

Equitable compensation for breach of confidence

The New South Wales Bar Association-Parsons Seminar was presented by P G Turner, University of Cambridge, in the Bar Common Room on 30 March 2017. The Hon Justice Mark Leeming spoke in reply.

Australian lawyers and judges have brought about two developments in the law of confidentiality which are of special importance for my purposes today. In talking of the law of confidentiality, I speak – as the billing suggests – not of obligations defined by statutes or which subsist in the law of contracts. Instead I speak of confidentiality arising on principles of equity. The first development was the recognition in 1984 by the High Court of Australia – some years ahead of the House of Lords – of:

an equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision, some wider fiduciary duty or some copyright or trade mark right (*Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 437-8).

In New Zealand, that conclusion had already been reached in a now little-noticed decision of 1978 (*AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515, 520-1), but it was only reached in 1988 in England (*A-G v Observer Ltd* [1990] 1 AC 109, 255 (HL)) and in 1999 in Canada (*Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, [19]-[28]).

The second development in which Australian lawyers and judges have led is on recognising that the kinds of ‘relief against an actual ... abuse of confidential information’ include compensation. The Australian cases soon recognised that this is not ‘damages’ in an undefined sense, of the sort granted by the English Court of Appeal in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203. The Australian cases also soon recognised that this was not ‘damages’ under Lord Cairns’ Act either, though such relief had been awarded by the Full Court of the Supreme Court of Victoria in *Talbot v General Television Corp Pty Ltd* [1980] VR 224. The Australian cases recognised that this ‘compensation’ is exclusively equitable relief, granted by reference to distinct equitable principles: it is, to use a convenient term, ‘equitable compensation’.

I wish to suggest that Australian lawyers and judges will be instrumental in a further development of the law of confidentiality, namely to work out what those distinct principles of equity are. There are two reasons for that.

First, the decisions of courts in influential foreign common law jurisdictions – especially Canada, England and New Zealand – are (I say with great respect) affected by certain misunderstandings. The Australian cases are largely free of those misunderstandings.

Secondly, while the Australian case law is in that sense ‘further ahead’, it presents its own difficulty. When the Australian cases say that equitable compensation for breach of confidence is to be ‘restitutionary’ or restorative in nature (following the principles

of relief for breach of trust in Street J’s famous judgment in *Re Dawson (dec’d)*), what do they mean?

THE POSITION ABROAD

By way of a mental holiday for my no doubt busy audience, let me direct attention to matters abroad. To Australian lawyers conversant with equitable principles, it can come as a surprise to learn that equitable compensation is a far less familiar remedy in common law countries beyond our shores.

England

The scene in England is set by the words of Arnold J, whose learning in intellectual property law and related topics gives his judgments quite some weight. In dealing with a claim of equitable compensation for breach of confidence in the 2012 case of *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), the learned judge said:

It is very difficult to find a clear, accurate and comprehensive statement of the principles applicable to the assessment of damages or equitable compensation for breach of confidence. The case law is very confused, and none of the existing commentaries deal[s] entirely satisfactorily with it. (at [374])

As that comment betrays, the outward sign of confusion in the English cases has often been a loose usage of the word ‘damages’. But the underlying malady is quite different. It is not merely the misuse of a word. It is the confusion of distinct ideas: the confusion of *forms* of action with *causes* of action.

In his Cambridge lectures, delivered around the turn of the twentieth century, Professor Maitland had said that ‘[t]he forms of action we have buried, but they still rule us from their graves’ (*The Forms of Action at Common Law* (CUP 1965), 2). Between 1940 and 1970, Lord Atkin, Lord Denning MR and Diplock LJ all declared the irrelevance of the old forms of action to the work of a twentieth century judge. The forms should have been plainly irrelevant to the equitable obligation of confidentiality given that they were abolished over 70 years before that obligation in its modern form was actively developed in English law (from the 1940s onwards). Indeed, the new action was an *equitable* action: the forms of action only lay at common law.

But in this case Maitland was right. Diplock LJ said in *Letang v Cooper* [1965] 1 QB 232, 242-3 that a cause of action ‘is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person’. Recognising a new equitable ‘cause of action’ for breach of confidence should not, alone, have indicated anything about the kind of relief that would be available: in particular, since a cause of action exists where there is simply a claim to some relief,

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recognising an equitable cause of action for breach of confidence should not have implied that damages or compensation were necessarily available forms of relief. It is striking, therefore, that as soon as the English judges began speaking of a 'cause of action' for breach of confidence, they began assuming that a remedy called 'damages' was available. In so doing, they slipped into the thinking of the forms of action: in particular, the *ostensurus quare* writs for the recovery of damages in trespass, case, trover and assumpsit (as distinct from the *praecipe* writs of debt, detinue, covenant and account). In this way, they unthinkingly assimilated the new equitable liability to a common law liability in contract or tort. Unlike Australian courts, before English courts can confront the question of how to elaborate the 'restitutionary' principle of equitable compensation for breach of confidence, they will have to move these obstructions out of the way.

Canada

In Canada, different problems attend the cases, although they too are rooted in the confusion I have just described. As a result of the confusion of *forms* of action with *causes* of action, a view was formed that the juridical basis of the new equitable action was not merely unclear, but was mixed. It was said to be *'sui generis'*: a phrase, Binnie J truly said in a leading Canadian case that 'tends to create a frisson of apprehension or uncertainty amongst lawyers': *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, [28]. In his important book, *Breach of Confidence* in 1984, Dr Gurry argued that the equitable obligation has such a mixed basis. In *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, the Supreme Court of Canada adopted his analysis.

The consequences have been several.

The most important was to invest Canadian courts with discretion to decide what is the 'appropriate' remedy in a particular case. This is an unusually wide discretion. Because the basis of the equitable action was 'multi-faceted' – facets of property, trust, contract, tort were all mentioned – there was no telling which facet might appear in a given case; nor, accordingly, what relief might need to be given. This discretion was, or is – if it still exists – arguably wider than the equitable discretion enjoyed by English judges of equity since at least the seventeenth century.

A further consequence was the Canadian judges' adoption of an explicit form of legal realism. Rather than look to the legal incidents of the equitable obligation when deciding on the proper form of relief, the Supreme Court said that the judges should look to the 'underlying policy' of the law, namely of protecting confidences.

The difficulties of these and other consequences of the Supreme Court's view that equitable obligations of confidentiality have

no single juridical root will be apparent. Since the obligation is an equitable obligation of conscience, conscience – rather than property, trust, contract or tort – is that on which analysis must focus when deciding the proper relief. Looking to underlying policies is of no help. To perceive a policy in a body of decided cases and thence to conclude that the reasoning in fact used to decide those cases should be discarded and the policy applied at large is contrary to legal method.

Perhaps for these reasons, the Supreme Court of Canada has since abandoned the *'sui generis'* or conglomerate theory of confidentiality and has declared that it is a purely equitable obligation: *Cadbury Schweppes* at [20]. That, with respect, is a desirable development. But it leaves the problem that a so-called 'full range' of equitable remedies is available to relieve a breach of confidence (at [76]) and yet no indication is given of how equitable compensation might be quantified and delimited.

New Zealand

The final stop in this mental tour abroad is New Zealand. The availability of equitable compensation for breach of equitable obligations of confidence has been established longer in New Zealand than in Australia, Canada or England. But the principles by which it is awarded are not clear. Following the Canadian courts, the courts of New Zealand have been attracted to a wide discretion to decide on the proper form – and, one assumes, the proper measure – of equitable relief. The New Zealand courts have also been influenced by notions of the mingling of law and equity, which do not correspond with the Australian legal position.

Thus, one returns to the Australia where the position is that:

1. the obligation of confidentiality is recognised as purely equitable;
2. equitable, not common law relief, is in principle available;
3. equitable compensation is one of the available forms of equitable relief; and
4. it is accepted that the award of equitable compensation is and ought to be subject to principles and doctrines, rather than pure discretion.

However, as I foreshadowed at the beginning of my remarks, the Australian position presents its own problem. What is that problem and how will Australian lawyers and judges be called on to test and develop the law?

THE AUSTRALIAN PROBLEM

'Restitution'

Shortly stated, the problem presented by the Australian cases concerns the word 'restitution'. For present purposes, no question

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arises in relation to the special sense given to the word 'restitution' by writers in the field of restitution for unjust enrichment, where 'restitution' is defined as a claim that depends on a person's receipt of a transfer of wealth. Rather, the present concern is with the word 'restitution' in its more traditional sense of restoring parties to a prior position.

Restitution in that sense has become central to claims of equitable compensation for breach of confidence by an extension of the reasoning of Street J in the breach of trust case, *Re Dawson (dec'd)* (1966) 84 WN (Pt 1) (NSW) 399, where the learned judge said (at 404):

The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.

Since equitable obligations of confidentiality have been derived from the wider set of obligations owed by trustees – including trustees' obligations of confidence – the obligation of defaulting trustees has been extended to defaulting confidants. Thus, Australian cases maintain that the obligation of a defaulting confidant in equity is essentially one of effecting a restitution. That is maintained in the analysis of Gummow J in *Concept Television Productions Pty Ltd v Australian Broadcasting Corporation* (1988) 12 IPR 129, 136 and *Smith Kline & French Laboratories (Australia) Ltd v Department of Community Services and Health* (1990) 22 FCR 73, 83, and later analyses such as that of Philippides J in *Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd* [2002] QSC 222, [14]-[16].

If I may, I would, with great respect, suggest that seeking a 'restitution' is indeed a proper objective of relief in equity for breach of confidence: unlike the objectives of some other forms of relief, including some common law remedies, this objective is consonant with the fact that obligations of confidentiality are obligations of conscience. For instance, while the doctrine of mitigation is consonant with the objectives of awards of damages for breach of contract, it is dissonant with obligations of conscience. A contract party can be expected, by acting in self-interest, to mitigate his or her loss by procuring a contract on equivalent terms with another promisor. However, a confider cannot sensibly be required to mitigate his or her loss by seeking another confidant to keep the secret. Similarly, it would be odd to suppose that an obligation of conscience might be discharged by pointing to unforeseen events or the claimant's own fault in a way that engages common law (and statutory) rules in, for example, the law of contract and the tort of negligence.

Unelaborated principles

But the objective of 'restitution' requires further elaboration than

has been made so far in the Australian cases of compensation for breach of confidence.

The fact that the 'restitutionary' obligation in confidence cases is derived from *Re Dawson (dec'd)* is significant. So is the fact that *Re Dawson* was a case of a breach of trust. One can accept that a defaulting trustee's obligation 'is essentially one of effecting a restitution to the [trust] estate'. Nevertheless, one might ask, 'How is restitution to be made in equity where there is no trust estate?' Equitable obligations of confidentiality require no trust or trust estate. If a breach of confidence does not deplete a trust estate, what is a defaulting confidant to make restitution of? Further, breaching a confidence in equity does not vitiate a transaction: 'restitution' by means of rescission is not in point.

The farthest one can take the proprietary analogy is perhaps to say that confidential information has some proprietary characteristics – it may be property for the purposes of section 51 (xxxix) of the Commonwealth Constitution – and that, where the breach of confidence is in passing a trade secret to a third party, the third party receives something possessing proprietary characteristics. In that case, perhaps the obligation to make 'restitution' might be analogous to relief for breach of trust in requiring the confidant (and perhaps the recipient, on principles analogous to the first limb of *Barnes v Addy*) to pay a sum equal to the value of the trade secret.

Even that analogy begs questions, because the obligation may be only to make good any diminution in the value of the trade secret. And, of course, a breach of confidence may occur without transferring the information. The breach may consist in the unauthorised use of the information. What 'restitution' is to be made then? The analogy from trust law is incomplete; the gap requires to be filled by further consideration of what the obligation of conscience involves when the objective is to effect a restitution. As I hope to have shown, Australian lawyers and judges are likely to have to consider that problem before their counterparts abroad.

The limits of the 'restitution' objective are even firmer where the confidence relates, not to commercial or 'proprietary' confidences, but to personal information. Here, I must confess, the lead has already been taken by the English courts. One must acknowledge that the line between commercial confidences and personal information cannot be precise. However, there is a difference of quality between the two kinds of confidences, and that difference can be seen in the kinds of grievance pursued in the two kinds of case and, I suggest, in the forms of relief which can properly be awarded in the two kinds of case.

If compensation is to be granted for harm to purely personal interests suffered through breaches of confidence, that

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development would be congruent with the law of torts. Diverse though it is, the law of torts is the natural home for an action for compensation where the kinds of harm suffered relate to purely personal interests and where, inevitably it seems, the harm can be done in a manner that is hurtful or highly embarrassing to the claimant, or so as to offend public morals or terribly misuse public power. The nature of breaches of privacy – of purely personal obligations of confidence – seems inherently closer to the nature of several of the harms to which the law of torts is addressed. Equity's traditional concern with specific relief, however, places its concerns outside the law of torts. Its new-found jurisdiction to award compensation is not, in truth, an exception to that: so much is clear from the fact that, in compensation cases, courts of equity have continually reinforced the 'restitutionary' objective of equitable monetary relief.

In this regard, the lead has already been taken by the English courts in distinguishing the action for breach of confidence, in equity, from what is now, it seems, a tortious action for misuse of private information. Whether the same will occur in Australia, by accepting the invitation issued by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, also lies in the hands of the adventurous advocate – and the hapless Australian judge.

A response by the Hon Justice Mark Leeming.

May I make six comments in response to Peter Turner's excellent, not to mention timely and provocative, paper?

First, on the point well made by Peter Turner as to the notable Australian contribution to the efflorescence of the remedy, may I add a reference to an Australian journal article, written some 35 years ago in the *Melbourne University Law Review*: 'The Equitable Remedy of Compensation'.² The title may seem a little unimaginative, but it was and is important to emphasise the equitable nature of the remedy. The author introduced his theme as follows:

This remedy is generally believed to be defunct except as an ill defined possibility where certain fiduciary obligations are breached. The general misconception that an award of monetary compensation is beyond the pale of Equity has led to confusion in many cases. The writer hopes to lessen that misconception and contribute to an increased understanding of the potential use of this remedy.

A lot has changed since then. A little surprisingly, the article was picked up by the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co.*,³ in a way which anticipated some of the themes of Peter Turner's presentation today, focussing on

restitution in the non-technical sense used by Street J in *Re Dawson (decd)*: 'the obligation of a defaulting trustee is essentially one of effecting a restitution to the estate'.⁴ A quarter of a century ago, one of the most junior members of the Supreme Court of Canada, said:

As Professor Davidson states in his very useful article 'The Equitable Remedy of Compensation' (1982) 13 Melb UL Rev 349 at 351, 'the method of computation (of compensation) will be that which makes restitution for the value of the loss suffered from the breach'.

The present Chief Justice of Canada, as she now is, was correct to describe the article as useful, and correct to pick up the prescient and non-technical language of restitution. Her Ladyship was of course incorrect to refer to the author as a professor; Ian Davidson, now of course senior counsel practising in this building, and sitting in the front row of the audience today, was then a newly admitted solicitor. In short, this is not the first time that there has been an important Australian influence upon international developments in common law legal systems in relation to equitable compensation.

Secondly, I share Peter Turner's opinion that there is no reason to think that all cases of equitable compensation for breach of confidence should fit in the same procrustean bed. For one thing, as Peter observes, and as Sir Frederick Jordan might have said,⁵ there are confidences and confidences. One example may be seen in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, where a unanimous High Court said that:⁶

Certain types of confidential information share characteristics with standard instances of property. Thus trade secrets may be transferred, held in trust and charged. However, the information involved in this case is not a trade secret.

The High Court held that if the third parties who were sued, Mrs Margaret Elias and her daughters, Sarah and Jade, had received confidential information which was confidential, it would still not have been property which was knowingly received by them for the purposes of the first limb of *Barnes v Addy*.⁷ At the same time, the High Court appears to have acknowledged that there were some species of confidential information which were sufficiently proprietary to sustain such a claim to relief.

Thus it may be seen that there can be no all-embracing theory applicable to all types of confidential information. That leads to the third point, which is a more general one. The nature of the legal system is that it is replete with overlapping causes of action and remedies.⁸ That is true of confidential information just as much as other areas of the law, including in what may be the most common circumstance where such a claim arises, namely, between parties who are in contractual relations. If the parties

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expressly or impliedly promise to keep information confidential (expressly in, for example, a non-disclosure agreement or employment contract, or impliedly in, for example, a solicitor's or accountant's retainer) then there may be a question whether there is any room for an equitable duty which sounds in equitable compensation. The remedy for breach of a contractual promise to keep information confidential will be damages, not equitable compensation – perhaps, even if absent the contract an obligation of confidence would have been recognised by the parties in respect of the same information. This is in substance the converse of the proposition made by Deane J in *Moorgate Tobacco* with which Peter Turner commenced.⁹

But that is not to say that there may not be scope to contend that the parties' promise did not exclude reliance on their rights in equity; after all, we have no difficulty recognising that directors and employees may subject themselves to overlapping fiduciary and contractual duties, nor that contract is often the source of a fiduciary obligation (consider a partnership deed or a trust deed).

There are at least two ways in which this overlap may play out in cases of confidential information. If the contractual confidence is tersely drafted (a single clause in an employment contract) or implied, then there may be ample scope to contend that it does not displace rights in equity. Alternatively, if the parties have gone so far as to elaborately define and protect their confidential information in a formal contract, then that may sustain an argument that it is all the more unlikely that their objective intention should be taken to be to have denied to themselves such additional protection as equity accords.¹⁰ In recent years, divergent views have been expressed in such cases.¹¹

The points to note for present purposes are that it will be essential in a claim for equitable compensation to identify clearly the equitable (and non-contractual) confidence sought to be vindicated, and that in turn may require a closer attention to be given to the underlying rights, to the extent they have contractual force. Otherwise the difficulties to which Peter Turner has referred may arise.

Fourthly, I turn to the elephant in the room, which is, as Neil Williams SC and Surya Palaniappan recently observed,¹² statute. Statute provides rich opportunities, as well as pitfalls, in relation to the content and application of the principles underlying equitable compensation.

I will focus largely, but not exclusively, on Victorian statutes. Some statutes deal in terms with remedies. The Victorian equivalent of Lord Cairns' Act has been amended to include claims based in equity,¹³ and one view – perhaps a controversial one – is that the reasoning in *Giller v Procopets* justifying a pecuniary award to a plaintiff whose confidential information was vindictively abused

by her former partner – is best regarded as being justified under that statute.¹⁴ There is a fine analysis by Professors Katy Barnett and Michael Bryant on this statute, whose title is self-explanatory: *Lord Cairns' Act: A case study in the unintended consequences of legislation*.¹⁵ In any event, while Victorian litigants will in future cases understandably be inclined to rely upon that decision in framing their case, a narrower approach may be required by s 68 of the *Supreme Court Act 1970* (NSW), which preserves the original language of Lord Cairns.

More importantly, there are many statutes which either recognise and are to be construed in light of equitable confidential information (s 183 of the *Corporations Act* is the most obvious example) or else create new rights to confidentiality and privacy. Of the latter, some speak in terms to pecuniary claims. For example, s 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) creates a right against arbitrary interference with a person's 'privacy, family, home or correspondence', but s 39(3) provides that 'A person is not entitled to be awarded any damages because of a breach of this Charter', although s 39(4) ensures that the section does not affect any right a person may otherwise have to damages.

Such a provision is apt to stand in the way of the creation of a statutory tort sounding in damages. But there are many other statutes which are less squarely directed against pecuniary remedies. There is a useful paper by Professor Neil Foster and Ann Apps 'The neglected tort – Breach of statutory duty and workplace injuries under the Model Work Health and Safety Law'¹⁶ -touching upon the opportunities for combining statutory norms with a tortious cause of action.

My fifth point is to say something about the statutory backdrop, and in particular, the Civil Liability Act. Importantly, I do so not because I necessarily endorse the suggestion that tort is the best natural analogy for many of the claims in this area (although I do agree with the congruence to which Peter Turner has pointed). I do so because it may be quite short-sighted to think that that Act is inapplicable to equitable claims.

Section 5A of the Civil Liability Act provides that Part 1A – which is headed 'Negligence' – applies 'to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise'. Not only is that language ('any', 'regardless of whether' and 'or otherwise') broad, but many of those terms are defined, and defined in counterintuitive ways. In particular, 'Negligence' does not mean negligence; it means 'failure to exercise reasonable care and skill'.¹⁷ It would be wrong to think that Part 1A applies only to actions for negligence, or for that matter only to actions at common law. Although the statutory label 'negligence' is

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suggestive, even if regard may be had to the defined term,¹⁸ the words 'under statute or otherwise' dictate that 'negligence' is not confined to common law.¹⁹

'Harm' is defined circularly but broadly to mean harm of any kind, including personal injury or death, damage to property and economic loss, and personal injury includes pre-natal injury, impairment of a person's physical or mental condition and disease.

At the very least it seems arguable that a publication of confidential information which occurs because of a failure to take reasonable steps to, say, prevent personal information like credit card details or health records from being stored securely, would fall within those definitions.

There is a similar broad definition in s 28 which is in Part 3 titled 'Mental harm':

This Part (except section 29) applies to any claim for damages for mental harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

The same reasoning applies to the effect of that definition upon this Part, noting that negligence is re-defined – in identical terms – in s 27. Most particularly, s 31 within that Part provides:

There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

That statutory intervention may have significant consequences. Let me illustrate one, once again by reference to *Procopets*, where it was statuted that:

the term 'nervous shock' - and its modern synonym 'recognised psychiatric illness' - should also be discarded, based as they are on the unsustainable assumption that a clear line separates 'psychiatric illness' from other (lesser) types of mental distress.²⁰

In cases to which the Civil Liability Act applies, that cannot be so. Of course, *Procopets* was a case of *intentional* dissemination of confidential information, to which the provisions of the Civil Liability Act referred to above would not respond, but nevertheless it remains a good example of the need to rationalise the reformulation of principle with the statutory landscape.²¹

Sixthly and finally, the upshot is that it may be convenient – for practical, as opposed to theoretical purposes – to delineate three broad classes of cases of breaches of confidence. The first is cases involving a recognised proprietary confidence; in such cases, a plaintiff is apt to have a range of well-established property-based rights against wrong-doers and third parties in addition

to personal rights. The second is intentional cases involving the use or dissemination of confidential information. These will fall outside the Civil Liability Act but may overlap with, or be analogous to, tortious claims in trespass, defamation, injurious falsehood and perhaps even malicious prosecution (to which, once again, statute may apply). The third is non-intentional cases, where the provisions of the Civil Liability Act may have an important role.

It may be helpful to have regard to those analogies when framing and evaluating submissions as to equitable compensation; this may be seen as one aspect of coherence. The point is not to look at the quantum of pecuniary relief which issues,²² but the underlying values and principles vindicated by relief. There may be a very large question as to the extent to which equity's concern for conscience, which is central to its protection of confidential information, overlaps with or is opposed to the principles underlying these similar common law rights. Perhaps the most interesting and valuable aspect of Peter Turner's paper is provoking thought about this, which may be seen as an aspect of coherence. Whether or not that be so, there seems to be no reason to think that the next four decades of Australian equitable compensation will be lacking in interest or complexity.

Endnotes

- 1 Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney.
- 2 (1982) 13 Melb Uni L Rev 349.
- 3 [1991] 3 SCR 534 at 547-548.
- 4 [1966] 2 NSWLR211 at 214.
- 5 Cf *Ex parte Hebburn; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.
- 6 (2007) 230 CLR 89; [2007] HCA 22 at [118].
- 7 (2007) 230 CLR 89; [2007] HCA 22 at [118].
- 8 See for recent examples *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732; [2016] NSWCA 81 at [48]-[51] and *Perena v Genworth Financial Mortgage Insurance Pty Ltd* [2017] NSWCA 19 at [44].
- 9 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 at 437-8.
- 10 In Australia, that includes the possibility of an account of profits, a remedy unavailable in Australia for breach of contract: *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at [158]-[159]. Although in England an account of profits is available 'when, exceptionally, a just response to a breach of contract so requires': *Attorney General v Blake* [2001] 1 AC 268; [2000] UKHL 45 at 284, the consequence may be a lessening of the occasions in which it is ordered even in cases where there are breaches of contractual and equitable confidences: see for examples *Veroe v Rutland Management Ltd* [2010] EWHC 424 (Ch) and perhaps also *One Step (Support) Ltd v Morris-Garner* [2017] QB 1; [2016] EWCA Civ 180 at [49]-[51].
- 11 Without seeking to be exhaustive, see *Optus Networks Pty Ltd v Telstra Corporation Ltd* [2010] FCAFC 21; (2010) 265 ALR 281 at [29]-[38] and *Del Casale v Arredomus (Aust) Pty Ltd* [2007] NSWCA 172; (2007) 73 IPR 326 at [118].
- 12 N Williams and S Palaniappan, 'Statutory Construction for Advocates', paper present to NSW Bar Association, 28 February 2017.
- 13 *Supreme Court Act 1986* (Vic), s 38.
- 14 (2008) 24 VR 1; [2008] VSCA 236.
- 15 (2015) 9 *Journal of Equity* 150.
- 16 (2015) 28 *Australian Journal of Labour Law* 57.

- 17 Section 5.
- 18 See *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419.
- 19 See *Paul v Cooke* (2013) 85 NSWLR 167; [2013] NSWCA 311 at [39]-[41].
- 20 (2008) 24 VR 1; [2008] VSCA 236 at [31].
- 21 See for example *CAL No 14 Pty Ltd (t/as Tandara Motor Inn) v Motor Accidents Insurance Board* (2009) 239 CLR 390; [2009] HCA 47 at [39]-[41] and M Leeming, 'Theories and Principles Underlying the Development of the Common Law' (2013) 36 UNSWLJ 1002.
- 22 Cf *Gulati v MGN Ltd* [2017] QB 149; [2015] EWCA Civ 1291 at [50]-[74] (comparing between damages for misuse of private information and personal injury damages).