *British Steel Corporation* case, statutory authorities should also be accountable to the public. This need for 'burgeoning openness' in the public sector can be met by embracing the Green Light philosophy. Importantly, however, the potency of this approach diminishes as one travels further away from the secrets of the government itself.

Bodies with significant commercial clout may inflict serious harm on society. But their relationship with the public does not demand the same level of accountability. This fact may explain the general ambivalence of the judiciary. On the one hand, the public interest exception has been invoked to justify breaches of commercial confidences.[235] But on the other hand, the courts have recognised the desirability of maintaining the integrity of commercial relationships, and of protecting commercial 'privacy'.[236]

[235] *Gartside* v *Outram* (1856) 26 LJ Ch 113; *Initial Services Ltd* v *Putterill* [1968] QB 396; *Sun Printers Ltd* v *Westminster Press Ltd* (1982) 126 *Sol J* 260; *Lion Laboratories Ltd* v *Evans* [1985] QB 526; *In re A Company's Application* [1989] Ch 477.

[236] See, eg, *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1; *Lion Laboratories Ltd* v *Evans* [1985] QB 526, 550 per Griffiths LJ.

Once one moves from commercial privacy to personal privacy, the need for accountability diminishes even further. For personal secrets, the right to autonomy and the importance of maintaining the integrity of personal and professional relationships raise a strong presumption in favour of confidentiality. Thus, in the absence of a compelling need for disclosure, confiders must not be robbed of their power to control the flow of their personal information. Accordingly, personal secrets are viewed through Red Light spectacles.

This coherent regime of confidentiality provides a workable framework within which the courts may determine whether the public interest is best served by disclosure or non-disclosure. As I have demonstrated in this part, this issue will be approached differently depending on the nature of the secret sought to be protected. This regime accords perfectly with the underlying justifications for protecting personal, commercial and governmental secrets. And its emphasis on the power of the confider as the touchstone for relief is a sensible way to harness the free flow of information in our society.

CONCLUSION

A duty of confidence is not absolute. There are circumstances in which confidential information may be disclosed. In Anglo-Australian law, the primary juridical device for justifying such a disclosure is the public interest exception. Despite its obvious importance, however, this exception is tainted by an awkward degree of uncertainty.

In the first part of this article, I examined the circumstances in which the exception may be invoked within a three-tiered structure. This structure was adopted in order to demonstrate that the *scope* of the exception is affected by the public interest advanced by disclosure, the circumstances surrounding the disclosure, and the court's assessment of the public interest equation. This structured approach retains a measure of internal flexibility, which allows the public interest exception to keep pace with changing social and economic needs.

In the second part, I explored the consequences of applying the exception. Although the courts have tended to overlook the *effects* of the exception's application, it was seen that this question assumes practical significance if the exception is treated as a defence that operates as a discretionary bar to injunctive relief. If this conceptual approach is adopted, the confider may be entitled to a pecuniary remedy. This flexible and pragmatic approach empowers the judiciary to mould remedial solutions that strike a fair balance between the competing interests involved.

But flexibility is not to be confused with naked inconsistency. In the third part of this article, which involved a critical overview and rationalisation of the exception, it was seen that it is possible to construct a coherent regime of confidence with the assistance of the Red Light and Green Light theories of confidentiality. Red Light theorists view the public interest exception as a destructive force that causes widespread and far-reaching harm to the relationships that constitute the fabric of our society. By contrast, Green Light

theorists view the exception as a flexible tool that curbs the excesses of the extending web of confidentiality.

Both theories have proved influential in different spheres. The more one moves towards public sector secrets, the greater the likelihood that the courts will adopt a Green Light approach. And the more one moves towards personal secrets, the greater the chance that the lights will turn red. This workable regime injects a significant measure of consistency into this area of the law. And it reflects that fact that, as the power of the confider increases, the shadows of confidentiality need to diminish.