THE NATURE AND FUNCTION OF EQUITIES

(PART II)

by

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D. *Confidence as a Suggested Equity*

We have been concerned thus far with the use made by the courts of the concept of an 'equity' as a device which enables them to act in a creative manner, while at the same time adhering to the structure of our system of precedent and *stare decisis*. We have suggested that the 'equity' was developed by the courts to deal with two distinct types of problem, neither of which was susceptible to a solution within the framework of traditional common law and equitable analysis. These problems were

(a) those involving priorities ('defined equities')

(b) those involving the more basic question of whether the plaintiff ought to have an enforceable right at all ('undefined equities').

It is instructive to examine a branch of the law which is coming into increasing prominence[1] — the protection afforded to confidential information. It will be suggested that developments in this area exhibit a number of significant analogies to the category of undefined equities as discussed above. It will also be suggested that such a mode of analysis has explanatory force, notwithstanding the reluctance of some courts and commentators[2] to see the problem in these terms.

It is essential at the outset to clarify and distinguish two broad senses in which the problem of confidential information has come before the courts. The first is the so-called action for breach of confidence. The second involves a party claiming in the course of litigation (of whatever kind) that he is entitled to withhold information from the other side

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1 His Honour Mr. Justice McGarvie of the Supreme Court of Victoria commented recently that there had been a spate of actions for breach of confidence coming before him. There has also been a plethora of scholarly writing in this area in recent years. The seminal work is undoubtedly by Gareth Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence', (1970) 86 *Law Quarterly Review* 463. There are also articles by P. M. North, (1972) 12 J.S.P.T.L. 149; W. Cornish, (1970) *J.B.L.*; and G. Forrai, (1971) 6 *Syd. Law Rev.* 382. The authors gratefully acknowledge the assistance they have derived from an as yet unpublished LL.M. thesis by S. Ricketson entitled *Breach of Confidence: A Property Analysis*. Many of the themes developed in this scholarly and challenging paper have formed the basis for our own ideas about the nature of confidential information. See also S. Ricketson, 'Confidential Information — A New Proprietary Interest?' (1977) 11 *Melb. U.L.R.* 223.

2 Jones, *supra* n. 1.

and/or the court on the basis that such information was imparted to him in confidence.[3]

So far as the action for breach of confidence is concerned, a number of further distinctions should be made. In a general sense, the action enables a party to take proceedings to prevent someone else from making improper use of information imparted by the first party in confidence. Sometimes the information is imparted directly to the person sought to be restrained, sometimes that person is in effect a stranger to the person who originally imparted the confidential information.

The range of confidential information which may be sought to be protected is great. The information may be of a personal, non-commercial kind, as for example with marital communications.[4] Or it may encompass complex trade secrets.[5] The general principles governing this area seem to be the same (though whether they ought to be is a difficult question). The information must be of a generally secret nature,[6] though it need not be, in content or form, of a kind which receives the specialised protection of patent and copyright law.

We shall not be concerned with the substantive law governing the action for breach of confidence as a whole.[7] Rather for the purposes of our analysis of equities we are concerned to understand the theoretical basis of the action for breach of confidence. This involves considering not simply what the courts have described themselves as doing, but attempting to fit their actual decisions into a comprehensible framework wherever possible.

The action for breach of confidence has been described by one commentator as revealing.

> ... great conceptual confusion. Property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment, have all been claimed at one time or another, as the basis for judicial intervention. Indeed some judges have indiscriminately intermingled all these concepts.[8]

The view has been expressed that it is not meaningful to speak of there being a proprietary interest in confidential information. For example, Latham C.J. once stated:

> If only some knowledge is property then it must be possible to state a criterion which will distinguish between that knowledge which is property and that knowledge which is not property. The only criterion which has been suggested is the secrecy of the knowledge — it is said that the fact that knowledge is secret in some

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3 This second category is discussed below.

4 *Prince Albert* v. *Strange* (1849) 64 E.R. 293; *Argyll* v. *Argyll* [1965] 1 All E.R. 611.

5 *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203; *Seager* v. *Copydox* (No. 1) [1967] 2 All E.R. 415.

6 *Ansell Rubber Co. Pty. Ltd.* v. *Allied Rubber Industries Pty. Ltd.* [1967] V.R. 37. Note that the information should not be trivial, or mere 'tittle-tattle', per Megarry J., in *Coco* v. *A. N. Clark (Eng.) Ltd.* (1969) R.P.C. 41.

7 For a comprehensive discussion of this branch of the law in its entirety, see S. Ricketson, 'Confidential Information — A New Proprietary Interest?' (1977) 11 *Melb. U.L.R.* 223.

8 Jones, *op. cit.* at p. 463.

> way creates a proprietary right in that knowledge. I confess myself completely unable to appreciate this proposition as a legal statement. It is obvious that a monopoly of knowledge may be valuable... but is such knowledge property only so long as it is secret? Does it cease to be property when it is communicated to one person or two or to two hundred persons?[9]

Such views can scarcely warrant serious consideration today. They can not be reconciled with numerous decisions which have treated confidential information as a species of property. Recently in *Boardman* v. *Phipps*[10] Lords Hodson and Guest described confidential information as capable of constituting property the subject matter of a trust. Lord Hodson expressly dissented from the view 'that information is of its nature something which is not properly to be described as property'.[11]

The Court of Appeal held in *In re Keene*[12] that confidential information was 'property' for the purpose of inclusion in a bankrupt's estate. In a sense our law of industrial and intellectual property would be a misnomer if Latham C.J.'s remarks were taken seriously. The question is not whether it is possible in any meaningful way to characterize confidential information as a species of property — but whether it is illuminating to do so. This entails answering the further question illuminating to whom? From what perspective? From the point of view of counsel exercising a predictive and advisory function? From the point of view of judges engaged in resolving disputes? Or perhaps from the point of view of commentators attempting to synthesize and comprehend this branch of the law?

Our response to this question would be that the characterisation of confidential information as a form of property will render this branch of the law more certain, will assist judges in developing more coherent doctrine, and will enable commentators to comprehend what courts are actually doing in this area (as distinct from what they say they are doing).

It is suggested that the action for breach of confidence is best understood as an action for the protection of a proprietary interest. Such a view is not widely held today, largely as a result of the influential views expressed in the writings of Gareth Jones. He says of the action for breach of confidence

> No property theory can satisfactorily determine even with the aid of equity, the question of the liability of the person who innocently exploits the secret.[13]

With respect, we suggest that the very converse of this proposition is true. *Only* a proprietary theory can satisfactorily determine the question of the liability of the person who *innocently* exploits a secret. Any other theory must lead to the conclusion that there is no liability. As we shall

9 *F.C.T. v. United Aircraft Corporation* (1944) 68 C.L.R. 525 at p. 534
10 [1967] 2 A.C. 46.
11 [1967] 2 A.C. 46, 107; cf. the views of Lord Upjohn at pp. 127-8.
12 [1922] 2 Ch. 475.
13 Jones, *op. cit.* at p. 465.

see, such a 'no liability' conclusion is not supported by the authorities, meagre and poorly reasoned as they are.

Jones asserts that the action for breach of confidence is based on a broad equitable principle. This principle holds that the defendant and others claiming from, through, or under him shall not knowingly take unfair advantage of the plaintiff's confidence.[14] Implicit in this argument is the proposition that such an obligation to act in good faith when dealing with another person's confidential information is directed towards deterring unconscionable conduct, and not towards protecting a proprietary right which the person who imparted the confidential information might have. As far as Jones is concerned, the fact that a plaintiff may obtain relief against third parties who acquire such information is not a manifestation of a proprietary interest in confidential information but merely of an equitable good faith doctrine.

Closer analysis of the range of situations in which an action for breach of confidence may arise reveals flaws in Jones's line of reasoning.

1. The plaintiff and the defendant may be in contractual relations with each other. The defendant may use information imparted to him in confidence in a manner which involves a breach of this contract.[15] Here it is apparent that the nature of the plaintiff's claim is purely contractual. It is of no consequence whether the information is 'confidential', or whether the defendant has acted knowingly or innocently in making use of this information. The rights of the parties are governed by the terms of their contract, whether express or implied.

2. The plaintiff may impart confidential information to the defendant in the course of negotiating towards a contract. If the negotiations break down, and the defendant subsequently makes use of the information, the plaintiff may proceed for breach of confidence against him. Here there is no question of any contract underlying the foundations of such an action.

In *Seager* v. *Copydex (No. 1)*,[16] the plaintiff, an inventor of a device designed as an improved carpet-grip, was negotiating with the defendant in an effort to arrange for its manufacture and distribution. He voluntarily, and without being requested by the defendant to do so, disclosed details of a different kind of carpet-grip during the course of their negotiations. After these negotiations broke down, the defendant proceeded to manufacture a version of the second carpet-grip. The plaintiff succeeded in obtaining damages for breach of confidence, Lord Denning stating in the Court of Appeal

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage

14 Jones, *op. cit.* at p. 466.

15 The usual situation involves an employer-employee relationship. See for example *Ansell Rubber Co. Pty. Ltd.* v. *Allied Rubber Industries Pty. Ltd.* [1907] V.R. 37, at p. 44.

16 [1967] 2 All E.R. 415.

> of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.[17]

His Lordship seems to be saying that the basis of the action for breach of confidence is an equitable doctrine of good faith. As has been seen, this is also the view of Jones.

The difficulty with all this is that such a principle really does not explain why the plaintiff was permitted to succeed in *Seager* v. *Copydex (No. 1)*. The Court of Appeal (including Lord Denning) held expressly that the defendant company and its officers had not acted in bad faith.[18] There was no evidence of any conscious plagiarism of the plaintiff's invention. The facts revealed simply that the plaintiff had implanted the germ of an idea when he discussed his alternative carpet-grip with the defendant. Over a long period of time the defendant company's researchers became convinced they had developed this carpet-grip themselves, independently of anything they had been told by the plaintiff.

To the same effect as *Seager* v. *Copydex (No. 1)* is the recent decision of Harris J. in *Talbot* v. *General Television Corporation Pty. Ltd.*[19] The plaintiff, a film producer, sought an injunction to restrain the defendant, a television station, from televising a segment of the television programme, 'A Current Affair'. This segment would have dealt with the theme of how to become a millionaire. The plaintiff had approached certain persons connected with the defendant company some months previously, with a very similar suggestion as the format for a television series. However, negotiations had not proceeded satisfactorily. The plaintiff alleged that he had imparted his idea for the programme in confidence, and that the defendant ought not to be permitted to misuse information originally imparted solely for the purpose of negotiating towards a contract. The defendant alleged that the idea for the television segment had in fact originated in the mind of one of its employees months after the negotiations with the plaintiff had broken down, and that this employee had no knowledge at all of the prior negotiations.

Harris J. concluded, on the facts, that the employee of the defendant who claimed to have thought up the idea for the segment, had been subconsciously influenced by material related to him by others present at the negotiations with the plaintiff. While this employee honestly thought the idea was his own, he had actually been drawing upon his subconscious memory of what he had been told. In those circumstances, his Honour held that the defendant company should be restrained from making use of the idea originally imparted by the plaintiff in confidence.

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17 [1967] 2 All E.R. 415, at p. 417.

18 [1967] 2 All E.R. 415, at p. 418. Salmon L.J., stated, in regard to the defendants — 'I certainly acquit them of any conscious plagiarism ... Nevertheless, the germ of the idea ... was I am certain implanted in their minds by the plaintiff at the interview of March 13, 1962 and afterwards subconsciously reproduced and used, if only as a springboard ... This is no reflection on their honesty, but it infringes the plaintiff's rights.'

19 1977 No. 1998 (Vic.) (unreported).

Again, the equitable doctrine of good faith scarcely seems to explain such a decision. There was no finding of bad faith on the part of the defendant (assuming that a corporate entitly can show bad faith through its officers). There was no finding of conscious plagiarism. Lord Denning has sought to explain away such difficulties in the following way.

> The jurisdiction is based, not so much on property or on contract, but rather on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless, once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence.[20]

Jones also denies that the success of the plaintiff in *Seager* v. *Copydex (No. 1)* signified a recognition by the Court of Appeal of a proprietary interest in confidential information. His argument is predicated upon a very broad usage of the term 'bad faith', as he states

> ... there is much to be said for the view that where the plaintiff is not suing for damages but is seeking to recover the defendant's unjust enrichment, knowledge and good faith should be interpreted to embrace constructive and imputed knowledge as well as actual knowledge. A defendant who acts unreasonably in thinking that he is not breaching the plaintiff's confidence has surely taken unfair advantage of the plaintiff.[21]

In support of this proposition Jones quotes an observation of Megarry J. in *Coco* v. *A. N. Clark (Engineers) Ltd.*[22]

> It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.[23]

It is submitted that such an approach involves extending equitable doctrines requiring good faith beyond their proper scope. It also leaves unresolved a number of questions. What if, at the time the information was originally received the person to whom it was imparted believed on *reasonable grounds* that it was not of a confidential nature. Will equity in effect impose strict liability upon a defendant who has acted reasonably and in good faith up till the moment that he discovers that the information was in fact confidential? What relevant difference does the

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20 *Fraser* v. *Evans* [1969] 1 All E.R. 8 at p. 11.
21 Jones, *op. cit.*, at p. 476.
22 [1969] R.P.C. 41.
23 [1969] R.P.C. 41 at p. 48. R. P. Meagher, W. M. Gummow and J. F. Lehane, in their excellent treatise *Equity — Doctrine and Remedies* (1975) at p. 46, have criticized this view as an unwarranted intrusion into equitable doctrine of the 'reasonable man'. In their words, 'the reasonable man labours at law not in equity which sets higher standards for fiduciaries'. Their concern for purity of doctrine is well taken, as is their analysis of the 'fusion fallacy'. However, it may be going too far to exclude from equity any notions of reasonableness, given that the idea of the reasonable man is not a concrete working rule, but only an example of the operation of categories of illusory reference. This point is developed below.

sudden acquisition of knowledge make? Even if the defendant acted unreasonably, in believing that the information was not confidential this fact of itself does not suggest bad faith. How can it suddenly become bad faith when added to subsequently acquired knowledge? The defendant does not know that he acted unreasonably previously. Would it make any difference if the defendant's conduct was reckless at the time he received the information as to whether it was of a confidential nature? If so, reckless in a subjective or objective sense?

Attempts to argue by analogy to the liability of fiduciaries are not conducive to clear thought. According to conventional analysis, a fiduciary owes strict duties in equity by virtue of his relationship with the party to whom those duties are owed.[24] This relationship is something which is perceived, or ought to be perceived, by the fiduciary at all relevant times. He is on his guard and able to avoid breaching such duties by careful management of his affairs. Nothing turns on the nature of the property that a fiduciary deals with — his obligations arise purely out of his relationship with the other party to the relationship. Contrast confidential information, where no recognised (or recognisable) relationship at all may exist between the person who imparts the information, and the person who 'misuses' it. Any obligation owed in such circumstances stems from the confidential character of the information imparted. In this sense the action has far more of a proprietary flavour about it than a 'good faith' flavour.

It is submitted that it would be unprecedented for equity to require a defendant who had acted in good faith to restore lost benefits to a plaintiff unless a proprietary interest of the plaintiff had been infringed. A clear illustration of this principle is the decision of the House of Lords in *Boardman* v. *Phipps*,[25] where such a proprietary interest was held to arise by means of a constructive trust. Occasionally the defendant will be described as a 'fiduciary', but this label merely conceals the fact that a constructive trust is deemed to exist, and the plaintiff is treated as the equitable owner of the property.

3. The plaintiff may be in contractual relations with another person, and may impart confidential information to that person under the terms of their contract. The defendant, a non-party to the contract, may acquire this confidential information from that person, with full knowledge of its confidential character. Here the plaintiff may seek compen-

24 See Meagher, Gummow and Lehane, *op. cit.* at p. 130. We take the same view as is there expressed by the learned authors.
'The equitable doctrine that information which is confidential and is imparted in circumstances of confidence may not be disclosed by the person to whom it is imparted is commonly dealt with as an example of fiduciary obligation ... it is better to regard this principle as a branch of equity distinct from the law as to fiduciary relationship ... the parties between whom the obligation of confidence exist need not be trustee and beneficiary, agent and principal or in any other relationship where fiduciary obligations are traditionally said to arise. "Confidence", in a loose sense, may be common to the law as to confidential information and fiduciary obligation, but little else is ...'

25 [1967] 2 A.C. 46.

sation or restoration of benefits against the defendant by suing for the tort of intentionally inducing breach of contract.[26] In essence the plaintiff's action is in tort, and does not necessarily involve any proprietary elements.

4. The plaintiff and another person may be negotiating towards a contract. After the negotiations have broken down, this person may pass the confidential information on to the defendant. The defendant may receive the information with full knowledge of the fact that it was imparted to him in breach of confidence. There is ample authority for the proposition that the plaintiff may succeed against the defendant in such circumstances.

For example, in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*[27] Lord Greene observed

> If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff he will be guilty of an infringement of the plaintiff's rights.[28]

It should be noted that by his use of the word 'indirectly' Lord Greene foreshadowed the action for breach of confidence against a third party who received confidential information from the person to whom it was imparted. It is entirely meaningful to describe the basis of such an action as being one of 'good faith'.

5. The plaintiff and another person may be negotiating towards a contract. After the negotiations break down, this person may pass confidential information which he has received from the plaintiff to the defendant, a non-party to the contractual discussions. The defendant receives the information innocent of any knowledge of its confidential origins. He may either give value for the information, or receive it as a volunteer.

If Lord Denning and Jones are correct, the question whether the plaintiff may succeed against the defendant will depend upon the reasonableness of the defendant's belief that the information he acquired was not confidential in its origins. If his belief was unreasonable, the fact that he was bona fide (*i.e.*, acting honestly) will be of no avail. Nor will the fact that he provided valuable consideration for the information. As Jones puts it,

> It is irrelevant, moreover, whether the defendant is the plaintiff's immediate confidant or a third party who receives information from that confidant. In either case, a defendant who has acted reasonably in believing that he was not breaching the plaintiff's confidence in acting as he did should owe the plaintiff no duty, conversely an equitable obligation of confidence should be imposed upon him if his belief was unreasonable.[29]

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26 *British Industrial Plastics Ltd.* v. *Ferguson* [1940] 1 All E.R. 479.

27 (1948) 65 R.P.C. 203.

28 (1948) 65 R.P.C. 203 at p. 213.

29 Jones, *op. cit.*, at p. 476.

Furthermore, both Lord Denning and Jones would contend that even if the belief of the defendant were reasonable at the time the information was acquired, as soon as the defendant discovered its true confidential origins he would come under an equitable obligation to the plaintiff. Again this would be so even if the defendant were a bona fide purchaser for value without notice. The only qualification that Jones allows is that the defendant should be excused from liability (where he has acted reasonably in his initial receipt of information, and only discovered its true nature subsequently), if he can establish that he has irrevocably changed his position to his detriment so that it would be inequitable to grant the plaintiff any relief.[30]

It is submitted that these views are not supported by the authorities. On balance, these hold that a bona fide purchaser for value without notice will acquire such confidential information free from any claim that the plaintiff might have. In addition, it will be argued that in principle this is as it should be.

Jones argues that in respect of confidential information a *bona fide* purchaser ought not to be in any better position than a bona fide volunteer. This view has a certain superficial plausibility. It does not stand up to closer scrutiny, however. Jones says —

> Bona fide purchase would certainly be a good defence if the plaintiff's action was based on the defendant's infringement of the plaintiff's equitable property in the particular information. But it is questionable whether the mere payment of money should, in itself, defeat a *restitutionary claim whose essence is a duty* of *good faith*, a duty not to take unfair advantage of the plaintiff's confidence.[31]

With respect, this argument involves circular reasoning. It is predicated upon an analysis of the action for breach of confidence as being based on an equitable doctrine of good faith, rather than a proprietary interest in confidential information. If this premise is not accepted, the arguments in favour of allowing a defence of bona fide purchaser require consideration on their merits.

These merits are weighty as Jones himself concedes.[32] He argues that there ought to be a *strong* (albeit rebuttable) presumption that a *bona fide* purchaser is deemed to have changed his position to his detriment. Under the 'changed circumstances' doctrine (which Jones posits as a qualification to the rule that a plaintiff ought to succeed in an action for breach of confidence against a defendant who acquires confidential information innocently and subsequently discovers its true nature), in most cases a bona fide purchaser will prevail against the aggrieved plaintiff.

The point is that Jones would prefer to see a defendant who has not changed circumstances to his detriment restore to the plaintiff the bene-

30 Jones, *op. cit.*, at p. 477.
31 Jones, *op. cit.*, at p. 478.
32 Jones, *op. cit.*, at pp. 478-9.

fits of his confidential information even where the defendant is a *bona fide* purchaser for value without notice. Such cases will be rare because of the operation of the strong presumption of changed circumstances, but ought nevertheless to be resolved in favour of the plaintiff, according to Jones. He argues that the interests of the *bona fide* purchaser defendant are sufficiently protected by requiring the plaintiff to reimburse the defendant any expenditure incurred by him, as a condition for the award of any equitable relief.[33]

The plaintiff would then be able to recover any amount so reimbursed from the person who wrongfully imparted the confidential information to the defendant in the first place.

It is submitted that these views are not sound, and that the plaintiff ought to have no rights against a defendant who is a *bona fide* purchaser of the confidential information. The plaintiff's remedy should be against the person who wrongfully imparted the confidential information to the defendant. This remedy may be contractual, or, as has been argued, it may be a proprietary action for interference with the plaintiff's interest in confidential information.

Commercial certainty would be seriously undermined if a *bona fide* purchaser of information were to take subject to the risk that it might subsequently emerge that the information was confidential, and that the purchaser might be obliged to forego the benefits of what he had paid for in good faith. In addition, as between the innocent plaintiff and the innocent defendant it is arguable that the plaintiff is more to blame for what has transpired. He has imparted confidential information without taking proper steps to safeguard his interests. Assuming the nature of the information was such that it could have been patented, he has failed to take out a patent. He could have been more careful about what he disclosed, and to whom he disclosed it. He could have protected himself by express contractual arrangements.

Another reason for recognising the defence of *bona fide* purchaser in an action for breach of confidence is the conceptual result of a failure to do so. If the action for breach of confidence is recognised as a proprietary action, the question arises as to what sore of proprietary interest the plaintiff is protecting. A failure to recognise a defence of bona fide purchaser of the legal interest would lead to the surprising result that the plaintiff's interest in confidential information is a legal interest, and not an equitable interest or mere equity. Ironically, if this were the case the incentive on the part of persons in the community of an inventive disposition to make use of our developed system of parent law would be greatly diminished. This would mean that secret information about useful techniques would remain secret, a result manifestly not in the interests of society.

Of course, it must be noted that confidential information differs from traditional forms of property in several key respects. Most types of

33 Jones, *op. cit.*, at p. 479.

proprietary interest are lesser parts of a greater whole. In speaking of confidential information, as a proprietary interest(and indeed as will be argued below a proprietary equity of the undefined type) it is not possible to conceive of any genus of which confidential information is a species. However, this may be true also of other forms of undefined equity, such as the equity of acquiescence, and perhaps also of equitable interests arising out of restrictive covenants.

The authorities also support the view that a defence of *bona fide* purchaser ought to prevail in actions for breach of confidence. It is true that there are some observations by Lloyd-Jacob J. in *Stephenson, Jordan and Harrison Ltd.* v. *MacDonald and Evans*[34] which run counter to this view. In that case the plaintiff sought an injunction against the defendant, a publishing company, to restrain it from publishing a manuscript it had obtained from an employee of the plaintiff. This manuscript revealed information of a confidential nature imparted by the plaintiff to its employee. There was no doubt that the defendant company was acting *bona fide* in every sense of the term in agreeing to publish the manuscript. At the time it received the manuscript it was unaware of the confidential nature of the material contained therein. It had since become aware of this, but proposed to publish unless prevented from doing so.

Lloyd-Jacob J. found for the plaintiff on the grounds that the proposed publication would constitute a breach of confidence. He intimated that the defence of *bona fide* purchaser would not avail the defendant, even if made out on the facts.

On appeal, the Court of Appeal [35] also found for the plaintiff, albeit on different grounds. Evershed MR stated that it would be

> ... shocking if reputable publishers, who discovered that there was in some work which they had acquired a gross breach of faith, publication of which would involve the ruin of some business, yet nevertheless could say, having discovered that fact before they had published or incurred any substantial expense, that they were entitled to insist on going on with their ublication.[36]

It is suggested that this decision is at best weak support for Jones' view that the defence of *bona fide* purchaser will not avail a defendant in an action for breach of confidence. Jones himself concedes this point.[37] For one thing, it was not clear on the facts of the case whether the defendant company had given value for the manuscript, as for example would be the case with an advance on royalties.[38] If not, it would be difficult to describe the defendant as a *bona fide* purchaser. However, it must be conceded that the dicta of Evershed MR seem to

34 (1951) 68 R.P.C. 190.
35 (1952) 69 R.P.C. 10.
36 (1952) 69 R.P.C. 10, 16.
37 Jones, *op. cit.*, at p. 481.
38 Perhaps an undertaking to pay royalties in the future would be adequate 'value'.

support the change of circumstances criterion posited by Jones as a solution to the priorities problems which might arise in this area.

The balance of authority appears to support the view that a *bona fide* purchaser will prevail over a plaintiff in an action for breach of confidence.

In *Printers and Finishers Ltd.* v. *Holloway*[39] Cross J. observed

> If authority is needed for the grant of an injunction against someone who has acquired ... information to which he was not entitled without notice of any breach of duty on the part of the man who imparted it to him but who cannot claim to be a *purchaser for value*, I think that can be found in the case of *Prince Albert* v. *Strange* ...[40]

An old New South Wales case which may be in point is *De Beer* v. *Graham.*[41] The plaintiff purchased a secret formula for curing certain ailments in sheep from an inventor. The agreement required the inventor to give up all 'right title and interest' in the formula. Subsequently the inventor sold the same formula to the defendants, who had no knowledge of the earlier transaction. It was held that as the defendants were *bona fide* purchasers, the plaintiff could have no action against them. However, this decision is by no means decisive as Owen J. strongly implied that the plaintiff had no proprietary interest in the secret formula in any event, so that the plaintiff would have failed even if the defendants had been neither bona fide, nor purchasers.

Another old case in point is *Morrison* v. *Moat.*[42] Here Turner V.C. found for the plaintiff in an action for breach of confidence, but added 'It might be different if the defendant was a purchaser for value of the secret without notice of any obligation affecting it ...'[43]

Various Law Reform bodies which have examined the scope of the action for breach of confidence, such as the English Law Commission,[44] have concluded that the defence of *bona fide* purchaser ought to operate in this area. The Law Commission expressly rejected Jones's suggested 'change of circumstances' criterion. The American Restatement of Torts also supports the view that the defence of *bona fide* purchaser ought to prevail in actions for breach of confidence.[45]

To sum up, therefore, it is suggested that both in principle and on the authorities, the action for breach of confidence is best seen as a proprietary action rather than based on a general equitable good-faith doctrine. Furthermore, the defence of *bona fide* purchaser does operate and should continue to operate in this area. This makes it clear that the plaintiff's proprietary interest in confidential information is generally equitable, and not a legal interest. The action for breach of confidence

39 [1965] 1 W.L.R. 1; (1965) R.P.C. 239.
40 (1965) R.P.C. 239, 253 (our emphasis).
41 (1891) 12 N.S.W.R. (Eq.) 144.
42 (1851) 8 Hare 241.
43 (1851) 8 Hare 241, 263.
44 See the Law Commission — Working Paper No. 58 (1974).
45 *Restatement of Torts*, Article 758.

has its historical roots in Chancery, and the remedies typically sought are equitable as well (*i.e.* injunction and equitable damages under *Lord Cairns' Act*).[46]

This being the case, what kind of equitable proprietary interest are we dealing with? In hierarchical terminology is it an equitable interest, or an equity?

It is our contention that the plaintiff's interest in confidential information is a proprietary equity of the undefined variety, and not an equitable interest. It certainly does not have about it the flavour of full equitable interests which are now formed into 'established categories'. In Jackson's terms the action for breach of confidence represents a situation where the courts

> ... have acted so as to create a proprietary interest, but which has not yet reached the stage when it can be said to a plaintiff 'bring yourself within that category and you will be protected'. Instead, all that can be said is that the remedies are available for protection. Prove that yours is a situation where they should be employed. But this does not mean that the 'interest' once recognized as an equity, s any the less a proprietary interest of a sort.[47]

Jackson argues that it is inherent in the concept of an equity that its existence may be largely dependent upon the conduct of the parties. This is said to be one of the factors which distinguish the equity from the equitable interest. We support his view, but only in so far as it purports to distinguish undefined equities from equitable interests. It has already been argued in this paper that equities are of two types; those that are undefined, and those that are defined. Defined equities, which serve a different function from those which are undefined, (namely the resolution of priorities disputes), have solidified into recognised categories but are still distinct from equitable interests for priorities purposes.

Given that the action for breach of confidence closely resembles those situations in which undefined equities have been held to exist, the question may be asked why the courts have been reluctant to characterise the nature of the plaintiff's interest as an equity. There are several possible answers. The idea of an equity as a proprietary interest at the bottom of a hierarchy of proprietary interests is a relatively recent phenomenon. The implications of such a mode of analysis are still being worked out and refined in the courts. A more important factor is that the concept of an equity has seldom been resorted to in any area of law unless a specific need for it has arisen. In the case of undefined equities, it operates as an analytic device which promotes flexibility, and enables the courts to rationalise the hidden premises which underlie many judgments involving finely balanced adjustments of rights between parties.

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46 For example see *Supreme Court Act* 1958 (Vic.) s. 62 (3); *Supreme Court Act* 1970 (N.S.W.) s. 68.

47 Jackson, *Principles of Property Law* (1967) at p. 69.

However, in the context of the action for breach of confidence, resort to such an analytic device is seldom necessary. Most of the issues which arise in this area can be dealt with by the application of fixed legal or equitable categories such as contract, tort, or equitable good-faith. It is only when problems arise which do not fall readily into any of these existing categories that the need for a conceptual tool such as the undefined equity arises. As with all sources of judicial creativity, it is the hard cases which provike the need for an unusual response. In areas such as the equity of a deserted wife, or the equity of a contractual licencee it is soon apparent that orthodox categories are inappropriate and cannot resolve the questions in issue. Hence the obvious need for resort to new solutions such as the equity. In the action for breach of confidence, existing categories can be used to resolve most of the problems which arise. It is only the hard case which forces us to confront the issue of whether the nature of the action is proprietary or not, and if so whether it is meaningful to ascribe to it the label equity.

It is our contention that much of the confusion which at present underlies the action for breach of confidence will be resolved if it is seen as being in essence proprietary in nature. Furthermore, conceptual clarity will be enhanced if the plaintiff's rights are characterised as a proprietary equity of the undefined variety. We believe that it would serve useful analytic purposes if the action for breach of confidence were to be conceived of in this way, though we have no illusions about the real function which such an analysis serves — as a method of enabling the courts to resolve difficult questions by the use of 'logical form' rather than by the consideration of social needs and policies. We accept the view that the use of a conceptual label such as the equity (even our more precise undefined equity) is a device which permits a secret and even unconscious exercise by courts of what in the ultimate analysis in hard cases is a creative choice. We would argue that the equity itself is a form of 'category of illusory reference',[48] in Stone's terms. In fact we would go further and say that it is a paradigm example of what Stone calls a 'legal category of concealed circular reference'.[49] It is analogous to the notion of 'implied contract'. As Stone puts it:

> Recovery was not allowed because the court implied a contract, much less because the court believed there had actually been a contract; it was rather that the court *pretended* that there was a contract because it was thought there *ought* to be a recovery.[50]

The use by the courts of the term equity, in its undefined sense, serves the same role. It allows the court to say with full solemnity that there ought to be recovery because the plaintiff has an equity. The point that is neglected is that the court only holds that there is an equity because it concludes that there ought to be recovery.

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48 See J. Stone, *Legal System and Lawyer's Reasoning* (1964) Ch. VII.

49 Stone, *op. cit.*, at pp. 260-1.

50 Stone, *op. cit.*, at pp. 260-1.

Notwithstanding its illusory character, the use by the courts of the equity in the area of breach of confidence would still resolve much confusion. To describe the equity as a category of illusory reference is to use the term 'illusory' in a neutral and non-pejorative sense. It is not to imply that judges are deluding themselves in concluding that their decision to allow recovery in an action for breach of confidence is the direct result of the application of logical processes of deduction to binding rules. No doubt many judges are unaware of the fallacies inherent in such a belief when faced with 'hard cases'. No doubt many others are perfectly aware of the creative role they are in fact playing in granting a remedy in a situation hitherto not governed by precedent. There is nothing illegitimate about using devices such as an equity, or a constructive trust, or a fiduciary relationship to make their decisions seem rule guided, and in conformity with existing and recognized patterns of legal thought. Indeed it is inherent in the crafts of lawyers to do so. The role of a court is not simply to decide a case as between the two parties before it, but to provide guidance (at least) as to how analogous problems should be dealt with in the future. Express advertence to relevant policy criteria is desirable, but within a conceptual framework which allows for accurate transmission to new sets of circumstances. Categories of illusory reference serve precisely this role, in addition to any other functions they may have.[51]

Analysis of the action for breach of confidence as an undefined proprietary equity would also have at least one very useful side benefit. Recently there has been great confusion engendered by the courts in the areas of evidence excluded in the public interest (so-called Crown Privilege), and legal professional privilege. Much of this confusion has been brought about by the efforts of Lord Denning. In a series of cases involving Government Departments and other public institutions he has repeatedly arrived at the conclusion that evidence ought not to be admissible because it consisted of information imparted by someone in confidence.

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51 Stone comments *op. cit.* at p. 231: 'Does this means that those who insist on strict adherence to the rule of *stare decisis* must either be merely trying to hold the living law within a matrix which is quite arbitrary in relation to the contents, or that they are hypocritically pretending to do so? Nothing here said should be so understood. When judges resort to precedents to derive present decisions by logical reasoning, this is a real activity with real functions, even if not quite in the sense generally assumed. This way of 'law-saying' certainly helps to keep alive such important legal ideals as certainty, stability, uniformity and order, and it is also an important way of giving law the appeal of reasonableness. If legal progress is a fact and a necessity, it is no less true and no less commonplace that so are a degree of stability and logicality. These commonplaces should leave us not with the cynical jibe that the law speaks *one way and acts another,* but with the conundrum how the law can *simultaneously act in two such mutually inconsistent ways.*'
Stone goes on to say, at p. 241, that categories of illusory reference 'serve as devices permitting a secret and even unconscious exercise by courts of what in the ultimate analysis is a creative choice'.

In *Alfred Crompton Amusement Machines Ltd.* v. *The Commissioner of Customs and Excise*,[52] his Lordship rejected the view put by the Commissioner that certain invoices supplied to him in confidence by third parties were the subject of Crown Privilege. However, he went on to hold that the invoices need not be disclosed to the other party or to the court on the ground of confidence, a 'privilege' available to all litigants. This privilege was said to be a long standing one and took the form that '... a party to litigation, is not obliged to produce documents, or copies of documents, which do not belong to him, but which have been entrusted to his custody by a third party in confidence'.[53]

On appeal to the House of Lords,[54] Lord Denning's view was rejected. Lord Cross described Lord Denning's equitable privilege of confidence as '... combining if not confusing, two quite different considerations — the property in the document and the confidential nature of its contents...'[55] He went on to say that no such privilege of confidence existed.

Lord Denning in *Norwich Parmacal Co.* v. *The Commissioner of Customs and Excise*[56] also stated his belief in an equitable privilege of confidence. He said '... the names of the importers were given to the customs authorities in confidence — for a limited and restricted purpose — and the courts ought not to compel the customs to break that condence... the law about confidential information has developed much of recent years'.[57]

Once again, on appeal, the House of Lords[58] held that no such general privilege of confidence existed. One must admire Lord Denning's persistence if not his adherence to the doctrine of *stare decisis*. In *D.* v. *National Society for the Prevention of Cruelty to Children*,[59] Lord Denning said

> ... when information has been imparted in confidence, and particularly where there is a pledge to keep it confidential, the courts should respect that confidence. They should in no way compel a breach of it, save where the public interest clearly demands it... In the converse case where the recipient of confidential information himself threatens to disclose it to others, the courts have repeatedly restrained him from breaching the confidence... If the courts thus restrain a breach of confidence, surely they should not themselves *compel* a breach save when the public interest requires.[60]

On this occasion Lord Denning's dissenting judgment was upheld by the House of Lords,[61] though again his reasoning was disapproved. It was emphatically restated that

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52 [1972] 2 All E.R. 353.
53 [1972] 2 All E.R.
54 [1973] 2 All E.R. 1169.
55 [1973] 2 All E.R. 1169, 1180.
56 [1972] 3 All E.R. 813.
57 [1972] 3 All E.R. 813, 818.
58 [1973] 2 All E.R. 943.
59 [1976] 3 W.L.R. 124.
60 [1976] 3 W.L.R. 124, 132.
61 [1977] 2 W.L.R. 201.

> The fact that information has been communicated by one person to another in confidence... is not of itself a sufficient ground for protecting from disclosure in a court of law the nature of the information... The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information....[62]

It is submitted that the views of Lord Denning are deficient in failing to perceive that the notion of confidence does not travel well when it is transported from the action for breach of confidence into the area of privilege. His Lordship's views would no doubt be substantially altered if he came to see the action for breach of confidence as being essentially proprietary. This would result in sounder development of legal principles in the areas of adjective law affected, as well as in the action for breach of confidence itself.

E. *Priorities — Defined Equities*

So far we have discussed the use which the courts have made of the undefined equity, and considered the reasons for the courts' apparent failure to apply the equity analysis in the field of confidential information. It is now necessary to discuss the question of priorities, the other area in which the 'equity or equitable interest' problem has been important.

In 1965, valuable insight into the nature of the 'equity' was given by the High Court in *Latec Investments Ltd.* v. *Hotel Terrigal Pty. Ltd. (In Liquidation)*,[63] a case concerning a 'defined equity', the right to have a conveyance set aside for fraud. All members of the court, (Kitto, Taylor and Menzies JJ.) recognised that an equity, as compared to an equitable interest, could bind third parties. This recognition of the equity as a category in the property hierarchy stood in sharp contrast to the approach of the Law Lords in *National Provincial Bank* v. *Ainsworth* where Lord Upjohn, for example, said:

> I myself cannot see how it is possible for a 'mere equity' to bind a purchaser unless such an equity is ancillary to or dependent upon an equitable estate or interest in land... a mere 'equity' naked and alone is, in my opinion, incapable of binding successors in title even with notice; it is personal to the parties.[64]

Lord Wilberforce expressed a similar view:

> Lastly, an analogy was sought to be drawn with such an equitable claim as one for rectification or rescission on the ground of fraud. But even if such an 'equity' can be binding on the purchaser of a legal estate in lands, that can only be the footing that the purchaser, taking under an instrument cannot claim the benefit of it

62 [1977] 2 W.L.R. 201, 207 (*per* Lord Diplock).
63 (1965) 113 C.L.R. 265.
64 [1965] A.C. 1175 at p. 1238. Lord Upjohn also expressed the view that where judges have said that a purchaser takes subject to all equities, equities is meant in the sense of equitable interests.

> if he knows that there is a good equitable claim to reform it.... In my opinion, even if we accept the description of the wife's right as 'an equity' that does nothing to elevate the right from one of a personal character, to be asserted against the husband, to one which is binding on successors in title to the land.[65]

It can of course be argued that these comments must be confined to the context in which they were delivered, and do not throw doubt upon the existence of the equity generally. Obviously the lack of definability of the deserted wives' equity, and its discretionary nature were in a large measure responsible for its rejection.[66] Lord Wilberforce's comments about the difficulties faced by a prospective purchaser in the investigation of title, have a convincing ring.[67] But the comments of the Law Lords appear to go further, and throw doubt upon the existence of all equities, or at least upon the existence of the undefined equities. The approach in *Ainsworth's* case[68] could be reconciled with the recognition of the equity in the *Latec* case[69] by confining the comments in *Ainsworth* to undefined equities, thus acceding to the existence of the defined equities. Lord Upjohn and Lord Wilberforce in *Ainsworth* attempted to reconcile their broad statements about the non-existence of the equity, with the established equities of rectification and rescission.[70] In the quotation from Lord Wilberforce above the attempt is obviously unsatisfactory on two counts. First, he appears simply to be referring to the principle of notice. Secondly, the statement overlooks the fact that a purchaser will never 'know' whether a claim is good until the Court decides that it is, and when the facts concerning rectification or rescission are in dispute the outcome of such an action is far from predictable. The situation is not precisely analogous to cases, such as *Halsall* v. *Brizell*[71] where the principle that he who claims the benefit of a deed must bear the burden, is applicable.

The other way to accommodate cases in which the equity is treated as a category of proprietary interest, is to treat the equity as in some way 'attached' to an equitable interest. This approach denies the existence of naked equities, but allows them when they are ancillary to equitable interests. This more plausible approach is used by Lord Upjohn to explain the defined equities of rescission and rectification

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65 [1965] A.C. 1175 at p. 1254. Cf. Lord Hodson, at p. 1223. Lord Hodson said 'It being conceded that the "equity" is not an equitable interest in the land I find difficulty in seeing how it can operate so as to affect third parties'.

66 Lord Wilberforce said 'Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities...'. [1965] A.C. 1175 at p. 1248.

67 [1965] A.C. 1175, at p. 1248; *cf.* Lord Upjohn at pp. 1233-1234.

68 [1965] A.C. 175.

69 (1965) 113 C.L.R. 265.

70 All the Law Lords appear to have rejected the analogy between the deserted wives' equity and other interests which it was argued were equities. See for example [1965] A.C. 1175 at p. 1223 *per* Lord Hodson, 1239 *per* Lord Upjohn at p. 1251 *per* Lord Wilberforce.

71 [1957] Ch. 169.

when he points out that once an equity to rectify is successfully asserted the result is the creation of an equitable interest.[72] (It might also be the creation of a legal interest.) The same reasoning could be applied to those examples of the equity of acquiescence where the court intervenes by treating the facts as giving rise to an equitable interest of a definable nature. But this explanation does not characterise the nature of the plaintiffs' right before the court has intervened (apparently it is not an equitable interest) and nor does it enlighten as to the outcome of a priority dispute such as that in the *Latec* case.[73]

Lord Upjohn's comment does find some support in the judgment of Kitto J. where he speaks of the case where 'an equity is asserted which must be made good before an equitable interest can be held to exist'.[74] It is clear in *Latec* that the successful assertion of the equity will give rise to an equitable interest in Terrigal. But this is not to deny that at the time when the conflict arises, it is, in the view of Kitto J. and Menzies J., a conflict between an equity, and an equitable interest. If M.L.C. had had notice of the equity it would have prevailed, which clearly demonstrates that the interest is more than merely personal. In the words of Kitto J. on the facts of *Latec*, 'it is against the preliminary equity, and not against the equitable interest itself that the defence of purchase for value without notice has succeeded'.[75]

While the conflict in the *Latec* case was characterised as a conflict between a prior equity and a subsequent equitable interest, it is undeniable that the success of Terrigal would lead to the creation of an equitable interest. Do the comments of Lord Upjohn and Lord Wilberforce throw doubt on the existence of the category of 'naked equity' as opposed to the equity accompanied by an equitable interest? The *Latec Case* tends to support the view that even a 'naked equity' may be more than merely personal. In the case of the equity of acquiescence it has not yet been necessary to characterise the equity for the purposes of the resolution of a priority conflict with a later equitable interest. Will it be characterised as an equity, an equitable interest, or an equity which must be successfully asserted before an equitable interest can come into being? Where the interest intended to be conferred on the plaintiff is of a defined nature, for example a life interest, it seems likely that it will be classified as an equitable interest. If this approach were taken the 'equity' category would be unnecessary to accommodate interests arising out of acquiescence. But in the case where the interest is not so readily definable (for example *Inwards* v. *Baker*)[76] and where there are other reasons for not characterising the interest as equitable (for example

72 [1965] A.C. 1175, at p. 1238.

73 (1965) 113 C.L.R. 265.

74 (1965) 113 C.L.R. 265, at p. 277.

75 (1965) 113 C.L.R. 265, at p. 278. Note the other criticisms of the 'equity leading to equitable interest' theory in Jackson, *Principles of Property Law*, at p. 77.

76 [1965] 2 Q.B. 29.

E. R. Ives Investment Ltd. v. *High*)[77] the equity classification still serves a useful purpose.

Another difficulty arises if the court regards an equity as in some way dependent upon or bound up with the equitable interest it foreshadows. In *Downie* v. *Lockwood*[78] the plaintiff sought rectification of an unregistered tenancy agreement against a registered successor in title to the original landlord. It was necessary to determine whether the plaintiff's right to rectify was protected by the exception against indefeasibility of title in favour of 'the interest... of a tenant in possession of the land' contained in *Transfer of Land Act* 1958 (Vic.) s. 42 (2) (e). Smith J., of the Victorian Supreme Court, took the view that the plaintiff's interest could be classified in two possible ways. It could be said that the plaintiff had an equitable leasehold interest upon the terms of the written lease, coupled with an equity to rectify the lease to make it accord with the terms of the agreement between the original parties. Alternatively it could be said that the plaintiff had simply an equitable leasehold interest upon the terms of the lease as rectified. Smith J. adopted the latter approach, and on this view the plaintiff's right to rectify was part of his interest and came within the exception in s. 42 (2) (e). Since the plaintiff's lease was only equitable, he was entitled to specific performance and equity would grant specific performance of the real bargain between the plaintiff and the original landlord. If the priority conflict had arisen in the general law context, the plaintiff's interest would have prevailed over the holder of a later equitable interest. On the other hand, as conceded by Smith J., if the plaintiff had had a legal lease, his right to rectify could not be attached to the equitable claim for specific performance.[79] Accordingly it would be classified as a mere equity which would be defeated by a later purchaser of the equitable estate for value without notice. *Downey* v. *Lockwood* may no longer be good law as a result of the decision in *Latec*. But the absurdity of the contrast described above illustrates the difficulty in treating an equity as something absorbed in a larger equitable interest, rather than as an interest having an independent existence for the purpose of resolving a priority conflict.

In *Latec* the High Court treated the problem basically as one of classification. Was the interest of Terrigal to be characterised as an equity or as an equitable interest? If it was an equity M.L.C.'s equitable interest acquired without notice took priority. If it was an equitable interest, in the view of Kitto and Menzies J.J., the interest of Terrigal would prevail. (Taylor J. found a means of avoiding this conclusion by making an exception to the priority in time principle.) In other words, the policy reasons which justified the classification of Terrigal's right as an equity were not fully explored. Possibly this was because merit clearly lay with M.L.C. in the case. Kitto J. attempted to rationalise

77 [1967] 2 Q.B. 379.
78 [1965] V.R. 257.
79 See *Smith* v. *Jones* [1954] 2 All E.R. 823.

the result by explaining that the court must choose between 'a purchaser who has relied upon the instrument as taking effect according to its terms and the party whose rights depend upon the instrument being denied that effect.[80] On his view the parties have equal merits and 'the court, finding no reason for binding the conscience of either in favour of the other declines to interfere between them'. This explanation is, of course, spurious, for by characterising the right to set aside the instrument as a mere equity the court is intervening in favour of the holder of the later equitable interest. Nevertheless one might argue that in such a case the person relying on the instrument as taking effect according to its terms, should be preferred to the person seeking to have the document set aside and the court is justified in intervening in his favour.

The difficulty is that this policy choice is obscured by treating the problem as simply one of classification. If the court reaches its conclusion by (1) classifying the interest as an equity or an equitable interest, (2) applying the appropriate priority principle, the policy issues implicit in such a choice are not explored. While the decision in *Latec* cannot be dissented from, it is argued that it should not preclude a later court from enquiring whether a different 'equity', for example the equity of acquiescence, or even particular examples of the equity of acquiescence, should prevail over a later equitable interest.[81] It is likely, of course, that such a result may be achieved simply by the process of re-classifying the interest in question as an equitable interest. In other words the classification approach may merely serve as a device for the court to reach the conclusion, abnormal in the context of equitable interests, that a later interest prevails over an earlier one. But this device has limited flexibility, for once an interest has been classified, later courts are bound by the classification. It is argued that the classification of an interest as an equity should not serve as a strait-jacket in the resolution of priority disputes. In formulating priority principles different policy considerations may apply to the enforceability of different equities, and even within one particular class of equity.

Another line of enquiry is suggested by the approach of Menzies J. in *Latec*.[82] Menzies J. took a functional approach to the classification of Terrigal's interest. The lines of cases typified by *Stump* v. *Gaby*[83] and *Gresley* v. *Mounsley*[84] had described the right to have a conveyance set aside for fraud as equitable and had decided that it was devisable and transferrable. But Menzies J. (in comparison with Taylor J.) did not see these cases as an obstacle to treating the right as an equity for priority purposes. This approach does not seem unsatisfactory, and would contribute welcome flexibility. As Maudsley says:

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80 (1965) 113 C.L.R. 265, 278.

81 See *Hanbury's Modern Equity* (9th ed. R. H. Maudsley, 1976) at p. 702.

82 (1965) 113 C.L.R. 265.

83 (1852) 2 De G.M. & G. 623; 42 E.R. 1015. See also *Dickinson* v. *Burrell* (1866) L.R. 1 Eq. 337.

84 (1854) 4 De G. & J. 78; 45 E.R. 31.

> This approach points to the only way to a breakdown of the general problem into manageable components. There is no reason why equitable rights should have to be classified in the same way for all purposes. Policy considerations are bound to vary in different areas of the law, and it would seem less productive of anomalies to contemplate different solutions of the problem 'equity of equitable interest' — in different areas of the law than to insist, despite the obvious objections, that there must be one classification for all purposes.[85]

It is curious, however, that in *Latec* the court appeared to accept the equation drawn between the existence of an *equitable* interest and assignability and the implicit statement that a mere equity could not be assigned.[86] The question whether an equity, or indeed this particular equity should be assignable, is never directly approached. In fact, in both *Stump* v. *Gaby*[87] and *Gresley* v. *Mounsley*[88] the court was not concerned with a choice between the 'equity', 'equitable interest' dichotomy. Rather, it was obliged to decide whether the interest in question was a legal right of entry or right of action which at that period was not devisable or an equitable interest. The concept of an equity as a proprietary interest which in itself might be assignable was not in question. The assignability of equities has not yet been considered in depth[89] but it is again suggested that the answer to the question should depend upon the particular equity being considered, rather than upon its classification. It is interesting to note that in *Gross* v. *Lewis Hillman*[90] the Court of Appeal held that the right of a purchaser of land to rescind for misinterpretation was personal and could not be assigned by him to a third party, despite the obvious parallel between such a right, and the right of a vendor to have a conveyance set aside for fraud.

F. *Conclusions*

Various commentators have attempted to define the equity and explain what differentiates it from the equitable interest. We have adopted the different approach of attempting to describe the function of the equity concept as it is used by the courts. We have argued that equities fall into two groups, undefined equities and defined equities. In the case of

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85 *Hanbury's Modern Equity* (9th edition, 1976) at p. 701. See particularly the comment of Menzies J. (1965) 113 C.L.R. 291.

86 An attempt to simply assign a right to sue in equity to set aside a conveyance for fraud, (as distinct from an assignment of the whole interest in the property) was void for maintenance and champerty. In such a situation however 'an equity' would appear to be used in the sense of a personal right to equitable relief. *Cf. Dickinson* v. *Burrell* (1866) L.R., Eq. 337. *Prosser* v. *Edmonds* (1835) 1 Y. & C. Ex. 481. See also Jackson's comments upon the alleged inability of an equity to amount to 'an interest in land', Jackson, *Principles of Property Law* (1967), at p. 70.

87 (1852) 2 De G.M. & J. 623; 42 E.R. 1015.

88 (1854) 4 De G. & J. 78; 45 E.R. 31. See particularly the explanation at p. 37.

89 See the arguments against the assignability of the equity of acquiescence in Poole, 'Equities in the Making', 32 *Conveyancer and Property Lawyer* 96, 107. Maudsley suggests that such equities would not be assignable: 'Licence to Remain on Land', 20 *Conveyancer and Property Lawyer* 281, at p. 282.

90 [1969] 3 All E.R. 1476.

undefined equities the particular equity in question has not yet reached the stage where a plaintiff can ask for a remedy on the basis that he can bring his claim within a particular category of legal or equitable proprietary interest. In this area the use of the equity concept introduces flexibility and enables the court to modify the rigid structure of legal and equitable interests. It is not yet clear to what extent the equity and the concept of the constructive trust as a remedial device intended to prevent unjust enrichment, may interact. We have argued that confidential information should be regarded as an undefined equity, and that the failure of the courts to employ the equity concept in this area has led to unnecessary confusion.

In contrast with undefined equities, defined equities fall within specified categories. In this area the equity classification has been used mainly to solve priority disputes. In the course of time an undened equity may become a defined equity. Both defined and undefined equities ultimately may become equitable interests.