TOWARDS A REAL RIGHT OF PRIVACY

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The High Court's decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[1] has excited a great deal of criticism and comment. It has been the subject of a number of published commentaries presenting a range of views about the decision's correctness and desirability. Although not wishing to single them out unnecessarily, the comments of William Heath[2] and David Lindsay[3] were in some respects critical of the dissenting opinion of Callinan J. A careful analysis of the opinion shows the comments were misconceived and based upon an imperfect reading of his Honour's judgment.

In summary, Callinan J found that a relationship of a fiduciary kind arose between the ABC and Lenah after an animal liberationist committed the illegal act of breaking and entering into Lenah's premises and taking footage of its (lawful) possum slaughtering operations. That film was provided to the ABC which became aware of the likely circumstances of its making before telecasting the film.[4] Lenah attempted to restrain the ABC from airing the footage but was unsuccessful, with a majority of the High Court holding there was no basis for granting an interlocutory injunction because no legal or equitable right of Lenah's had been or would be infringed by publication of the material.

Callinan's J dissenting opinion was generally welcomed by practitioners and commentators in privacy law and the law of confidential information.[5] His Honour went further than any of the other Justices in finding that the law has developed to such an extent that a tort of invasion of privacy should now probably be recognised. If it were to gain general acceptance, the opinion would, at least in part, accomplish what both Australian[6] and English common law has so far been slow to accept: a right to privacy. In 1991, the English Court of Appeal thought it was too late for that jurisdiction to adopt a general right to privacy, or an expanded tort of breach of confidence,[7] not because those rights

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1 (2001) 208 CLR 199 ('*Lenah*').

2 William Heath, 'Possum Processing, Picture Pilfering, Publication and Privacy: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd' (2002) 28(1) *Monash University Law Review* 162.

3 David Lindsay, 'Playing Possum? Privacy, Freedom of Speech and the Media Following ABC v Lenah Game Meats Pty Ltd' (Pt 1) (March 2002) *Media and Arts Law Review* 1; David Lindsay, 'Playing Possum? Privacy, Freedom of Speech and the Media Following ABC v Lenah Game Meats Pty Ltd' (Pt 2) (September 2002) *Media and Arts Law Review* 161.

4 (2001) 208 CLR 199, 314.

5 See, eg, (2002) 8(7) *Privacy Law and Policy Reporter*; Greg Taylor and David Wright, 'Privacy, Injunctions and Possums: An Analysis of the High Court's Decision' (2002) 26(3) *Melbourne University Law Review* 707.

6 Taylor has pointed to the irony of there having been significant other judge-initiated legal changes over the last twenty years while no right to privacy has emerged: Greg Taylor, 'Why is there no Common Law Right of Privacy?' (2000) 26(2) *Monash University Law Review* 235, 235-6.

7 *Kaye v Robertson* (1991) 18 FSR 62.

were antithetical to English law, but they had simply been 'disregarded' for too long.

It was not until relatively recently that the English Court of Appeal indicated its approval of a tort of interference with privacy in *Hello! Limited v Douglas*,[8] but that appears to have been short-lived. Subsequent cases have not embraced that approach as was first thought they might. For example, in a differently constituted Court of Appeal in *Wainwright v Home Office*,[9] Mummery LJ held there is no tort of invasion of privacy,[10] that judicial development of a 'blockbuster' tort is not desirable and that incremental evolution from traditional, nominate torts is preferable.[11] Lord Justice Buxton too held there was probably no English law tort of breach of privacy.[12]

When *Douglas v Hello! Limited* later came on for trial, Lindsay J declined the invitation to hold there is an existing right to privacy, in part at least on the basis of Wainwright's case and in part on the basis that any development in this regard is best left to Parliament.[13]

The hesitancy of courts in Australia and England stands in stark contrast to the United States where Samuel Warren and Louis Brandeis advocated a legal right to privacy over a century ago (ultimately successfully).[14]

That general position has gradually found some resonance here. Almost ten years ago, Megan Richardson argued convincingly that the decided cases provided a much broader basis for an expanded tort of breach of confidence than had generally been taken to be the case.[15] In particular, the author concluded those authorities had sought to assimilate the obligations applicable to information *obtained* in confidence with long standing obligations imposed regarding information imparted in confidence.

In Lenah itself, the High Court removed *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[16] as an obstacle to further development of a tort of unjustified invasion of privacy. That decision had been generally perceived as standing in the way of the development of a tort of unjustified invasion of privacy because Latham CJ had rejected the notion that a right of privacy was recognised under the head of the law of nuisance. However, as Gummow and Hayne JJ pointed out in *Lenah* (Gaudron J apparently agreeing), the racecourse owner in *Victoria Park* did not seek privacy protection for the races conducted, and the plaintiff itself was a corporation which, both then and now, could not enjoy

8 [2001] QB 967.
9 [2002] QB 1334 ('*Wainwright*').
10 Ibid 1351.
11 Ibid 1351-2.
12 Ibid 1363.
13 [2003] EWHC 786 (Ch), [229].
14 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4(5) *Harvard Law Review* 193.
15 Megan Richardson 'Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Law Versus Theory' (1994) 19(3) *Melbourne University Law Review* 673.
16 (1937) 58 CLR 479 ('*Victoria Park*').

interests which a tort of unjustified invasion of privacy would protect.[17] Kirby J thought more may have been read into the case than necessary.[18] Only Gleeson CJ did not in some way expressly question whether *Victoria Park* is an obstacle to establishing an enforceable general right to privacy.[19] That case, therefore, cannot be taken as the obstacle to privacy protection it was once thought to be.

Why then the disparity between the commentary critical of the dissenting opinion and the body of opinion largely supportive of a wider tort for breach of confidence? Two main flaws are claimed to exist in Callinan J's reasoning:[20]

1. the information the subject of the film was not 'confidential'; and
2. the parties were not in a relationship out of which a constructive trust could arise.

I WAS THE INFORMATION OF A CONFIDENTIAL NATURE?

Heath has claimed that Lenah conceded, in submissions to the High Court, that the information the subject of the film was not confidential.[21] There are three responses to this.

First, as Callinan J pointed out,[22] the matter was fully argued. Both parties treated all issues as live and arguments on both sides ranged across all possible causes of action and defences.[23] Secondly, and more importantly, the claim incorrectly treats the subject matter of the video film and the film as if they were indistinguishable and one and the same. In numerous places in his judgment, Callinan J makes the point that they are not: that the film is not unlike the nectarine budwood in *Franklin v Giddins*,[24] a separate, tangible and valuable piece of property. For example his Honour says:

> The film ... is a tangible item of property. It has a value, like any reproduction, over and above the value of a mere spoken or written description of the respondent's activities. If it were otherwise, the appellant would surely have been content to describe, as it is still free to do, without telecasting images of, what took place at the respondent's abattoir.[25]

In *Franklin v Giddins*, the male defendant stole from the plaintiffs' budwood from which he was able to breed a particular variety of nectarine trees with qualities that had commercial advantages. The Court held that the male defendant had taken more than the physical property (the budwood); he also stole a trade

17 (2001) 208 CLR 199, 250.
18 Ibid 277.
19 Ibid 225.
20 Heath, above n 2, 173.
21 Ibid.
22 (2001) 208 CLR 199, 296.
23 See, eg, the exchanges recorded in the transcript between the bench and the parties' counsel in the early stages of argument: available at http://www.austlii.edu.au/au/other/hca/transcripts/2000/H2/1.html.
24 [1978] Qd R 72.
25 (2001) 208 CLR 199, 315.

secret,[26] that being the information which the genetic structure of the wood represented. There was no need, either, for the plaintiffs' property to be patrolled by guard dogs or electric fences - the plaintiffs were entitled to rely on the fact that people would normally respect their rights of property.[27]

Although the male defendant was no longer an employee of the plaintiffs, the Court found a constructive trust in respect of both the male defendant and the female defendant, the latter who, like the ABC in *Lenah*, had not herself participated in the theft, but became aware that the trees which eventually grew were the produce of a stolen trade secret. The defendants were ordered to deliver up or destroy all trees grown using the stolen budwood.

The whole point of his Honour's references to a spectacle - the value in it and the value of an opportunity to record and reproduce it - is to show that the spectacle or event, although it may not have value, does not deprive a right to record and reproduce it, which has a separate value. Equivalent rights are recognised in respect of 'works' by the *Copyright Act 1968* (Cth); the right to reproduce and communicate that work to the public.

Thirdly, and inconsistently with the making of any concession of non-confidentiality, the ABC itself made a concession that until the moment it obtained the film, Lenah could have restrained the film's maker from using or showing it.[28]

It has been said that, in any event, the film could not have been in any respect confidential because Lenah's activities were known to and licensed by a public authority and the production processes were no different from other slaughtering operations carried out in Australia.[29]

The fact that Lenah's activities required a licence did nothing to diminish its right to control entry generally to its premises and to control what was done on them. Legal brothels, too, must be licensed but the filming of activities within them equally would be subject to the proprietors' (and possibly the participants') consent. The fact that an activity may require executive authorisation for its conduct does not mean that proprietary and other rights of general exclusion and control of what occurs on premises are lost. The relevant test is whether there was a real danger of disclosure.[30]

Again, the argument that the production process may have been no different from other production processes equates the process with the recording and reproduction of it, the latter of which may be especially graphic. But in any

26 [1978] Qd R 72, 80.
27 Ibid.
28 (2001) 208 CLR 199, 314.
29 Heath, above n 2, 173.
30 See, eg, *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 where the relevant operation could be observed through openings in the factory and by visiting contractors and tradespeople and relations or friends seeking out employees. That was not sufficient to represent a real danger of disclosure to competitors.

event, commercial value or otherwise is not definitive.[31] Nor is it necessary that the information be totally new or secret.[32] Instead, the question overall is whether there is sufficient secrecy such that there would be difficulty in acquiring the information except by improper means.[33] Here, the act of trespass required to obtain the material the subject of the film is a factor strongly supportive of its confidential nature.

As Taylor and Wright rhetorically ask,[34] had the ABC had access only to non-pictorial information, would it have been so keen to run the story? Why did the film maker not simply seek access to the relevant government documents relating to Lenah's operations and present those to the ABC? The obvious answers, Taylor and Wright rightly claim, show why this video was new and confidential information.

II NATURE OF THE RELATIONSHIP

If the information the subject of the film is accepted as confidential, it becomes necessary to consider whether the ABC, as a third party not directly involved in the trespass initially committed, should nevertheless be susceptible to the law's reach in restraining use of that information or compelling its destruction or return.

Gaudron J observed in *Johns v Australian Securities Commission*[35] that the law of confidence had not developed to the point of identifying in a definitive or comprehensive way the matters which determine whether a duty of confidence has devolved onto third parties. However, one apparently appropriate basis for assessing liability, and one which has been described as the 'better view', is that any person who surreptitiously (or illegally) or even accidentally obtains confidential information, reasonably knowing it to be confidential, may be placed under a confidential obligation, subject to the defence of publication in the public interest.[36] That test could apply equally to direct and third party recipients of confidential information.

Support for the approach Callinan J adopted in Lenah can also be found in the judgment of Gaudron J in *Johns v Australian Securities Commission*[37] (citing Moorgate Tobacco):

> The jurisdiction to grant equitable relief with respect to confidential information is not in doubt. Nor is it in doubt that the basis for the jurisdiction lies in an *obligation of conscience*. The question whether there is an obligation

31 See *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 334 (Kirby P); *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, 49-50 (Gowans J).
32 Megan Richardson and Jennifer Stuckey-Clarke, 'Breach of Confidence' in P Parkinson (ed), *Principles of Equity* (1996) 420, 433.
33 Ibid; *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, 50 (Gowans J); *Aquaculture Corp v New Zealand Green Mussel Co Ltd* (1985) 5 IPR 353, 378-9 (Prichard J).
34 Taylor and Wright, above n 5, 717-18.
35 (1993) 178 CLR 408, 460.
36 Richardson and Stuckey-Clarke, above n 32, 445.
37 (1993) 178 CLR 408, 459.

> of that kind ordinarily depends on the 'circumstances in or through which the information was *communicated or obtained*'.[38]

Callinan J was of the opinion that a fiduciary-style relationship did exist, the basis for it being that had the ABC and Lenah bargained freely for the rights of entry, Lenah would undoubtedly have granted those rights on terms, which would have necessarily embargoed filming and televising. His Honour pointed to authority for the proposition that equity will intervene by impressing a constructive trust in circumstances where the holder of property may not, in good conscience, retain it.[39] It is to be emphasised that equity does not truly invent a trust: it identifies the circumstances giving rise to and impresses upon them a trust when such circumstances (relevantly a synonym for conscience) requires it.

The majority did not think this was a case in which such a trust could arise: no claim to copyright was made by Lenah which might have given rise to a statutory trust, ownership of intellectual property rights in the sounds and images in the tape had not been explored or argued,[40] and the ABC had not been implicated in or privy to the trespass on Lenah's premises.[41]

It simply cannot be correct, as Callinan J points out, that by trespassing (and acting criminally), the ABC's informant should find itself and the ABC in a better position than both would have been in had the film been obtained lawfully. The English Court of Appeal in *Hello! Limited v Douglas*[42] did not regard itself as restricted by *Kaye v Robertson* in reaching a similarly robust result as Callinan J in *Lenah*.

In summary, the facts, if analysed by analogy with either contract or equity, lead to the same conclusion as that of Callinan J. What the ABC obtained as a result of an unlawful act could only have been *lawfully* obtained as a matter of consensual (and therefore contractual) arrangement with Lenah: 'If you come on my premises you may [or may not] film, and if you do, it will be where, when and of what occurrences and for such price, both as to the filming and subsequent exploitation of the film as is agreed between us'.

Taylor and Wright observe that it is up to individuals to determine how wide the circle of the informed shall be with respect to their own confidential information, and ask what more Lenah could have done in this case to preserve the privacy of its operations.[43]

There can be no legitimate concern that Callinan J's recourse to hypothetical contractual arrangements is unorthodox. Property law classifies entrants on land as either trespassers or licensees.[44] If they are trespassers, then as a matter of

38 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 438 (Deane J with whom the other members of the Court agreed) (emphasis added).
39 R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia* (6th ed, 1997) 306.
40 (2001) 208 CLR 199, 247.
41 Ibid.
42 [2001] QB 967.
43 Taylor and Wright, above n 5, 716-17.
44 *Parker v British Airways Board* [1982] QB 1004, 1010.

public policy if not a rule of law, they acquire 'very limited'[45] or 'frail'[46] rights to things found on the land they entered, based on the notion that wrongdoers should not benefit from their wrongdoing.[47] The rights acquired are limited only because of the need to avoid a free-for-all; that is, another wrongdoer taking from the trespasser. In any event, the owner of the land retains a superior title to the thing in the possession of the wrongdoer.

If the entrant on land is a licensee, then construing the terms of the licence (either express or implied)[48] would provide the answer to any question about the title the entrant acquired to the particular items.

These are the rules applied in finders' cases: where the identity of the true owner is unknown. But in *Lenah* that question need not be asked because both the land and the operation the subject of the film were Lenah's. Lenah could be in no worse position than the owner of land on which a thing was found, certainly with respect to the person who committed the acts of breaking and entering and filming, but also with respect to third parties such as the ABC who had learned of the likely circumstances of the making of the film before it telecast the contents. No doubt the film itself, having been taken in a clandestine manner, was of poor quality and that alone may have been sufficient to alert the ABC to the likely circumstances in which it was obtained. Accordingly, Lenah would have superior title and be able to restrain the film's use and compel return of it, being a direct result and product of the trespass.

The only other relevant point of departure between *Lenah's* case and finders' cases is that the item the subject of the dispute was not a tangible article found on land, but one brought into existence making use of the operations conducted on that land. That mere fact should not place Lenah in any worse position provided it is accepted that the subject of the film can be recognised, by virtue of its confidential qualities, as 'property'.

In equity, if a party comes into possession of something to which someone else is entitled and which can be followed, traced or recovered by the latter (here, a valuable right to film and exploit the film), the person in possession is under an obligation to hold that thing for and on behalf of its true beneficial owner. Although an initial fiduciary relationship is sufficient to establish a basis upon which to trace,[49] it does not appear to be necessary in the strict sense. Thieves holding stolen property on constructive trust to the extent they have legal title are also susceptible to tracing's reach and only acquisition by a third party for valuable consideration without notice can free the property from the trust.[50]

45 Ibid 1017.
46 Ibid 1010.
47 Ibid 1009; 1010; 1017.
48 In relation to public land, the licence can be derived from the terms under which public authorities hold land on behalf of the general public: *Waverley Borough Council v Fletcher* [1995] 3 WLR 772, 785. Rights of entry and the ability to conduct certain activities on land containing historic and otherwise significant material may be similarly construed: *Webb v Ireland* [1988] IR 353.
49 *Re Diplock* [1948] Ch 465. The term 'fiduciary' in this context is used broadly: *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1980] Ch 105, 109.
50 *Black v S Freedman & Co* (1910) 12 CLR 105, 110; *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584, 589. See also Richardson and Stuckey-Clarke, above n 32, 822.

In any event, as Mason and Deane JJ point out in *Gosper v Sawyer*, there will often be a convergence between contract and trust:

> The origins and nature of contract and trust are, of course, quite different. There is however no dichotomy between the two. The contractual relationship provides one of the most common bases for the establishment or implication and for the definition of a trust. Conversely, the trust, particularly the resulting and constructive trust, represents one of the most important means of protecting parties in a contractual relationship and of vindicating contractual rights. An action to vary the terms of a trust could, in some cases, properly be seen as an action affecting a contract pursuant to whose terms the trust was established and governed. The mere fact that the purported proceedings under s 88F in the present case related to provisions of the Trust Deed pursuant to which the appellants held the Fund does not necessarily mean that those proceedings could not also be an action 'affecting' a 'contract' for the purposes of s 11(1)(b) of the *Service and Execution of Process Act*.[51]

The catalogues of situations to which equitable principles will apply are, like equity itself, not inflexible and unchanging. As the present authors of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* state:

> Many activities regarded as fraudulent were not done with an intention to cheat or deceive. The principles concerning unauthorised profits by fiduciaries may be thought to operate harshly in situations where there has been no conscious deception or sharp practice. The line of authorities from *Keech v Sandford*[52] through to *Boardman v Phipps*[53] to *Foskett v McKeown*[54] contains many examples where profits made by fiduciaries have been brought to account in circumstances which, it might reasonably be considered, made the accounting unfair. Such results may appear inconsistent with the notion of equity acting in personam upon the conscience of the defendant, with its implication of 'fault' and intentional wrongdoing on his part. But this is to misunderstand the approach of the Chancellor in these matters.[55]

Further, Lenah falls well within the important principle stated by the same authors:

> As *Avondale Printers & Stationers Ltd v Haggie*[56] shows, property acquired by the defendant from a third party and which was never in any shape or form an asset of the plaintiff, may be impressed with a constructive trust in favour of the plaintiff in order to deprive the defendant of fraud practised not upon the third party disponor but upon the plaintiff.[57]

51 (1985) 160 CLR 548, 568-9.
52 (1726) CastempKing 61; 25 ER 223.
53 [1967] 2 AC 46.
54 [2001] 1 AC 102.
55 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002) 445-6.
56 [1979] 2 NZLR 124.
57 Meagher, Heydon and Leeming, above n 55, 455.

The breaking and entering into and filming upon Lenah's premises as a result of which Lenah lost, and the ABC gained, valuable property was more than a fraud upon Lenah - it was a criminal act directed against it. Surely crime as opposed to common law fraud should not escape salutary legal correction.

III CONCLUSION

In summary, what Callinan J is saying appears to be this: Lenah was entitled to rely on its position as a lawful operator and land owner to give rise to a legal right to prevent entry by trespassers for whatever purpose, or at least to provide a basis upon which it could set the terms and conditions upon which people could enter and remain upon the land. In entering without permission, causing damage to the property and filming without consent, the organisation or person who took the film committed a crime. The fact that a third party obtained the information where it knew or came to know about the likely circumstances in which the property was obtained and its likely confidential nature was sufficient to enliven equity's protection and restrain that third party from making use of the property it had obtained.

The reasoning of Callinan J is therefore not unorthodox, as some commentators would have their readers believe. It falls well within traditional principles and provides a result which is not only defensible but preferable in that it achieves the result which most closely does justice, and also gives proper weight both to Lenah's ability to protect its legitimate commercial activities from uninvited unlawful attention, and the rights of owners and occupiers of property to have some control over intangible things which are a product of an unlawful interference with those rights. In an area of law where 'courts ... have spoken quickly and with many tongues',[58] Callinan J's decision is unusually clear and has the added obvious benefit of emanating from a member of this country's highest court. While it is a dissenting opinion, it is not unknown for such opinions to be subsequently adopted as the correct expression of the law and taken up in a decisive majority judgment. The commentators have simply failed to grasp the need to apply those principles to a modern situation involving the use of avenues of reproducing an occurrence in a new, packageable and valuable form. What is more, the decision represents the first real possibility in this country of a judicial basis for the development of a wider tort of breach of confidence or unlawful invasion of privacy. Callinan's J dissenting opinion provides a basis upon which those rights might be established in a way which is not only acceptably orthodox, but the most appropriate way to achieve a result which can be considered just in all the circumstances. The judgment also gives proper effect to equity's concern with conscience.

[58] Meagher, Heydon and Leeming, above n 55, 1111.