

# 'Fidelity' in the Post-Industrial Age: Developments in Case Law on Employee Disclosure of Confidential Information

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*Confidential information can be protected against use or disclosure by employees, usually by injunction. However, courts refuse the injunction where the information has become part of the employee's own stock of knowledge. This clear position was confused with the case of Faccenda Chicken v Fowler [1987] 1 Ch 117, which suggested that there were two types of confidential information, of which only the 'more confidential' type could be protected against use or disclosure once the employment was terminated. Since then, courts have quietly re-absorbed Faccenda into the traditional approach. With the increasingly 'knowledge-based' nature of employment, much confidential information will have been created by the employees themselves, raising questions as to the approach of treating it as the employer's property, even when the court declines, in its discretion to protect that property by injunction.*

## I INTRODUCTION

It has been long established that an employee owes his/her employer a duty of confidentiality - a duty not to disclose or misuse confidential information of the employer. For well over a hundred years the existence of the duty was uncontentious: attention was concentrated on determining whether, in particular situations, the duty had been breached and what the consequences of a breach, in those particular situations, should be. In 1987, the case of *Faccenda Chicken v Fowler* (*Faccenda Chicken*)<sup>1</sup> introduced a reformulation of the duty. This was hailed by some<sup>2</sup> as representing 'the modern law on disclosure'. The *Faccenda Chicken* reformulation was initially followed judicially, or referred to with apparent acceptance. Subsequent cases, however, exhibited a return to earlier statements of basic principle, and - subtly - refrained from approval of the reformulation. This article reviews the history of the *Faccenda Chicken* experiment and its aftermath. It suggests, by way of conclusion, that there needs to be quite a different reformulation, taking into account the nature of work in the 'post-industrial' age.

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<sup>1</sup> [1987] Ch 117.

<sup>2</sup> See for example, P. Maxwell, 'Disclosure of Confidential Information by Ex-Employees' [1988] Aug/Sep *Business Law Review* 189.

## II THE DUTY OF CONFIDENTIALITY - PRE-FACCENDA CHICKEN

What amounts to a breach of this obligation, and in fact what amounts to 'confidential information', has varied over the years, but until the case of *Faccenda Chicken* the law had reached a logical position, if one difficult of application. Whereas the early cases<sup>3</sup> concentrated on the manner of gaining the information or the motive with which it was gained (information secretly copied down with the intent to use it for one's own purposes versus information necessarily learned in the ordinary course of carrying out one's duties), the later position<sup>4</sup> concentrated simply on the nature of the information itself: was it or was it not 'confidential'? The criterion for deciding whether information was confidential or not - apart from the necessary initial question of whether it was or was not in the public domain - was whether its disclosure or use would cause harm to the employer? This meant that it was difficult to be precise about the types of information which would be regarded as being confidential, because that could depend on the circumstances of the particular case. Disclosure of a customer list or list of prices could, in the circumstances of one employer, cause substantial harm, while in the circumstances of another employer, it would have no deleterious effect at all.

If, on this criterion, the information was confidential, then prima facie the employee could not use or disclose it at any time. However, it was recognised that this limitation could well have the effect of preventing the employee from ever working again in his or her field of expertise after leaving a particular employer, because confidential information gained by the employee in the course of carrying out their duties would have become inextricably mixed with his/her own 'stock of knowledge'.<sup>5</sup> The acknowledged interest of the law in the protection of confidence thus came into conflict with the law's equal commitment to freedom of trade and occupation. In such cases, the courts solved the problem created by the two contradictory impulses by refraining from enjoining ex-employee use of confidential information when to do so - because of its mixture into the stock of knowledge - would have necessitated restricting the ex-employee's use of that entire stock of knowledge. It was not that the employer's property in his/her confidential information was denied. Rather, in order to protect the employee's property in his/her knowledge and skills, the law would decline to afford its protection to the employer's property at the expense of the employee's property. Thus, the situation was that of a 'balancing act' to which the common law of employment is so prone: the employer's property right (and concomitant right to

<sup>3</sup> For example, *Robb v Green* [1895] 2 QB 315.

<sup>4</sup> For example, *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37; *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731.

<sup>5</sup> *Printers and Finishers v Holloway* [1964] 3 All ER 731, 735.

its protection) was balanced against the employee's property right and right to its protection. The right which would be favoured in a given case would depend on the relative damage; would the harm to the ex-employee if the injunction against use or disclosure were granted be greater than the harm to the employer if the injunction were refused?

Clearly, such a conflict, with its threat to the ex-employee's livelihood and opportunity to work, would only arise in relation to a proposed disclosure or use of the confidential information after the employment relationship between the employer and employee had ended. Where that had occurred it was possible to divide information gained during the employment into two types: non-confidential information, with which the law was unconcerned; and confidential information. However, in relation to confidential information which was the property of the employer, there were two possible outcomes: an injunction prohibiting use or disclosure; or a refusal of injunction, where to grant it would be unduly restrictive of the former employee.

### III THE 'MODERN LAW' ON DISCLOSURE

*Faccenda Chicken*<sup>6</sup> created a three-fold categorisation of information: that which was not in any sense confidential, and which could be disclosed at any time; that which was 'sufficiently confidential' that its disclosure or misuse could be prevented during the currency of the employment relationship, but which the employee was free to disclose or use after the relationship had ended; and that which was 'so confidential' that it could never be disclosed or used, whether during the currency of the employment relationship or after it had ended and the employee was an ex-employee. In relation to information of this third type, an injunction was available to restrain any disclosure or use.

It is easily seen that the result of application of the *Faccenda Chicken* doctrine will not necessarily be different from the result of application of the earlier doctrine. The difference is in the logic. 'Confidentiality of information' is like uniqueness - a thing is either *unique* or *not unique*. It cannot be *almost* unique, *rather* unique etc. Similarly, information is either confidential or not; the criterion is 'does disclosure of it do harm to its owner?'

On the other hand, it is quite logical to discuss and compare the *amount* of harm done. It is perfectly legitimate to say that in one case, disclosure of a piece of confidential information has done the employer in question very great harm; that in another case it has done moderate harm; and that in a third case, it has done only a small amount of harm. This is because the 'harm' can be assessed monetarily by reference to the employer's business: to the profits, to the value of

<sup>6</sup> [1987] Ch 117.

the goodwill etc. Similarly, the harm which an injunction will do to the future employment prospects of the ex-employee can be quantified, and therefore categorised by adjectives such as 'great', 'moderate' or 'minor'. Moreover, once these two assessments of harm are made, it is possible to make a sensible decision as to which party will suffer most: if disclosure will do great harm to the employer, but an injunction will do only minor harm to the ex-employee, then the 'balancing act' will require that the injunction be granted; if disclosure will do minor harm to the employer, but the injunction would do great harm to the ex-employee, the proper balance is to refuse the injunction.

The problem with the *Faccenda Chicken* approach is that it apparently directs itself to the type of information: secret formulae, customer lists, price lists etc, when the *relevant* point is not the type of the information, but the degree of harm the disclosure would do in the particular case relative to the harm an injunction would do to the employee. It is also worth noting that the application of the 'new' doctrine in *Faccenda Chicken* itself produced a very dubious result. The information in question was a package consisting of the names and addresses of customers, the most convenient routes to be taken to reach the individual customers, the usual requirements ( as to quantity and quality) of the individual customers, the days of the week and the time of day when deliveries were usually made to individual customers and the prices charged to individual customers. Refusal of an injunction meant that Fowler and his colleagues were able to take the whole of Faccenda Chicken's business when an injunction would not have severely restricted Fowler's employment/trading opportunities, but merely prevented him soliciting and/or trading with established Faccenda customers.

The root of the problem in *Faccenda Chicken* appears to be the use in earlier cases of two phrases: 'confidential information' at times, 'trade secrets' at others. The Court of Appeal in *Faccenda Chicken* treated these two phrases as applying to intrinsically different *types* of information: one which would be protected from disclosure or misuse post-employment, the other which would not be afforded such protection. This however, is a misreading of the earlier cases. A close reading shows that the phrase 'trade secrets' was used in three different senses at different times - none of which conform to the *Faccenda Chicken* interpretation. First, some judges regarded the terms as completely interchangeable. Second, some judges saw 'trade secrets' as a subset of the broader category of confidential information, but failed to elaborate and attach different duties in respect of the subset as compared to the rest of the category. However, in practice, it was fairly predictable that disclosure of confidential information that was a 'trade secret' - such as a secret formula - would do immense harm to the employer and therefore, it was more likely than not - again *in practice* - that the injunction would be granted. Finally, some judges used 'trade secrets' as a short-hand expression to describe not a distinct subset within a broader category, but merely those pieces

of confidential information, disclosure of which would be enjoined because they were discrete and not mixed in the employee's stock of knowledge. Thus, the harm to the employer due to the disclosure would be greater than the harm to the ex-employee following an injunction. But it did not follow from any of these cases that only those pieces of confidential information which fell into a recognisable 'trade secret' subset would be protected by injunction after the employment ended.<sup>7</sup>

From this misreading, the Court of Appeal went on to create two separate *contractual* duties of confidentiality on the employee in place of the former one duty. However as well as the contractual duty of confidentiality, there is an equitable duty which exists independently of contract. The scope of the two, in the circumstances of an ex-employee, was the same. Therefore, in a situation where a court had to consider an actual or proposed use or disclosure by an ex-employee, it did not matter which was applied. In both circumstances the court would consider first, whether the information was confidential and second, whether in the circumstances restraint would be unduly and disproportionately oppressive to the ex-employee. In relation to disclosure or use by a current employee: if the information was in fact confidential, this would be a breach of both the contractual and equitable duties of confidentiality and would be enjoined, since the currency of the employment meant the injunction would not harm the employee. If the information was not confidential, but the employer had directed it to be used for his/her purposes only and not disclosed, then use or disclosure would be a breach of another constituent of the duty of faithful service - the duty of obedience.

Clearly then, in the context of a during-employment use or disclosure, it was not necessary to determine whether the information was confidential and courts would simply refer to the 'duty of faithful service' (or, at times, the duty of *fidelity*). However, in earlier cases, there was often some laxity of terminology - the duty of fidelity being regarded as another phrase for the duty of faithful service, whereas in fact, it is only a constituent part: the duty to perform...*faithfully* the work contractually agreed, whereas the duty of faithful service is the duty 'to perform well and faithfully the work contractually agreed', encapsulating the duty to perform it - i.e. the duty of obedience, the duty to perform it well - i.e. the duty to work with care and skill, and the duty to perform it faithfully - i.e. the duty of fidelity). In the post-employment situation it was necessary to decide if the information was confidential, but not necessary to refer to the duty of fidelity since the equitable duty of confidentiality as well as the contractual duty of confidentiality, would cover the case. For these reasons the terminology of earlier cases was not altogether precise.

<sup>7</sup> As to the lack of specificity in the use of the phrases 'confidential information' and 'trade secrets' in 19th and earlier 20th century cases, see the comment quoted from R Rideout, 'Confidentiality or Protection of Trade Secrets' (1986) 15 *Industrial Law Journal* 183, p. 119 *infra*.

As a result, the Court of Appeal in *Faccenda Chicken* reached the interpretation that the law to be derived from the earlier cases was that:

- (a) in the period of employment, confidential information given to the employee (or learnt in the course of employment) for the employer's purposes was protected by the contractual duty of fidelity
- (b) in the post-employment period, 'trade secrets' were protected by an allegedly 'new' contractual duty of confidentiality; but confidential information not amounting to a 'trade secret' was not protected by that duty (nor by the equitable one).<sup>8</sup>

The illogicalities of such an approach can be clearly seen in the article 'Disclosure of Confidential Information by Ex-Employees'.<sup>9</sup> In discussing *Faccenda Chicken*, the author refers to:

the clear statement...that where the parties are, or have been, linked by a contract of employment, then the obligation as to confidentiality is to be determined by that contract...In effect, this means that it is not the general equitable duty of confidentiality which is to govern employment cases, but another (less exacting) one<sup>10</sup>

and a little later:

...the obligation of an ex-employee is simply to ensure that he does not disclose information which amounts to a trade secret. Other confidential information falling short of a trade secret may be protected during employment by the duty of fidelity, but not thereafter.

How does the existence of a contractual relationship between two people displace an equitable duty that applies to all people? And why is it logical that the previous existence of a contractual relationship should render an ex-employee under a less extensive duty to preserve confidences than would apply to a person who had not been previously bound by contract? This is nonsensical - if anything, the previous existence of the contractual relationship (which was the source of gaining the information) should make the subsequent duty greater! The author argues that authority is to be found in the judgment of Cross J, in *Printers and Finishers v Holloway*<sup>11</sup> - but the passage quoted, as the author herself then suggests, is an example of the process referred to above of using 'trade secret' as shorthand for 'a situation in which in our discretion we will not protect the confidential information'.

<sup>8</sup> It is difficult to explain the exclusion here of the equitable duty of confidentiality, since there are many cases enforcing it where the matter in question bears no possible resemblance to a 'trade secret'. See, for example, *Prince Albert v Strange* (1849) 64 ER 293.

<sup>9</sup> Maxwell, above n2, 189.

<sup>10</sup> Ibid 190.

<sup>11</sup> [1964] 3 All ER 731, 736.

The confusion to which this presentation of a 'new' and discrete contractual duty of confidentiality leads is demonstrated also by Maxwell's statements that:

It is unusual but not entirely unknown for the duty of fidelity to be used to restrain breach of confidence. The case of *Hivac Ltd v Park Royal Scientific Instruments*<sup>12</sup> presents an example...The basis of the injunction appears to have been the danger of the transfer of confidential information, even though there was no evidence of misuse of trade secrets

and

There seems little doubt that the Court of Appeal (in *Faccenda*) has extended the boundaries of the duty of fidelity, and in reality has created a new, temporary duty of confidentiality which will protect information which may not amount to a trade secret.<sup>13</sup>

The basis of the injunction in *Hivac Ltd v Park Royal Scientific Instruments*<sup>14</sup> was not the danger of transfer of confidential information. There was no evidence of misuse or disclosure of confidential information. The basis of the injunction was that, in the circumstances, work done in spare-time amounted to 'competition' with the employer in breach of the duty of fidelity in its broader sense - 'to act *faithfully and in the employer's best interests*'.<sup>15</sup> This is because the first employer had previously held a monopoly in a very small and specialised market and because the spare-time employer could not have got other employees to enable it to enter the market (because of wartime labour restrictions). One reason that the restraint of breach of confidence via the duty of fidelity is rare is that there will be few instances of a disclosure or misuse of information during a period when the employee is employed only by the employer whose information it is. It would be very silly of a person who wished to continue in a particular employment to consider doing this. However, it is a danger that may arise in circumstances of concurrent employment (something much more common now than ten or twenty years ago). However, it was not this danger that made the concurrent employment in *Hivac Ltd v Park Royal Scientific Instruments*<sup>16</sup> a breach of good faith.

The Court of Appeal in *Faccenda Chicken* did not create a new duty of confidentiality nor did it extend the boundaries of the duty of fidelity. Effectively, it purported to cut down the duty of fidelity, by suggesting that in the post-employment period the duty of confidentiality only applied to a particular category of confidential information which it labelled 'trade secrets'. The error in this attempt can be further appreciated when we examine the Court of Appeal's

<sup>12</sup> [1946] Ch 169.

<sup>13</sup> Maxwell, above n2, 190.

<sup>14</sup> [1946] Ch 169.

<sup>15</sup> *Hivac Ltd v Park Royal Scientific Instruments* [1946] Ch 169, 174-6.

<sup>16</sup> [1946] Ch 169.

inadequate attempt to define this special category. As Rideout wryly commented:

The fact that it finds itself doing so for the first time in 150 years of the existence of the contractual duty of fidelity might suggest to the suspicious that this has not been the line of distinction recognised hitherto.<sup>17</sup>

The Court of Appeal produced no clear guide to the specific nature of trade secrets - because of course there is none! On the other hand, there are certain types of information which will almost certainly be protected after the employment has ended. The classic example is that of a secret formula. Use or disclosure after the employment will almost always be restrained because the particular formula does not become so mixed with the employee's own stock of knowledge that a restraint on use or disclosure would almost inevitably prevent the ex-employee using the rest of that knowledge. In other words, the employer's interest in the intellectual property in the formula can be protected without thereby interfering with the ex-employee's opportunities to work in their trade or profession.

The illogicality underlying the decision in *Faccenda Chicken*, and the problems that would result from an attempt to define and distinguish 'trade secrets' as a particular type of information, can be seen in subsequent cases which purport to approve *Faccenda Chicken*. Maxwell discusses two cases, concluding that both:

confirm and apply without hesitation the principles laid down in [*Faccenda Chicken*], which appear to be accepted as the basis of the modern law on disclosure of confidential information arising from employment.<sup>18</sup>

The first case was *Roger Bullivant Ltd v Ellis*.<sup>19</sup> The ex-employee of a civil engineering company set up a rival business. On leaving the previous employer, he had taken with him a card-index with the names of all the company's trade contacts. The ex-employer was granted an interlocutory injunction restraining Ellis from contracting with any person whose name was on the index. Ellis appealed. The Court of Appeal upheld the injunction. The 'names' of these contacts could not be said to be a 'trade secret'. But, the grouping of the names in relation to the trade in question could be said to be confidential. Thus, use of the index could be restrained for the length of time it would have taken a competitor, unaided, to prepare and test a similar grouping for him/herself. It is difficult to understand how this decision amounts to a 'confirmation and application' of *Faccenda Chicken* or how it demonstrates that *Faccenda Chicken* is the basis of 'the modern law on disclosure'. Rather, it was an application of the principles of a long line of cases such as *Robb v Green*.<sup>20</sup>

<sup>17</sup> Rideout, above n7,183,186.

<sup>18</sup> Maxwell, above n2, 191.

<sup>19</sup> [1987] IRLR 491.

<sup>20</sup> [1895] 2 QB 315.

What appears to distinguish the case from the situation in *Faccenda Chicken* is the fact that the information was taken away in a concrete form as also in *Robb v Green*.<sup>21</sup> Otherwise, the grouped names are no different from the information carried away by Fowler. Does this mean then that carrying away in one's head a group of facts, the value of which comes from the grouping, will make the difference so that restraint on use will be refused? The answer, I think, has to be a factual one: if one has... actually absorbed such a group of facts into one's head, it may well have become part of one's general stock of knowledge in a way that a remembered formula does not; taking away the card-index itself indicated that the group of facts was too large to become absorbed in that way.

Though purporting to follow it, the second of the two cases really indicates the misinterpretations of *Faccenda Chicken*, and indicates in particular the difficulties that arise from treating the concept of 'trade secret' as a discrete *type* of information, rather than as a shorthand expression for a type of *situation*. The case was *Johnson and Bloy Holdings Ltd v Wolstenholme Rink plc and Fallon*.<sup>22</sup> Here too, the former employee had taken to a new employer in the same field documents about the ex-employer's processes. The former employer sought an interlocutory injunction against use of the documents; this was refused, and instead the new employer gave an undertaking not to use them until the trial. On appeal, the interlocutory injunction was granted. Again, such an injunction is clearly supported by the principles in *Robb v Green*.<sup>23</sup> The point which was raised was that it was likely that some of the information contained in the documents was also in the ex-employee's head. If (it was suggested) this was a trade secret, future use could have been restrained, even if no documents had been taken. But if it was only 'confidential information', use could not have been restrained unless the documentary evidence had also been taken.

This is confusing what is really a simple principle. Moreover, it is also creating 'principles' out of what are really facts. The factual aspect is that taking information away in documentary form implies fairly strongly that it is not 'inevitably' in one's head. But even setting that implication aside, suppose there is a body of confidential information relating to the business; some is of such a nature that to restrain its use would necessitate restraining the ex-employee from working in the field, some sufficiently discrete that its use can be restrained without that further step. *Prima facie*, the ex-employer is entitled to protect all of it, as his/her property, by an injunction against use, but in its discretion the court will refuse a restraint on use of that part of the information which would effectively close the ex-employee out of his/her trade or profession. It is all simply 'confidential information', but as a result of 'becoming part of the

<sup>21</sup> *Ibid.*

<sup>22</sup> [1987] IRLR 499.

<sup>23</sup> [1895] 2 QB 315.

employee's own stock of knowledge', some will be refused protection. If we then add to this the circumstance of an unlawful taking of documents, we get this schema:

- a) information not so mixed that a restraint would involve the ex-employee not working in the field:
  - confidential information of the employer
  - prima facie entitled to protection
  - no discretionary factor requiring refusal of protection
- b) information that is mixed so that a restraint would involve the ex-employee not working in the field:
  - confidential information of the employer
  - prima facie entitled to protection
  - ex-employee's right to work at his/her trade or profession indicates a refusal of protection
  - ex-employee's wrongful act in taking in documentary form wipes out the favourable indication

In other words, the difference between taking 'mixed' information only in one's head and taking it also in documentary form is that in the second situation, the principle of 'he who seeks equity must do equity' will apply. This is so whether the court is dealing with the 'equitable duty of confidentiality' or the 'contractual duty of confidentiality'. In either case, the application for the injunction involves 'seeking' equity.

Perhaps the following hypothetical example will throw the fundamental principles into relief. As suggested above, a secret formula will almost inevitably be protected even after employment has ended, and is generally accepted to be a 'trade secret' (in so far as such exists discretely). Thus, if a manufacturer of meat-pies makes the pies to a secret recipe (formula) with a unique blend of 'herbs and spices', there is no doubt that an ex-employee would be restrained from disclosing the recipe if he/she took employment with a rival pie manufacturer. Suppose that a pie manufacturer advertises that his/her pies are made with a special recipe and charges more for them than rival manufacturers. And suppose that in fact there are no special ingredients in the pies, that the recipe is one in common knowledge and common use. Leaving aside the possible issue of false advertising in breach of statute, can it be doubted that an ex-employee could be restrained from disclosing the previous employer's recipe to a subsequent pie-manufacturing employer? Yet that recipe is not a 'secret formula'. The 'formula' is not secret; but the use of the common recipe is. The information that the recipe is one in common use is confidential information, the disclosure of which could surely be restrained. It is confidential because of the disproportionate harm its disclosure would do. The ex-employee will not be hindered in future work as a pie-maker;

he/she can still use his/her stock of knowledge to make pies. What he/she must not do is disclose the recipe of the former employer as that employer's recipe.

#### IV RETURN TO ESTABLISHED PRINCIPLES

Subsequent cases do not entirely bear out Maxwell's presentation of the *Faccenda Chicken* principles as 'the basis of the modern law on disclosure of confidential information'. Effectively, they continue to apply the pre-existing principles, particularly those stated in *Printers and Finishers Ltd v Holloway*,<sup>24</sup> while giving polite recognition to the *Faccenda* categorisation as a 'useful taxonomy'. Even those cases which purport to follow *Faccenda* do so by restating its principles in line with the *Printers and Finishers Ltd v Holloway*<sup>25</sup> approach. Thus, for example, in *Riteway Express Pty Ltd v Clayton*,<sup>26</sup> McClelland J stated that the relevant principles as to disclosure:

are conveniently discussed in the recent decision of the English Court of Appeal in *Faccenda Chicken Ltd v Fowler*...They involve a reconciliation of two interests, namely (1) the right of any person to use and exploit for the purpose of earning his living all the skill, experience and knowledge which he has at his disposal, including skill, experience and knowledge which he has acquired in the course of previous employment and (2) the right of an employer to have its secrets kept confidential.

In the *Faccenda Chicken* case the distinction was drawn, as it had been in earlier cases, between information of a kind which an employee may not properly use or disclose during the period of his employment, on the one hand and information which he may not use or disclose after the termination of his employment on the other. It is established that the second category of information is narrower than the first.<sup>27</sup>

This passage appears to suggest that *Faccenda Chicken* categorised confidential information in relation to the two interests to be reconciled. However, that is not the case; *Faccenda Chicken* categorised in relation to the type of information 'information about what?' - rather than in relation to the situation of the employee who had gained the information.

There was more extensive discussion of the issue in the decision of the NSW Court of Appeal in *Wright v Gasweld Pty Ltd*.<sup>28</sup> The case was an appeal against

<sup>24</sup> [1964] 3 All ER 731.

<sup>25</sup> [1964] 3 All ER 731.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid* 240.

<sup>28</sup> (1991) 22 NSWLR 317.

the grant of an injunction against use of certain confidential information on the grounds it was akin to a 'trade secret'. Unlike the situation in *Faccenda Chicken*, the ex-employee's contract had contained a clause restraining post-employment disclosure or use of confidential information and trade secrets. The respondent employer was an importer of tools from Taiwan. The information in question was the list of Taiwanese suppliers. Obviously, the names of suppliers was in the public domain, but it was argued that the list of the respondent's suppliers had the further quality that it was limited to suppliers found to be reliable - a finding that was the result of effort and trial and error by the respondent. Thus, the use of that list by a competitor would give them a 'springboard advantage'. All three judges held that the information was not such that its disclosure or use could be restrained as breach of the implied duty of confidentiality, but Kirby P and Samuels JA held the information was confidential information within the meaning of the express restraint clause, and suitable for protection by injunction.<sup>29</sup> This finding involved a rejection of the Court of Appeal's (obiter) statement in *Faccenda Chicken* that 'category two' information could not be protected by a restraint clause.

While comments as to the enforceability of such a restraint were obiter in *Faccenda Chicken*, comments as to the *Faccenda Chicken* principles and the scope of the implied duty were not obiter in *Wright v Gasweld Pty Ltd*, since the trial judge's finding that the information was akin to a trade secret would have justified the injunction he granted both in relation to the implied duty of confidentiality and the express restraint. Samuels JA commented:

...it is not clear that Australian courts have adopted the tripartite classification of confidential information which an employee may obtain in the course of his employment which Goulding J advanced in *Faccenda Chicken v Fowler*...However it seems to me that it represents a useful taxonomy...<sup>30</sup>

Gleeson CJ stated that the information was not 'a trade secret', but 'valuable commercial information, of a kind which the respondent would understandably take pains to keep to itself and from its competitors'.<sup>31</sup> After analysing the reasoning at first instance, the Chief Justice went on:

This is of critical importance, because a case such as the present involves a tension between two competing considerations of public policy. An employer is not entitled to protect himself against mere competition by a former employee, and the corollary of that is that the employee is entitled to use skill,

<sup>29</sup> The clause itself was found to be unreasonably wide, but able to be read down under the *Restraint of Trade Act 1976* (NSW), s4.

<sup>30</sup> (1991) 22 NSWLR 317, 339. This statement is in fact incorrect in that Goulding J did not advance a 'tripartite classification of confidential information', but a tripartite classification of information - his first category being information which was *not* confidential.

<sup>31</sup> *Ibid* 326.

experience and know-how acquired in the service of the former employer in legitimate competition. It is in the public interest that this should be so...At the same time the law will protect trade secrets and confidential information, and will intervene to prevent their misuse. The decision of the Court of Appeal in England in *Faccenda Chicken Ltd v Fowler*...illustrates the importance, where there is a conflict between these two principles, of a close examination and accurate categorisation of the nature of the alleged trade secret or confidential information. It is not necessary to adopt in its apparent rigidity the three-fold classification of information accepted in that case, or to accept the passage...dealing with the capacity of an employer to take a valid covenant against use of 'second category' of information, in order to see the case as a valuable guide to the resolution of the present problem...<sup>32</sup>

Thus, Gleeson CJ and Samuels JA appear to be accepting the *Faccenda Chicken* argument that there are distinct types of confidential information, rather than distinct situations in which its use or disclosure will or will not be enjoined. *Triangle Corporation Ltd v Carnsew*<sup>33</sup> was another case of an express covenant, which was decided with unquestioning reliance on the authority. Heerey J held that the covenant merely reproduced the implied duty as to confidentiality, and after citing the *Faccenda Chicken* categorisation, stated without any real explanation that:

I am not satisfied that there is an arguable case that the information which the respondents acquired in the course of their employment by the applicant went beyond that second category of information referred to in the *Faccenda Chicken* case. I do not doubt that it was valuable and useful information, and information which had taken some time and trouble to compile, but nevertheless it is information which the law does not restrain an employee from using once he has left his employer's business.<sup>34</sup>

In *Broadwater Taxation and Investment Services Pty Ltd v Hendriks*,<sup>35</sup> Santow J, in dismissing an application for an injunction, did not refer to *Faccenda Chicken* but decided on the basis of the established pre-*Faccenda Chicken* principles in *Ormonoid Roofing and Asphalts Ltd v Bitumenoids Ltd*<sup>36</sup> and *Printers and Finishers Ltd v Holloway*.<sup>37</sup> The information in question was a client list. After leaving the plaintiff's employment, the defendants had set up their own business, and had mailed to some 200 of the plaintiff's 1800 clients. The plaintiff alleged that the client list had been taken away in documentary form by the defendants. Santow J found this allegation unproven, and there was no allegation that the

<sup>32</sup> Ibid 329.

<sup>33</sup> [1994] AIPC 38,624.

<sup>34</sup> Ibid 625.

<sup>35</sup> (1993) 51 IR 221.

<sup>36</sup> 1930 NSW 347.

<sup>37</sup> [1964] 3 All ER 731.

defendants had deliberately memorised the list whilst in the plaintiff's employment. His Honour stated:

It follows that on none of these bases has the plaintiff been able to demonstrate that a client list of the plaintiff was used by [the defendants] in the manner contended by the plaintiff. Indeed I am satisfied, on the balance of probabilities that it was not. These particulars of customers were rather 'stored in the mind as a necessary consequence of the way in which the defendants were employed or engaged'. See *Ormonoid Roofing and Asphalts Ltd v Bitumenoids Ltd*...The information in question could not in the circumstances be fairly regarded 'as a separate part of the employees' stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of the employer'; see *Printers and Finishers Ltd v Holloway*...<sup>38</sup>

There is no reference to the information being within the second category in *Faccenda Chicken*, and thus available for the defendant's post-employment use, though a client list was one of the pieces of information which the Court of Appeal in the British case held to be of 'category two' status.

*Faccenda Chicken* was used as an authority in *SWF Hoists and Industrial Equipment Pty Ltd v Polli*,<sup>39</sup> regarding an application for an injunction restraining misuse of confidential information. The applicant company was in the business of supply, maintenance and servicing of overhead cranes. The respondent had left the applicant's employment after some nineteen years. The applicant alleged that the respondent had dishonestly taken away documentation relating to the applicant's customers (identity, type of cranes used, repair and service history, specifications of spare parts needed, dates on which services were due and prices charged), and argued that the contract contained an implied term that the service records would remain in its possession and that the records were confidential and protected in equity. As to the claim relating to confidentiality, Branson J quoted from Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)*<sup>40</sup>:

It is now settled that in order to make out a case for protection in equity of alleged confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not for example common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of

<sup>38</sup> (1993) 51 IR 221, 227.

<sup>39</sup> (1996) 67 IR 356.

<sup>40</sup> (1987) 14 FCR 434.

that information...It may also be necessary...that unauthorised use would be to the detriment of the plaintiff.<sup>41</sup>

(We might note in relation to this list of requirements that (ii) is circular - information is protectable as confidential if it is confidential, and that the criterion which 'may also be necessary' is in fact essential)<sup>42</sup>. Branson J then referred to the acceptance by the Court of Appeal in *Faccenda Chicken* of Goulding J's categorisation at first instance and stated that 'similar categorisations were found useful by the members of the Court of Appeal in *Wright v Gazwell Pty Ltd* [sic].<sup>43</sup> She continued:

I do not consider that the evidence before me on this application is sufficient to demonstrate a serious question to be tried that the applicant's business records, and in particular its client register and 1994 wall chart [the documentation allegedly taken] contain confidential trade secrets of the kind included within Goulding J's third category in the *Faccenda Chicken* case. Nor do I consider that such evidence is sufficient to satisfy the criteria outlined by Gummow J...with the exception, possibly, of the information concerning the applicant's pricing practice.<sup>44</sup>

To be pedantic, 'confidential trade secrets' is a tautology; whether or not there is a separate category of 'trade secret', clearly if there is, it is confidential. As to the information not being within the *Faccenda Chicken* third category, that would follow from an unquestioning acceptance of that case, since (allowing for the different type of business) it was exactly the same 'package' of information for which protection was refused in *Faccenda Chicken*. On the other hand, if we apply to the information package the test of whether an injunction would prevent the employee using his/her own stock of knowledge, the answer is 'no'. Therefore, on the pre-*Faccenda Chicken* principles, there would be no reason and no policy issue requiring the court to refuse the injunction sought. As to the information not satisfying the criteria outlined by Gummow J, it is not clear which of the criteria it fails to meet. If it is criterion (ii), then the statement that it fails is merely an assertion without explanation. If it is criterion (iii), there is no evidence in the judgment, one way or the other. If it is criterion (iv), it is a dubious assertion. At this point of the argument, the case is proceeding on the assumption that the documents were taken away without authorisation. That would surely point to a 'threatened misuse'. And if it is the *possible* criterion of detriment, then it is clear

<sup>41</sup> Ibid 443.

<sup>42</sup> See *Lansing Linde Ltd v Kerr* [1991] IRLR 80.87 (Staughton LJ) as paraphrased in *FSS Travel and Leisure Systems Ltd v Johnson* [1998] IRLR 382.385: It must be possible to identify information used in the relevant business, *the use and dissemination of which is likely to harm the employer...*[emphasis added] See also *Jack Allen (Sales and Service) Ltd v Smith* [1999] IRLR 19.

<sup>43</sup> As seen above, it was not 'similar categorisations' which were considered in *Wright*, but exactly the same categorisation.

<sup>44</sup> (1996) 67 IR 356, 358.

that use by a competitor of such a package of information would be to the severe detriment of the applicant. Branson J's reference to the pricing information as 'possibly' meeting the criteria is also dubious. Pricing information without the other information would be meaningless, but even if the other types of information were not individual sources of detriment in the hands of a competitor, once the pricing information is added, the total package becomes very useful to the competitor and this is to the detriment of the applicant.

However, application of the *Faccenda Chicken* and *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)*<sup>45</sup> principles did not conclude the matter. As Branson J pointed out:

an employee can be prevented from using information of his or her employer, even information within the second of Goulding J's categories, if such information, and the advantage that flows from it, have been obtained dishonestly. (See *Robb v Green...*). It would be sufficient in this regard for information of a confidential nature to be memorised or copied and subsequently used to the advantage of the former employee.<sup>46</sup>

This statement is incontrovertible, but it is necessary to examine it more closely, to see what it entails and why. It is necessary to consider how the application to prevent such use would be framed. It would be an application to enjoin breach of the implied duty not to misuse confidential information. Prima facie, the employer is entitled to protection. But equity in its discretion will refuse to afford protection where the harm to the employee, by limiting opportunities for employment and exercise of their skills and knowledge, would outweigh the harm suffered by the employer. However, since the equitable maxim of 'he who seeks equity must do equity' is invoked, where the information has been dishonestly acquired, equity will not exercise its discretion on the employee's behalf. Thus, this 'exception' in the case of deliberately memorised or copied information in fact establishes the illusory nature of *Faccenda Chicken* category two. There is simply 'confidential information'. It will be protected by injunction subject to the 'balance of convenience', but that balance is swung in favour of the employer when the information is dishonestly obtained. The upshot of the case was the granting of an interlocutory injunction. This was granted because her Honour considered that there was a serious question to be tried as to whether the information had been dishonestly obtained or merely *absorbed* by the respondent over the years of service with the applicant, and that the balance of convenience was in the applicant's favour. This last point seems to answer the doubts as to detrimental nature of the respondent's use of the information.

<sup>45</sup> (1987) 14 FCR 434.

<sup>46</sup> *Ibid.*

*Kone Elevators Pty Ltd v McNay*<sup>47</sup> is another case in which no reliance is placed on the *Faccenda Chicken* decision. Admittedly, the ex-employee's contract had contained a clause restraining employment with any company that could make use of the employer's confidential information to the employer's detriment. However, *Faccenda Chicken* is not irrelevant, since it purports to define and categorise confidential information. The information in question in the case was knowledge of three new products the former employer was about to release and of the marketing strategies to be adopted. At first instance, *Faccenda Chicken* had been considered, but the Court of Appeal made no reference to it. Sheller JA, with whom Meagher and Cole JJ concurred, found that the employer had a legitimate interest in protecting such information, and that:

The question is whether the employee proposed to engage in any business in Australia as a consultant or employee which could make use of confidential information as defined to the material detriment of Kone's business. To this, in my opinion, there can only be one answer, namely, that the employee by taking employment with Schindler proposed to do exactly that.<sup>48</sup>

His Honour pointed out that the wording of the clause made it unnecessary to determine whether the employee possessed confidential information. On the authority of *Littlewoods Organisation Ltd v Harris*,<sup>49</sup> Sheller JA held a clause of the type in question legitimate, and granted the injunction sought.

The nature and scope of the *Faccenda Chicken* third category was considered again by the English Court of Appeal in *Lancashire Fires Ltd v SA Lyons and Co Ltd*.<sup>50</sup> *Faccenda Chicken* was referred to, and apparently accepted.<sup>51</sup> However, that acceptance took the form of aligning the categories with the earlier principles as to 'separate information' versus information that had become part of the ex-employee's 'own stock of knowledge', the Master of the Rolls (Sir Thomas Bingham) describing Goulding J's 'category two' as having 'an echo' of Bennet J in *United Indigo Chemical Co Ltd v Robinson*<sup>52</sup> and Cross J in *Printers and Finishers Ltd v Holloway*.<sup>53</sup> He went on to outline matters presented in *Faccenda Chicken* as necessary to be considered in allocating information between categories two and three (discussed below), and stated that:

...ultimately the court must judge whether an ex-employee has illegitimately used the confidential information which forms part of the stock-in-trade of his former employer either for his own benefit or to the detriment of the former

<sup>47</sup> [1997] ATPR 43, 830.

<sup>48</sup> *Ibid* 830,835.

<sup>49</sup> [1977] 1 WLR 1472.

<sup>50</sup> [1997] IRLR 113.

<sup>51</sup> Except in relation to the assertion that 'category two' information could not validly be protected by an express covenant.

<sup>52</sup> [1931] 49 RPC 178.

<sup>53</sup> [1964] 3 All ER 731.

employer, or whether he has simply used his own professional expertise, gained in whole or in part during his former employment.<sup>54</sup>

The case of *FSS Travel and Leisure Systems Ltd v Johnson*<sup>55</sup> is a valuable example of the type of 'confidentiality' situation likely to arise today, and again displays the Court of Appeal's return to the pre-*Faccenda Chicken* principles which concentrate on the issue of unwarranted hindrance to the former employee's right to exercise his/her skills. The case was an appeal against the refusal of an injunction. The ex-employee had been employed as a computer software programmer by a travel firm. The alleged confidential information was knowledge of the systems used to facilitate on-line travel bookings. The contract had contained a restraint on being engaged or concerned in any United Kingdom business competing with the business of the FSS Group for one year. Nothing in the judgment of the Court of Appeal turns on the express restraint versus implied duty issue. The Court relied on *Printers and Finishers Ltd v Holloway*<sup>56</sup> in which there was no express restraint and *Faccenda Chicken* was not referred to. The crucial question was whether the information was part of Johnson's 'own stock of knowledge'? Mummery LJ (with whom Millett LJ and Woolf MR agreed) stated:

Later decisions have not improved upon, or doubted the correctness of, the approach adopted by Cross J in *Printers and Finishers Ltd v Holloway*:

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

Cross J gave examples of clear cases for restraint of an ex-employee eg using or disclosing a chemical formula, a list of customers, methods of construction or design features made known to the employee while in employment. He then considered knowledge which was not readily separable from the employee's general knowledge and his acquired skills: eg knowledge of the difficulties encountered in a process or of an expedient which the employee had found out for himself by trial and error. He doubted whether 'any man of average and intelligence and honesty would think that there was anything improper in his putting his memory of particular features of his late employer's plant at the disposal of his new employer.'<sup>57</sup>

Adopting this approach, Mummery LJ considered the evidence as to the

<sup>54</sup> *Lancashire v Lyons* [1997] IRLR 113, 117.

<sup>55</sup> [1998] IRLR 382.

<sup>56</sup> [1964] 3 All ER 731.

<sup>57</sup> [1998] IRLR 382, 385.

information possessed by Johnson. He quoted at some length from the evidence of FSS as to that information and knowledge. What emerged from that evidence was far more to the benefit of Johnson than of FSS. It is clear that the information was in reality the development by Johnson *himself* of ways and means to solve problems encountered in working for FSS Travel by applying his pre-existing knowledge of programming. On that basis, the Court dismissed the appeal.

## V DISCLOSURE IN THE 21ST CENTURY

What remains then, of the *Faccenda Chicken* developments? And did *Faccenda Chicken* indeed put forward developments, or merely state existing principles in a different way? The flurry of attention paid to it in cases and articles in the immediately subsequent years, certainly supports my contention that *Faccenda Chicken* put forward new principles. It did not reject earlier approaches - it even adopted some - but it added new and questionable criteria. As to earlier approaches adopted, there is the list of matters to be considered in allocating information between categories two and three, referred to by Sir Thomas Bingham in *Lancashire Fires Ltd v SA Lyons and Co Ltd*.<sup>58</sup>:

...the nature of the employment; the nature of the information itself; the steps (if any) taken by the employer to impress on the employee the confidentiality of the information; and the ease or difficulty of isolating the information in question from other information which the employee is free to use or disclose...In the ordinary way, the nearer an employee is to the inner counsels of an employer, the more likely he is to gain access to truly confidential information. The nature of the information itself is also important: to be capable of protection, information must be defined with some degree of precision...If an employer impresses the confidentiality of certain information on his employee, that is an indication of the employer's belief that the information is confidential...<sup>59</sup>

Consideration of the cases shows that ultimately these matters go to the question whether the information is separate from or mixed with the employee's 'own stock of knowledge'. The reference to 'the nature of the information', for example, is not concerned with its *type*, but with its *separateness* in the circumstances of the particular case.

The 'famous' categorisation in *Faccenda Chicken* is based on the suggestion that the deciding issue is the *type* of information. This approach seems to derive from two points noted about the earlier cases - that injunctions were sometimes denied in respect of information the disclosure of which would be restrained during

<sup>58</sup> [1997] IRLR 113.

<sup>59</sup> *Ibid* 113, 117.

employment, and that there were cases granting injunctions that referred to trade secrets and others denying injunctions that referred to confidential information. As I have already pointed out, earlier cases granted or refused injunctions post-employment by reference to the degree of limitation they would impose on the ex-employees' ability to work in a field which allowed them to use their 'own stock of knowledge', and the terms 'trade secret' and 'confidential information' were used interchangeably and imprecisely. The established principles for the grant or refusal of injunction focussed not on the type of information, but on the situation of the ex-employee possessing it. It would not matter that *Faccenda Chicken* recast those principles into ones based on types of information if the result would inevitably be the same. But it will not. *Faccenda Chicken* itself is an example of that. The components of the package of information in *Faccenda Chicken* were definable with precision, they were able to be separated from the employee's own stock of knowledge, and a restraint on their use would not have prevented the employee from using that stock of knowledge. On the other hand, their use by Fowler caused extreme detriment to *Faccenda Chicken*'s business. The balance of convenience was heavily weighted towards the ex-employer, and yet, as a result of focus on type of information, the injunction was refused. The same is true of *SWF Hoists and Industrial Equipment Pty Ltd v Polli*,<sup>60</sup> in which Branson J applied the *Faccenda Chicken* categorisation.

## VI THE NEED FOR AN ALTERNATIVE REFORMULATION

The classic statements of the duty of fidelity in the common law contract of employment still derive from the Victorian Edwardian Ages in the United Kingdom, and are still imbued with notions of the forelock-tugging subservience that employees - then 'servants' - owed to their employers as fealty, as gratitude for the *gift* of a paid position. However, society has, in Lord Denning's words in *Langston v AUEW*,<sup>61</sup> 'altered much since then'.<sup>62</sup> There have been, in successive stages, profound shifts in the social relations out of which the earlier legal doctrines grew. At least as profound, though perhaps later in occurrence, have been the shifts in the nature of the work done, in labour economics and in the technology utilised in today's workplaces. These changes impact dramatically on the operation of the requirements of obedience and fidelity which the common law of employment extracted from the more ancient doctrine of master and servant to control workplace relations at the coming into flower of the industrial age.<sup>63</sup> 'Working for pay' is almost as old as human society itself, but the doctrines of the common law contract are not. They are century or era specific and as we

<sup>60</sup> (1996) 67 IR 356.

<sup>61</sup> [1974] 1 All ER 980.

<sup>62</sup> *Ibid* 987.

<sup>63</sup> As to this process of 'extraction', see A Merritt, 'The Historical Role of Law in the Regulation of Employment', (1982) 1 *Australian Journal of Law and Society* 56.

move into the third millennium, there is not merely a value but an imperative to reconsider the philosophical baggage we have brought with us in our legal forms. The duty of 'fidelity' must adapt itself to a very different social and economic landscape. In the new landscape, the duty raises issues which would have been comparatively seldom in issue a century ago. In today's world (of worldwide, web-wide communication, of significant job mobility and geographical mobility, of enhanced technological skills and of skill mobility), they are potentially of much greater significance.

Employment at the beginning of the twenty first century is far more knowledge-based and far more *intellectual* than employment was at the beginning of the twentieth century. That is not simply to say that we as human beings, have more knowledge or are more intellectual, or even that work is more dependent on knowledge or is more intellectual. We have, we are, it is. But that is not the point. Rather, the point is that employment - the service given under contracts of employment - is much more dependent on the application of brain-power rather than of brawn-power. However, the seduction of the 'brain-power...brawn-power' almost-rhyme, somewhat obscures the point. The essential distinction is not that between physical and non-physical labour. Nor is it the distinction between being paid to 'do' and being paid to 'think', though that is closer to the point. Essentially, there has been a major development in both parts of the 'do equals physical labour' and 'think equals non-physical labour' dichotomy. Today, 'do' involves far less physical labour than previously. Today in factories and mines, the production workers push buttons on sophisticated pieces of machinery. There has also come a shift in the 'think' category of employment away from those jobs that involve dictated or fairly basic applications of thought to the required task towards those that require individual and creative applications of thought. Underlying the reference above to 'the application of brain-power' is the idea of application of the brain *creatively* - to produce rather than merely to replicate. Until the latter half of the twentieth century, such application of brain-power (for financial reward) was predominantly carried out by persons whose status was that of independent *professionals*. Today, large sections of the employed workforce (the fastest growing sections of the employed workforce), are employed simply to carry out what are essentially creative brain-power functions. To the extent that using and improving one's brain and its creative capacities becomes the *service* that one renders as employee, the obligations owed in return by the person to whom one renders that service must inevitably change.

What employees *do* today is to a much greater extent the development and application of their own knowledge in the employer's service rather than the application to their various tasks of knowledge imparted to them by the employer. Balancing the protection of the employer's intellectual property with protection of the employee's rights is thus, a much more complex procedure, and it is of real

importance that the appropriate principles are understood and applied. More people are being employed simply to 'think', and to think *creatively* - to provide to the employer the products of their creative thinking. This clearly affects the appropriateness of traditional doctrine as to confidentiality. For a start, a progressively greater amount of the employer's confidential information will be inherently part of the employee's 'own stock of knowledge'. Facile categorisation into 'trade secrets' and 'other' confidential information will simply be inadequate to deal with the matter. Business has become far more a matter of the possession and control of information, yet that information is not only shared by but brought to the business - and indeed often created - by the employees. The balancing of the employer's and employee's property rights in information that I have argued was misunderstood in *Faccenda Chicken v Fowler*<sup>64</sup> will itself become infinitely more difficult.

Clearly the common law employment contract, whose present form was constructed to meet the changed nature of work ushered in by the Industrial Revolution, must adapt to meet the changed nature of work in the post-Industrial age. Some of the cases discussed above are indications that an adaptation to the 'information age' is quietly underway. *FSS Travel and Leisure Systems Ltd v Johnson*<sup>65</sup> is an example of both the problem and the partial adaptation to meet it. However, the development of the common law through distinguishing precedents and through almost surreptitious reinterpretation, is a very slow process, while the social and technological changes necessitating an adaptation are increasing their pace exponentially. Whatever the method to be adopted, a legal response to the changes mentioned is desirable.

Ironically, the core of such adaptation would seem to be a re-assessment of the *types of information* involved. However, this does not mean a categorisation of types of confidential information, such as was mistakenly attempted in *Faccenda Chicken*. Rather, it means - as in *FSS Travel and Leisure Systems Ltd v Johnson*<sup>66</sup> - a differentiation between discrete items of secret information communicated to an employee by the employer for the purpose of performance of work tasks, and information and knowledge developed by the employee, building on their existing professional knowledge and skills, in the course of performance of those tasks. It is a recognition that much of the information and knowledge, previously treated as confidential information of the employer but not to be subjected to restraint on use or disclosure because mixed with the employee's own knowledge, should not in fact be categorised as confidential information of the employer at all. It is either shared knowledge and information or else the employee's *own* information and knowledge, which the employee may be required, by virtue of

<sup>64</sup> [1987] Ch 117.

<sup>65</sup> [1998] IRLR 382.

<sup>66</sup> *Ibid.*

the very fact of the contract, to use only in the employer's interests during the period of the employment, but which is freely utilisable by the former employee once the contract ends. It is freely utilisable not because the courts in their discretion will not restrain its use, but because - not being confidential information *of the employer* - there is no right in the employer which could found a restraint of its use. Such a recognition is of substantial significance. In the middle and latter decades of the twentieth century, most of the knowledge and information 'in the heads of' employees leaving an employment would have been of the 'mixed' type use of which courts in their discretion would not restrain. As the twentyfirst century unfolds, employees' information will be less and less categorisable as the *property* of an employer.