

BREACH OF CONFIDENCE CLAIMS AGAINST DIRECTORS, SENIOR EMPLOYEES AND OTHERS

Will Davies, Grant Thornton UK LLP
Gerard McMeel and Hugh Sims, Guildhall Chambers

INTRODUCTION

1. "Things of Confidence", in the general sense, have long been an object for protection in the Courts. The lines attributed to Sir Thomas More 'Three things are to be... in Conscience: Fraud, Accident and things of Confidence' (see *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 46 (also reported at [1968] FSR 415)) demonstrate that longevity. Whilst the Courts focus in the past might have been more concerned with protecting the rights of high society and royalty (compare with *Prince Albert v Strange* (1849) 2 De G & Sm 652; on appeal 1 Mac & G 25, where the concern was to prevent unauthorised copying and advertising of etchings of the Prince Consort), modern day litigation tends to be focused on more mundane matters, such as seeking to prevent a former employee from mis-using confidential information when they leave one business to join (or set up) another¹. Whilst breach of confidence claims encompass a wide variety of claims (including the recent common law development of privacy), it is intended to focus on breach of confidence claims in the business context in these notes².
2. It is proposed to consider breach of confidence claims against directors, senior employees and others under the following headings, though with a particular emphasis on the question of remedies:
 - (1) The nature of the duty of confidence;
 - (2) The inter-relation with fiduciary duties and restrictive covenants;
 - (3) Injunctive relief & interim remedies;
 - (4) The menu of final remedies; and
 - (5) Practical issues arising on quantification.
3. It is not proposed to consider the issue of breach of confidence below, it being considered that the most difficult areas in practice tend to be addressing whether a duty has arisen, and establishing the appropriate remedies, rather than establishing a breach (though of course, depending on the facts, proving a breach may be difficult).

NATURE OF THE DUTY

4. Obligations of confidence can arise in a number of different common law contexts (the statutory contexts, such as data protection legislation, are outside the scope of the notes below)³ including the following:
 - (1) Contract;
 - (2) Tort;
 - (3) Equity;

¹ Though the cause of action still tends to attract celebrity attention from the likes of Campbell, Terry et al in support of their efforts to protect their privacy and/or reputations

² The tension between everyone's right to respect for their private and family life under Article 8 of the European Convention on Human Rights and everyone's right to freedom of expression under Article 10

³ A useful commentary in respect of Data Protection matters can be found on the Information Commissioner's website at: <http://www.ico.gov.uk/>.

- (4) Property;
 - (5) Bailment.
5. Considering each in turn as follows:
6. Contract: In order to attract a contractual duty of confidence the following factors normally need to be present: first, the information must be of commercial or industrial value; secondly, it must have the necessary quality of confidence about it (as to which see further below); and thirdly, it must have been communicated in circumstances importing an obligation of confidence. This is usually straightforward to spot in contractual disputes where there will be an express confidentiality clause, or non disclosure agreement. Where parties have negotiated and agreed the terms governing how confidential information may be used, their respective rights and obligations are then governed by the contract and in the standard contractual dispute there is no wider set of obligations imposed by the general law of confidence. See the discussion in *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415 @ 419-421.
7. Tort: There remains an academic debate (and case law dicta supporting both sides of that debate⁴) as to whether claims for breach of confidence arise in tort at all. However that debate is somewhat arid since undoubtedly such an obligation may arise in equity, and ordinarily such a jurisdiction will provide an adequate remedy. It must also be remembered that there are many torts which may involve an abuse of confidence, such as conspiracy, intimidation, unlawful interference with business relations, inducing a breach of contract, and conversion to chattels.
8. Equity: As noted above, the equitable jurisdiction to protect confidences is well established, and provides a more wide ranging and more flexible jurisdiction than contractual claims. In particular an equity to protect confidence may be invoked when information is received which is known to be confidential (or a reasonable recipient would have known it to be so), whether or not under an agreement having contractual force, and even as against a third party who might have initially received that information innocently but later becomes aware it has been provided to them in breach of confidence. Some commentators suggest that remedies may be more restricted (because of the absence of common law conventional damages). It is doubted whether this is correct (amongst other things, damages may be awarded in lieu of injunctive relief); see the discussion further below in that common law damages may not be available.
9. Property: If confidence is embodied in hard copy material the torts of trespass to goods or conversion may be available. A specific statutory cause of action is provided in relation to electronic databases by the Copyright and Rights in Databases Regulations 1997. The question of whether there is "property" in confidential material or whether the courts are willing, when seeking to protect it to ascribe to it certain proprietary characteristics is also a matter of continuing academic debate (with case law dicta available to support both lines of argument). As appears below when discussing remedies, it may be that the answer to that question depends to a certain extent on the nature of the confidential information (e.g. a quasi IP right) and the circumstances in which it is imparted (e.g. in a fiduciary context). The courts may also be willing to consider an analogy with bailment.
10. Bailment: Ordinarily bailment only relates to tangible assets. However obligations of confidentiality might arise where confidential information is imparted at the same time as entrustment of the chattel and in relation to the chattel. A typical example is a delivery of a prototype with related confidential, technical information. In those circumstances the action in bailment may be used not only in relation to the chattel itself, but also to protect the confidential information delivered with it. As noted above, there is also some case law support for the idea that the entrustment of the confidential information itself, without an

⁴ The dissenting speech of Lord Nicolls in *Campbell v MGN Ltd* [2004] UKHL 22 @ para 14 recognises a tort of misuse of private information.

accompanying delivery up of a chattel, might be viewed as a bailment of intangible and confidential material, with remedies, including monetary remedies, being the same as those available in a bailment action.

11. Finally, it is worth noting that the confidential information in question must in all cases have the necessary quality of confidence. That usually means that the information must be of limited public availability (or accessibility; see *A-G v Observer Ltd*, *AG v Times Newspapers Ltd* [1990] 1 AC 109 at 215) and of a specific character (i.e. capable of precise definition).

INTER-RELATION WITH FIDUCIARY DUTIES AND RESTRICTIVE COVENANTS

12. It is of the essence of fiduciary relationships that trust and confidence is reposed in another. However it does not follow that a fiduciary relationship always exists simply because confidential information is provided or exchanged. For an example of such a scenario see the facts in *Vercoe* referred to further below. That said, the importance of full observance of duties of confidence often arises in a fiduciary relationship, such as the case of a director of a limited liability company, or where duties of fidelity and loyalty are owed, as in the case of ordinary employees.
13. One of the best known breach of confidence cases arose in the context of an employment relationship, namely *Faccenda Chicken Ltd v Fowler* [1987] Ch 117. Employees will owe duties of confidentiality even without any such express term in their employment contract (such duty arising out of the implied duty of fidelity and good faith). They are entitled to make plans and preparations to move to new employment as long as they do not use technical secrets or confidential information when doing so. The case of *Faccenda Chicken* concerned the extent to which there were continuing duties of confidence owed after the employee had left.
14. The facts, in summary, were as follows: *Faccenda Chicken* owned a number of refrigerated vans and operated a mobile service selling frozen chickens to shops and catering outlets. *Fowler*, an ex-employee set up in competition with his previous employers, and they attempted to prevent him from doing so by raising an action for breach of confidence. *Faccenda Chicken* alleged that *Fowler* was using confidential information in breach of his obligation of confidence by using his knowledge of sales information and customer lists to compete with them.
15. At first instance *Goulding J* defined three classes of information: (i) information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all; (ii) information which the employee, whilst an employee, must treat as confidential, but which once learned necessarily remains in the employee's head and becomes part of his skill and knowledge; (iii) specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the employee may have left the service, they cannot lawfully be used for anyone's benefit but the employer's.
16. In *Faccenda Chicken* the dispute was as to the second class. On the facts in *Faccenda Chicken* it was held that the information used by *Fowler* fell into the first two categories, as it had not been restricted to high-level employees in any way and he could not be prevented from using it. *Mr Fowler* was simply making use of information after he had left which he obtained in the course of his previous employment. *Goulding J.* expressed the view that the second category of information could have been protected by an express restrictive covenant, though the Court of Appeal rejected such a notion. Subsequently other judges have touched on the topic in *Balston Ltd. v. Headline Filters Ltd.* [1987] F.S.R. 330 and *Lock International Plc. v. Beswick* [1989] 1 W.L.R. 1268.
17. The main difficulty in this respect is one of definition: when is a piece of information a trade secret? In *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251 CA (Civ Div) *Staughton LJ* held that trade secrets “ must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.”

He went on to note “*It can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods which they buy. But some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, the class of information which can justify a restriction is wider, and extends to some confidential information which would not ordinarily be called a trade secret.*”

18. It is frequently the case that contracts will contain both confidentiality clauses and restrictive covenant clauses, and typically both will come into play in breach of confidence cases against directors or former employees.
19. Historically it was considered that only directors could be treated as fiduciaries when considering claims against them in this sphere. The significance of whether they are so treated has relevance, because it may be argued that a fiduciary is restricted from making preparatory acts before the fiduciary ceases to work for the principal in question, and it also has relevance when considering the applicable remedies; see for example the discussion in *CMS Dolphin Ltd v Simonet & Another* [2001] 2 BCLC 704.
20. More recently, however, the Courts have shown a greater willingness to treat senior employees who are not directors as persons who owe fiduciary duties. If a person occupies a senior position, it may be successfully argued that they owed fiduciary duties as an employee and not simply as a director, and that such duties continued even after resignation as director; compare with the decision of Peter Smith J in *Crowson Fabrics Ltd v Rider & Others* [2007] EWHC 2942 (Ch).

INJUNCTIVE RELIEF AND INTERIM REMEDIES

21. For a detailed consideration of the general procedural requirements in relation to interim injunction applications the reader is referred to the 2008 Guildhall Chambers Commercial Seminar notes (Ascroft & Sims). What follows is a brief summary of the most pertinent substantive points in the context of breach of confidence claims.
22. Typical interim injunction orders in order to protect confidential material can include the following: prohibition or restriction on the use of confidential information; search orders to uncover confidential material; delivery up orders and destruction of confidential material.
23. The leading authority on the grant of interim injunctions generally continues to be *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Considering in brief terms here the relevant criteria:
24. The court should in this context first consider whether, if the claimant were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of trial: *American Cyanamid* at 408 C.
25. If damages in the measure recoverable at common law would be an adequate remedy *and the defendant would be in a financial position to pay them*, no interim injunction should normally be granted, however strong the claimant’s claim appeared to be at that stage (emphasis added): *ibid* at 408 C-D.
26. If, on the other hand, damages would not provide an adequate remedy for the claimant in the event of his succeeding at trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the claimant’s undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial: *ibid* at 408 D.

27. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the claimant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interim injunction: *ibid* at 408 E.
28. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, that the question of balance of convenience arises: *ibid* at 408 F.
29. The matters relevant to a determination of where the balance lies will vary from case to case: *ibid*.
30. Where other factors are evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo: *ibid* at 408 G.
31. Relevant factors in considering whether an applicant may obtain some form of injunctive relief in breach of confidence claims include the following:
 - (1) More often than not damages will not be an adequate remedy for the simple reason that damages will frequently be difficult to prove and difficult to assess (see discussion further below). This tends to favour the grant of an injunction;
 - (2) Ordinarily, if the confidential information has already been released into the public domain then an injunction to prevent further re-publication will not be granted since the information is no longer confidential (see the discussion in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109);
 - (3) That said, the Court will be willing to consider granting the claimant “springboard relief” until trial against a person who was subject to a duty of confidence, even if that information has entered the public domain, in order to prevent them having an unfair competitive advantage; *Terrapin Ltd v Builders Supply (Hayes) Ltd* [1967] RPC 375 (see for a more recent, and wider, application of the principle *UBS Wealth Management (UK) Ltd & Another v Vestra Wealth LLP & Ors* [2008] EWHC 197444 (QB))
32. Further, in many instances the outcome of applications for interim relief is determinative of the outcome of the litigation as a whole, and this particularly true in the context of interim injunctions. In certain cases this may militate against the grant of an injunction (see discussion in *Lansing Linde Ltd v Kerr* referred to above). The early tactical advantage of a successful application (which necessarily requires the court to have found the existence of a serious issue to be tried) however is not to underestimated; the respondent and his or her legal team are immediately on the back foot.
33. Apart from an early possible judicial indication of the strength of the claim⁵, there is an additional incentive for an applicant for injunctive relief to act expeditiously; such relief is discretionary in nature and delay may be fatal if unexplained⁶. This will especially be the case where the respondent has changed his position on the basis of the applicant’s apparent lack of concern (or apparent approval of the conduct subsequently challenged) or the respondent has otherwise been lulled into a false sense of security.
34. So if no early application is made for an injunction then a claimant may be unwise to seek such discretionary (equitable) relief, bearing in mind the old adage that delay is the enemy of equity. Ultimately each case turns on its own facts and little is to be gained by seeking to divine from the authorities a maximum time within which any application must be made. In *Raks Holdings AS v Ttpcom Ltd* [2004] EWHC 2137 (Ch), however, Lloyd J, in refusing an interim injunction to restrain exploitation of allegedly confidential information disclosed to the

⁵ Though many judges are astute to avoid saying anything other than that the case alleged by the claimant is one with a real prospect of success. Anything more than this can be dangerous because the judge is usually without a full understanding of the factual position.

⁶ See also para 2.7 of *PD – Applications* which provides that every application should be made as soon as it becomes apparent that it is necessary or desirable to make it.

defendant in the course of a commercial collaboration which had come to an end, considered a delay of 4 months⁷ to be fatal; the lack of urgency showed that the claimant did not really fear irrevocable damage in the meantime such as would justify an injunction. See also *AAH Pharmaceuticals Ltd & ors v Pfizer Ltd & anr* [2007] EWHC 565 (Ch) where delay was a “powerful factor” in the refusal of the claimants’ application for an interim injunction restraining Pfizer Ltd from terminating its supply agreements with the claimants in accordance with proposals published some months before. The fact that the claimants were pursuing their complaints with the OFT did not provide a good ground for not bringing the matter before the court at a much earlier stage.

35. The making of an early application for interim relief is, however, not without its disadvantages for the claimant:

- (1) it necessarily gives rise to some front-loading of costs as the evidence gathering and drafting phases of the claim are condensed to a short period of time;
- (2) in an effort to establish a “serious issue to be tried” and otherwise to bolster the chances of success there is naturally a tendency to disclose all of the evidence obtained by the claimant; the defendant accordingly has advance warning of what can usually be assumed to be the high-water mark of the claimant’s claim.

36. It is proposed to turn to consider therefore the menu of final remedies on offer to the claimant, and in particular to explore when one or more of those remedies might be available.

THE MENU OF FINAL REMEDIES

Introduction

37. The menu (other than injunctive relief) may include:

- (1) “conventional” damages;
- (2) “wrotham park” damages;
- (3) account of profits;
- (4) equitable compensation; and
- (5) constructive trusts

38. Traditionally the remedy for breach of common law duties (breach of contract, tort) was assumed to be almost invariably damages, based on a compensatory measure (albeit there were differences in approach between compensatory damages in contract and tort). Nevertheless compensation focused on the *loss* caused to the claimant by the defendant. Conversely, in respect of the equitable wrongs of breach of trust or breach of fiduciary duty the principal remedy was traditionally seen as being the account of profits. For example, as in the leading cases of *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134 and *Boardman v Phipps* [1967] 2 AC 47. Here the focus is on the *benefits* accruing to the defendant from his or her breach of duty.

39. It is no longer safe to assume that the remedy for a wrong (whether originating at common law or in equity) will sound exclusively as a loss-based measure or as a benefit-based measure. In appropriate cases litigants and the courts may have a choice between the two approaches, and consideration will have to be given to marshalling the evidence in respect of either eventuality. Furthermore, it is not safe to assume that the account of profits is the only benefit-based remedy available.

40. The focus here is upon remedies for breach of contract (more narrowly breach of restrictive covenants) and the remedies for breach of confidence.

“Conventional” damages and equitable compensation

⁷ Since discovery of a vital piece of evidence.

41. Prior to the decision of the House of Lords in *Attorney General v Blake* [2001] 1 AC 268 the remedies for breach of contract were seen as exclusively compensatory. That case made it clear that, in what were described as exceptional cases, an account of profits may be available for breach of contract, even where the contract-breaker is not a fiduciary and no action lay for breach of confidence.
42. In respect of torts which do not protect a proprietary interest of the claimant the Court of Appeal reached a conservative conclusion in *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390, and a further appeal was compromised. Accordingly benefit-based awards for torts are at present confined to proprietary torts (trespass, wrongful interference with goods), at least below the level of the UK Supreme Court.
43. Accordingly conventional damages in this context means a loss-based remedy, whether sounding in compensatory damages at common law or as equitable compensation for breach an equitable wrong. For the modern approach to equitable compensation see *Target Holdings Ltd v Redfern* [1996] AC 421.

“Wrotham Park” Damages/ Lord Cairns’ Act

44. Prior to the decision of *Attorney General v Blake* [2001] 1 AC 268, the first instance judgment of Brightman J in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 was arguably an instance of a benefit-based award for breach of contract. Having refused an injunction to demolish homes built in breach of a restrictive covenant, Brightman J awarded damages in the sum of £2,500 in lieu of the injunction based on Lord Cairns’s Act (now s 50 of the Senior Courts Act 1981) explicitly based on ‘the sum of money as might reasonably have been demanded by the plaintiffs from [the defendant] as a quid pro quo for releasing the covenant.’ (at 815).
45. Two principal explanations have been put forward for the award in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*. The sum of £2,500 was based on 5% of the developer’s profit from its breach of covenant. First, as an expanded version of compensation, utilising a hypothetical bargain to compensate the claimant for its loss of the opportunity to bargain. Secondly, as a benefit-based or restitutionary award intended to strip the wrongdoer of its gain at the expense of the claimant, either as a partial account of profits, or as some would prefer “restitutionary damages.” The second explanation was favoured by Lord Nicholls in *Attorney General v Blake*.
46. The attempt in *WWF – World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 to explain such damages as compensatory is manifestly unsatisfactory and inconsistent with prior, binding authority. Contrast *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390, paras [40-41] (Arden LJ). See also *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, paras [46-54].
47. In the recent case of *Vercoe v Rutland Fund Management* [2010] EWHC 424 (Ch) Sales J, in the context of a business plan being used in breach of confidence, awarded damages (arising from a common position adopted by the parties) based on hypothetical reasonable agreement whereby the defendant paid for a release from his confidentiality obligation in respect of the business plan.

Accounts of profits/Restitutionary Damages

48. The clearest account of the distinction between the two principal benefit-based measures – the account of profits and “restitutionary damages” - is by J Edelman, *Gains-Based Damages* (2002), 1-4. An account of profits or “disgorgement damages” operates to make the defendant disgorge all the profits resulting from its wrongdoing. In contrast, “restitutionary damages” reverse the wrongful transfer of value from a claimant to a defendant. It should be based on an objective measure of the benefit transferred.

49. For breach of confidence an account of profits was awarded for wrongful exploitation of lingerie designs in *Peter Pan Mfg Corp v Corsets Silhouette* [1964] 1 WLR 96.
50. In the subsequent case of *Seager v Copydex* [1967] 1 WLR 923 and *Seager v Copydex (No 2)* [1969] 1 WLR 809 the award appeared to be more akin to “restitutionary damages”, being based upon the price that a willing buyer and willing seller would have been prepared to pay for confidential information (in that case in respect of a design for carpet grips).
51. Similarly in *Universal Thermosensors v Hibben* [1992] 1 WLR 840 Sir Donald Nicholls V-C was prepared to order that ‘the plaintiff ought to be paid by the defendants for the use they made of the plaintiff’s confidential information even if the plaintiff suffered no loss of profits in consequence.’ (at 856)
52. In respect of breach of contract, in *Attorney General v Blake* [2001] AC 268 the full remedy of an account of profits was required to strip the treacherous spy of all the profits of his breach of contractual duty to the Crown. Clearly this was an exceptional case.
53. In *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 Lawrence Collins J held that a director who diverted corporate opportunities to a NewCo after having left his employment was liable either to pay compensation for the breach of fiduciary duty and breaches of contract, or to account for the profits of his breach of fiduciary duty. In addition, after *Attorney General v Blake* Lawrence Collins J was also prepared to award an account of profits for breach of an implied contractual duty of fidelity (para [142]).
54. In *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 the defendant breached a compromise agreement under which it had agreed not to exploit recordings of the late rock superstar. Whilst the Court of Appeal did not regard the case sufficiently exceptional to justify a full account of profits, it did award substantial damages, based on a reasonable sum such as might reasonably have been demanded by the Hendrix estate from the defendant as a quid pro quo for releasing it from its obligations under the settlement agreement. The basis for that decision was that the breach was deliberate and on the basis that the claimant had a legitimate interest in preventing exploitation of the material. It was suggested that this should be based on a royalty from the unauthorised sales of material of one-third (which was twice the one sixth royalty for material where the estate had consented to exploitation).
55. The case of *Experience Hendrix* can either be explained on the damages for lost opportunity to bargain basis or the restitutionary damages approach. In any event it makes it clear that the court may have a choice between two benefit-based measures. A full account of profits for exceptional cases, or where the defendant is a fiduciary or closely analogous to a fiduciary. Secondly, substantial damages based on a proportion of the profits made, where the claimant nevertheless has a legitimate interest in preventing the defendant’s profit-taking in breach of duty.
56. Consider the approach of HHJ Havelock-Allan QC in *Barnes v Usher* (Unreported, 18 October 2007), paras [54-64], where his Lordship refused to award a full account of profits for breach of contract (restrictive covenants), but was prepared to consider making a restitutionary award. However note the subsequent judgment by David Blunt QC, sitting as a Deputy Judge in the same case (Unreported, 7 October 2010), paras [198-202].
57. In a judgment handed down this year HHJ Havelock-Allan QC was prepared to order an account of profits against recalcitrant former employees, where the most senior of the defendants (a regional sales manager) was either a fiduciary or akin to a fiduciary: *Shred-It v Lee Graham* (Unreported, 4 June 2010).

58. For some of the practicalities involved in the ordering of an account of profits see *My Kinda Town Ltd v Soll* [1983] RPC 15, 5-58, revsd on a different point [1983] RPC 407 (in the context of passing off).

Constructive trusts

59. There is Canadian authority that proprietary relief in the shape of a constructive trust might be imposed to reinforce an award of account of profits: *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (Sup Ct of Canada).
60. There were hints in the course of *Spycatcher* litigation that the Crown might advance a claim to be the owner in equity of copyright in the book written in breach of confidence: *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 262-63 (Lord Keith). Such entitlement to proprietary relief remains an open question in English law.

Concluding comment

61. The recent case law referred to above tends to reinforce the view that in breach of confidence claims there are never likely to clear boundaries on remedies, or a “grand unified theory”, but instead scales on which it might be said that you are more or less likely to obtain any particular form of relief, depending on the precise facts which arise in each case.

**Will Davies, Grant Thornton UK LLP
Gerard McMeel, Guildhall Chambers
Hugh Sims, Guildhall Chambers
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