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Confidence and the constructive trust

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Almost every leading work on the law of confidence mentions the possibility of a declaration of a constructive trust as a remedy for a claim involving an abuse of confidence. Apart from the Canadian Supreme Court, no other appellate court in the Commonwealth has seriously debated this issue. This paper investigates the legitimacy of the use of the constructive trust in this context.

The origins of the law of confidence can be traced to a humble rhyme in equity: 'These three give place in a court of conscience, fraud, accident, and breach of confidence.'[1] English judges have displayed admirable ingenuity that led them to develop a relatively sophisticated doctrine capable of protecting diverse subject matters from trade to personal secrets, despite its modest doctrinal beginning. The maturity of the law of confidence is a proud testament to equity's creativity and ability to cope with modern developments in a changing social system. The change is a continuing one. As Keene LJ, in *Douglas v Hello! Ltd*,[2] observed:

> 'breach of confidence is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice.'[3]

In the past decade, the law of confidence received a tremendous boost in terms of the relief available to the claimant. The Canadian Supreme Court[4] added the constructive trust to the armoury of remedies available against a defendant. It is

* I am indebted to Professor George Wei, Associate Professor Yeo Tiong Min, Mr K C Lye and Derek Davies for their invaluable comments on an earlier draft. I have also had the benefit of discussing some of the points with Professor Tan Sook Yee and Professor Tan Yock Lin. The usual caveats apply.

1. See F W Maitland *Equity A Course of Lectures* (Cambridge: Cambridge University Press, 2nd edn, 1936) p 7. Cited as 'Three things are to be helpt in Conscience; Fraud, Accident and things of Confidence' (1 Rolle's Abridgement 374) by Megarry J in *Coco v A N Clark* [1968] FSR 415 at 420–421. Cf R G Hammond 'The Origins of the Equitable Doctrine of Breach of Confidence' [1979] Anglo-Am LR 71, who traced the origins of the action to early decisions on copyright of unpublished works.
2. [2001] 2 WLR 992: see N Moreham (2001) 64 MLR 767; M Elliott (2001) 60 CLJ 231; R Singh and J Strachan 'The Right To Privacy In English Law' (2002) 2 EHLR 129.
3. [2001] 2 WLR 992 at 1035.
4 *Lac Minerals v International Corona Resources* (1989) 61 DLR (4th) 14: see D W M Waters (1990) 69 Can BR; P D Maddaugh 'Confidence Abused: *Lac Minerals Ltd v International Corona Resources Ltd*' (1990) 16 Can Business Law J 198; J D Davies 'Duties of Confidence and Loyalty' [1990] LMCLQ 4; P Birks 'The Remedies For Abuse of Confidential Information' [1990] LMCLQ 460; G Hammond 'Equity And Abortive Commercial Transactions' (1990) 106 LQR 207.

easy to see why such a proprietary right is desirable to a claimant.[5] The most obvious advantage is that the claimant would have priority in the event of the defendant's insolvency.

The use of the constructive trust as described above is relatively novel. Such a possibility was not discussed in earlier seminal works on the law of confidence.[6] This development has been noticed by leading works[7] in other Commonwealth jurisdictions, such as Australia and England. In the House of Lords, Lord Goff alluded in *A-G v Guardian Newspapers (No 2)*[8] to the prospect of declaring a constructive trust.[9] It would seem that the House of Lords would have been prepared to declare a constructive trust on the facts if the claimants had pursued it. The application for a constructive trust met with less success in *Satnam Investments Ltd v Dunlop Heywood & Co Ltd.*[10] The second defendant had received confidential information from the first defendant who was a fiduciary of the claimant. As a result, the second defendant acquired a piece of property that the claimant had intended to purchase. The prayer for a declaration that the second defendant held the property on constructive trust for the claimant succeeded before the trial judge. On appeal, this decision was overturned. Nourse LJ described the trial judge's conclusion that the second defendant's knowledge of the first defendant's breach of fiduciary duty was a sufficient basis to declare the second defendant a constructive trustee as a surprising proposition. More recently, in *United Pan-Europe Communications NV v Deutsche Bank AG*[11] the English Court of Appeal also considered the issue of remedies. This case was an appeal on an application for an interim injunction. The appeal was allowed and the English Court of Appeal found that there was a seriously arguable case that a proprietary

5. See R Goff and G Jones *The Law of Restitution*, (London: Sweet & Maxwell, 6th edn, 2002) pp 79–80. See also G Virgo *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 1999) pp 598–599.

6. Eg see G Jones 'Benefits Obtained in Breach of Confidence' (1970) 86 LQR 463; and F Gurry *Breach of Confidence* (Oxford: Oxford University Press, 1984).

7. See eg W R Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 4th edn, 1999) pp 331–332; Goff and Jones, n 5 above, pp 756, 764–765; S Ricketson *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (Sydney: LBC Information Services, 2nd edn, 1999) paras 27–100; M Richardson and J Stuckey-Clarke 'Breach of Confidence' in P Parkinson (ed) *The Principles of Equity* (Sydney: LBC Information Services, 1996) pp 469–470; *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2000) p 1539; L Bently and B Sherman *Intellectual Property Law* (Oxford: Oxford University Press, 2001) pp 974–976.

8. [1990] 1 AC 109 at 288. See also Lord Keith at 263, where he said: 'There remains of course, the question of whether the Crown might successfully maintain a claim that it is in equity the owner of the copyright in the book. Such a claim has not yet been advanced, but might well succeed if it were to be.'

9. In other areas of intellectual property, the courts have ordered the defendant to transfer the intellectual property right to the claimant. See *Missing Link Software v Magee* [1989] 1 FSR 361 (copyright in a computer program). See also, generally, *British Syphon Co Ltd v George Sidney Homewood* [1956] 73 RPC 225; and *Patchett v Sterling Engineering Co Ltd* [1955] 72 RPC 50 (where the defendant was made to assign the patent to the claimants).

10. [1999] 3 All ER 652: see C A Freedman 'Confidential Commercial Information and Breach of Fiduciary Duty – The Liability of Third Parties in Knowing Receipt To Make Restitution' [2000] Intellectual Property Q 208.

11. [2000] 2 BCLC 461.

right was available for the alleged misuse of confidential information. On balance, in England, based on the current weight of authorities, the position seems to be that it is plausible to make the argument that a constructive trust is a potential relief for a breach of confidence. In Australia, the position is similar. While Laddie J in *Ocular Sciences Ltd v Aspect Vision Care*[12] refused to grant a prayer for a constructive trust for an alleged breach of confidence, he did not completely reject the notion that a constructive trust may be granted in certain circumstances.

What is noteworthy is that in all these cases, the court's remarks were at most obiter dicta: in *Guardian Newspapers*, the constructive trust was not seriously pursued; in *United Pan-Europe* the matter was merely an interlocutory application; and in *Ocular Sciences*, the prayer for the relief was ultimately rejected. This issue has not had the benefit of serious debate in the highest appellate courts elsewhere in the Commonwealth, save in the Canadian Supreme Court. The object of this paper is to investigate whether the use of the constructive trust as a relief for a breach of confidence is defensible.

TERMINOLOGY

It is important to note that this paper is confined to the issue as to whether a proprietary right may be awarded for an abuse of confidence; it does not deal with when an account of profits is appropriate as a relief for an abuse of confidence, although this relief has sometimes been described as a constructive trust. It is, therefore, important to clear the ground before we begin analysing the problem at hand. Virtually every writer in this area prefaces the discussion with a lament of the confusion with the use of terminology in this area.[13] This paper is no different. The courts have used the term 'constructive trust' indiscriminately. The term 'constructive trust' may import two meanings. First, the defendant may hold the property in circumstances where the law will regard the defendant as holding it on trust for the claimant. In this instance, the constructive trust is employed in a proprietary sense. Secondly, the term 'constructive trust' may also be used to mean a relief granted to the claimant against a defendant which is personal in nature, for example, where the defendant is 'liable to account as a constructive trustee' to the claimant. Examples of categories where this formula is used are against defendants who: (a) intermeddle and voluntarily assume the mantle of trusteeship (*trustee de son tort*); (b) dishonestly assist in a breach of trust or fiduciary duty; and (c) knowingly receive property that is impressed with a trust or fiduciary duty. The superimposition of the term 'constructive trust' in these situations is simply a shorthand to denote a personal liability to account in equity.[14] Dr Lionel Smith perceptively points out that the use of this formula perpetuates the pretence that beneficiaries can only sue their trustees.[15] This is not true. Thus, the use of the term 'constructive trust' in this context is unhelpful and

12. [1997] RPC 289: see B Gray 'Ocular Sciences: A New Vision for the Doctrine of Breach of Confidence?' (1999) 23 MULR 241.

13. See eg P J Millett 'Equity – The Road Ahead' (1995) 9 Trust Law Int 35; L D Smith 'Constructive Trusts And Constructive Trustees' (1999) 58 CLJ 294; P J Millett 'Restitution And Constructive Trusts' (1998) 114 LQR 399.

14. See *Paragon Finance plc* v *DB Thakerar & Co* [1999] 1 All ER 400 at 408–410.

15. L D Smith 'Constructive Trusts And Constructive Trustees' (1999) 59 CLJ 294 at 301.

misleading.[16] It would be better to abandon reference to the constructive trust when referring to an equitable duty to account. In this paper, where the term 'constructive trust' is employed, it is used in a proprietary sense.

Therefore, this paper deals solely with the question whether it is appropriate to give the claimant a proprietary right in cases involving a breach of confidence.

CONFIDENCE AND THE CONSTRUCTIVE TRUST

I. The *Lac Minerals* decision – facts and holdings

The facts of *Lac Minerals v International Corona Resources*[17] are well known. Lac Minerals Ltd ('Lac') was a senior mining company, whereas International Corona Resources ('Corona') was a junior mining company. Corona provided confidential information to Lac pertaining to the core drilling results conducted on the property owned by Mrs Williams (the 'Williams' property') on an informal oral understanding as to how each would conduct itself in anticipation of a joint venture between both companies. In breach of confidence, Lac placed an independent offer for the Williams' property and succeeded in obtaining the property. The Williams' property turned out to be extremely valuable and was valued up to Can $1.95 billion. Corona sued for a breach of confidence and fiduciary duty.

The Supreme Court of Canada's decision in *Lac Minerals* was divided on many counts. They agreed that on the facts the circumstances between the parties gave rise to an obligation of confidence on Lac's part. However, this was where the agreement between the judges ended. The majority[18] thought that while there was an obligation of confidence, there was no fiduciary obligation owed by Lac to Corona. With regard to the relief available, the majority, La Forest, Lamer and Wilson JJ, decided that Lac held the Williams property on constructive trust for Corona. Sopinka and McIntyre JJ disagreed. Thus, the *ratio* of this case appears to be that a constructive trust is available as a relief for an action for breach of confidence even if no fiduciary duty was present.

In summary, the following reasons can be distilled from the decision of the majority in *Lac Minerals* why a proprietary right was granted: (a) this was a case of wrongful interception.[19] Lac had intercepted the Williams' property that would have otherwise been acquired by Corona. But for Lac's breach of confidence, Corona would have obtained the Williams' property;[20] (b) the constructive trust was declared to protect the 'institution of bargaining in good faith'. It is a deterrent against the breach of such a duty;[21] (c) the Williams'

16. See eg *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652, where the Court of Appeal appeared to have conflated the equitable duty to account and the constructive trust.

17. (1989) 61 DLR (4th) 14.

18. Sopinka, Lamer and McIntyre JJ. Cf La Forest and Wilson JJ held that there was a fiduciary obligation not to misuse the information.

19. (1989) 61 DLR (4th) 14 at 45, per La Forest J. See also L Bently and B Sherman *Intellectual Property Law* (Oxford: Oxford University Press, 2001) p 975.

20. (1989) 61 DLR (4th) 14.

21. (1989) 61 DLR (4th) 14 at 47, per La Forest J.

property was a specific and unique property.[22] It was virtually impossible to value the Williams property accurately; (d) an action for a breach of confidence was very similar to a breach of fiduciary duty. If a constructive trust could be declared for the latter; then it would be anomalous that a constructive trust could not be declared for a breach of confidence;[23] and (e) it would be unconscionable for Lac to retain the property.[24]

Prima facie, the arguments marshalled by the majority of the Supreme Court of Canada are formidable. Each reason given will be analysed in detail below. In addition, three further grounds to justify the declaration of a constructive trust will also be explored. First, whether a constructive trust may be justified as there was a pre-existing 'proprietary base'. Secondly, the defendant had engaged in an activity, which he was under an equitable duty to pursue for the claimant, resulting in a wrongful gain to the defendant. This has been termed as a 'deemed agency gain'.[25] Hence, it is argued that it may be appropriate to make the defendant to hold such gains on constructive trust for the claimant. Finally, the paper considers whether it can be argued that a constructive trust should be declared by extending the authority of *A-G for Hong Kong v Reid*.[26]

II. Wrongful interception of property[27]

La Forest J articulated the argument as follows:

> '[A] constructive trust should only be awarded if there is a reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer. Here as well it is justified to grant a right of property since the concurrent findings below are that the defendant intercepted the plaintiff and thereby frustrated its efforts to obtain a specific and unique property that the courts below held would otherwise have been acquired. The recognition of a constructive trust simply redirects the title of the Williams property to its original course.'[28]

22. (1989) 61 DLR (4th) 14 at 48–52, per La Forest J.
23. (1989) 61 DLR (4th) 14 at 17, per Lamer J.
24. (1989) 61 DLR (4th) 14 at 51–52, per La Forest J.
25. See R Goode 'Property and Unjust Enrichment' in A Burrows (ed) *Essays on the Law of Restitution* (Oxford: Oxford University Press, 1991) p 215; R Goode 'Proprietary Restitutionary Claims' in W R Cornish (ed) *Restitution Past Present and Future* (Oxford: Hart Publishing, 1998) p 63.
26. [1994] 1 AC 324.
27. Wrongful interception of a specific and unique property must be distinguished from the 'interceptive subtraction' debate in the law of unjust enrichment. The latter deals with the problem of creating a necessary link to show that the defendant's enrichment was at the expense of the claimant. In a breach of confidence, it is the wrong that creates the link between the claimant and the defendant. The privity issue is therefore not crucial. See A Burrows *The Law of Restitution* (London: Butterworths, 2nd edn, 2002) pp 31–32.
28. (1989) 61 DLR (4th) 14 at 51.

Two distinct arguments can be drawn from the passage above on why the relief was granted. First, this was a case of a wrongful interception of a specific property by the defendant. The interception was wrongful because the defendant had breached the claimant's confidence. But for the defendant's wrongful interception the plaintiff would have acquired the property. Secondly, the property intercepted was a specific and unique property.

With this reasoning, one can immediately see that the basis for the declaration of a constructive trust is not peculiar to a claim for abuse of confidence. It is arguable that, on this reasoning, the court may declare a constructive trust in appropriate circumstances where there has been a wrongful interception of a unique property. This argument is supported by the recent development of the so-called *Pallant v Morgan* equity[29] by the English Court of Appeal in *Banner Homes Group v Luff Developments.*[30] The facts of *Banner Homes* are quite similar to that of *Lac Minerals.*[31] The dispute arose from a failed joint venture between two companies. Luff Developments and Banner Homes reached an agreement in principle to acquire a particular site through a new company, which they agreed they would own in equal shares. Subsequently, Luff Developments had second thoughts about the joint venture, but did not inform Banner Homes of its doubts. It did not do so because it was afraid that Banner Homes would also bid for the site if the joint venture fell through. After Luff Developments acquired the site through its wholly owned subsidiary, it informed Banner Homes that it was withdrawing from the proposed joint venture. Banner Homes sued Luff Developments. Banner Homes' principal claims were twofold: (a) an oral agreement had been made for the acquisition and development of the site; and, alternatively, (b) notwithstanding the absence of any concluded agreement, the circumstances gave rise to a constructive trust. The trial judge dismissed the action as he found there was no concluded agreement. The trial judge also declined to declare a constructive trust. Banner Homes appealed against the judge's dismissal of the constructive trust. The Court of Appeal invoked the so-called *Pallant v Morgan* equity and declared that Luff Developments held the shares in the subsidiary equally for itself and Banner Homes.[32]

Another argument that can be discerned on why a constructive trust was declared in *Lac Minerals* is that the property intercepted was a unique and specific property. This proceeds upon an analogy with a purchaser who had

29. See *Pallant v Morgan* [1953] Ch 43, [1952] 2 All ER 951, [1952] 2 TLR 813.

30. [2000] Ch 372: see M P Thompson 'Constructive Trusts and Non-Binding Agreements' [2001] Conv 265.

31. *Lac Minerals v International Corona Resources* (1989) 61 DLR (4th) 14.

32. See N Hopkins 'The Pallant v Morgan "Equity"' [2002] Conv 35 for the conceptual difficulties with this decision. The judge borrowed principles from the laws of constructive trust, estoppel and restitution. Perhaps, a better explanation of the case is one based on a contractual analysis. The observations of S Hedley 'Work Done In Anticipation Of A Contract Which Does Not Materialise: A Response' in Cornish, n 25 above, pp 195, 197, albeit in another context, is equally apt here. He argues: 'But why should contract be excluded? Why should parties' *hope* that they would make a big contract prevent a finding that they have *in fact* made a more modest one? Why should the courts ignore good evidence of a contract? The court can simply enforce the agreement the parties actually made, vague though it might be, and leave aside the parties' fantasies as to agreements which they might have reached in other circumstances.'

contracted to buy land. It is textbook law that the vendor who has entered into a contract for sale of land holds the land as a constructive trustee for the purchaser due to the perceived inadequacy of damages as a substitute for the performance of the contract. In other words, a monetary award would not adequately recompense the purchaser, as he or she would not be able to use the award to purchase a duplicate property. As equity has an anticipatory effect, equity deems the purchaser as the beneficial owner of the land.

However, the analogy is not a perfect one. The paramount factor in explaining why a vendor who is in breach of contract for sale of land is a constructive trustee is the availability of specific performance to the purchaser.[33] However, specific performance is not relevant in the context of a breach of confidence. The primary remedy for a breach of confidence is to injunct the defendant from using the confidential information. The anticipatory effect of equity cannot be used to justify why the claimant is granted a constructive trust. The fact that the claimant could not be adequately recompensed by a money award because the Williams' property was specific, unique and impossible to value would, therefore, be a question of the shortcoming of the law of damages rather than of the law on the constructive trust. If the majority of the Supreme Court of Canada was of the opinion that the only way the claimant could be properly compensated was by an order to transfer the Williams' property, then this should be seen as a unique form of remedial response where damages are inadequate. As Janet O'Sullivan said in the context of restitutionary damages[34] for a breach of contract:

> 'if there is something deficient about the operation of the compensatory principle, and this is the *only* impetus for a restitutionary measure, then this deficiency should be rectified directly.'[35]

The same argument applies here. If the only impetus for the constructive trust to be declared is the remedial inadequacy of the current law of damages, then this should be addressed directly. The wrongful interception and the uniqueness of the property do not justify the declaration of a constructive trust. It does not tell us why this claimant should receive priority in bankruptcy.[36] The wrongful interception and the fact that the property was unique and specific may make out a case, at most, why an order for *specific restitution* should be made.[37] General

33. See S Worthington 'Proprietary Remedies: The Nexus Between Specific Performance And Constructive Trust' (1996–97) 11 JCL 1.

34. See *A-G v Blake* [2001] 1 AC 268.

35. J O'Sullivan 'Reflections On The Role of Restitutionary Damages To Protect Contractual Expectations' in D Johnston and R Zimmerman (eds) *Unjustified Enrichment* (Cambridge: Cambridge University Press, 2002) pp 327, 334. Much has been written on the House of Lords' decision in *A-G v Blake*: see eg A Phang and P W Lee 'Rationalising Restitutionary Damages In Contract Law – An Elusive Or Illusory Quest' [2001] 17 JCL 240; M McInnes 'Gain Based Relief For Breach Of Contract: *Attorney General v Blake*' [2001] 35 Can Business Law J 72; J Edelman 'Restitutionary Damages And Disgorgement Damages For Breach Of Contract' [2001] RLR 129. See also D Campbell and D Harris 'In Defence Of Breach: A Critique Of Restitution And The Performance Interest' (2002) 22 LS 208, who argue that the award of restitutionary damages for a breach of a commercial contract is incompatible with the operation of a market economy.

36. *Lac Minerals v International Corona Resources* (1989) 61 DLR (4th) 14 at 51.

37. See n 9 above for cases where specific restitution were ordered in the context of other intellectual property rights.

principles would have to be worked out on when such an order would be appropriate.[38] To declare a constructive trust that necessarily confers such priority would be to over-compensate the claimant. It is misleading to clothe such an order in the language of constructive trust. It is unacceptable both as a matter of history and principle. The inappropriate use of the constructive trust would lead to the undesirable effect of distorting the law in this area.

III. Institution of good faith in bargaining[39]

It is doubtful that an English court would view this argument kindly. It is beyond the scope of this paper to investigate the issue of whether the law should recognise good faith in pre-contractual negotiations. Suffice to say, English law does not recognise the 'institution of good faith'[40] in bargaining (save for insurance contracts) as demonstrated by the decision in *Walford v Miles*.[41] The House of Lords held that an agreement to negotiate had no legal content. Lord Ackner forcefully said that: 'A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here the uncertainty lies.'[42] Thus, this justification for imposing a constructive trust would probably not find favour in an English court.

IV. Confidence = fiduciary?

Another justification for a declaration of a constructive trust is based on the perceived symmetry between the law of confidence and fiduciary law. Since a

38. Cf P Birks 'Rights, Wrongs And Remedies' (2000) OJLS 1; P Birks 'Three Kinds Of Objection To Discretionary Remedialism' (2000) 29 W Australian LR 1, who argues that the development of discretionary remedialism is undesirable. However, the present author is more persuaded by S Evans 'Defending Discretionary Remedialism' (2001) 23 Syd LR 463; and D Wright 'Wrong and Remedy: A Sticky Relationship' [2001] Sing JLS 300.

39. See R E Hawkins 'Lac And The Emerging Obligation To Bargain In Good Faith' (1990) 15 Queen's LJ 65.

40. The literature on good faith is voluminous. See generally M Clarke 'The Common Law of Contract in 1993: Is There A General Doctrine of Good Faith?' (1993) 23 HKLJ 318; E McKendrick 'Work Done In Anticipation Of A Contract Which Does Not Materialise' in Cornish, n 25 above, pp 163, 186–91; J W Carter and M P Furmston 'Good Faith and Fairness in Negotiations of Contracts' (1994) 8 JCL 1; N Cohen 'Good Faith and Fault in Contract Law' in J Beatson and D Friedmann (eds) *Good Faith And Fault in Contract Law* (Oxford: Oxford University Press, 1995) p 25; J M Paterson 'The Contract to Negotiate in Good Faith: Recognition and Enforcement' (1996) 10 JCL 120. See also A F Mason 'Contract, Good Faith And Equitable Standards In Fair Dealing' (2000) 116 LQR 66; P Y Woo 'Protecting Parties Reasonable Expectations: A General Principle of Good Faith' [2001] OU Commonwealth LJ 195.

41. [1992] 2 AC 128. See also B J Davenport 'Lock-Out Agreements' (1991) 107 LQR 366; I Brown 'The Contract To Negotiate: A Thing Writ in Water' [1992] JBL 353; P Neill 'A Key to Lock-Out Agreements? (1992) 108 LQR 405; J Cumberbatch 'In Freedom's Cause: The Contract to Negotiate' (1992) 12 OJLS 586; E Peel '"Locking-Out" and "Locking-In": The Enforceability of Agreements to Negotiate' (1992) 51 CLJ 211; B Jamieson 'Lock-Out Agreement is Unenforceable' [1992] LMCLQ 16.

42. [1992] 2 AC 128 at 138. Cf E McKendrick 'Good Faith: A Matter of Principle?' in A D M Forte (ed) *Good Faith in Contract And Property* (Oxford: Hart Publishing, 1999) p 39.

constructive trust may be declared for a breach of fiduciary duty, it is argued that it would be anomalous if the constructive trust was unavailable as a relief for a breach of confidence – bearing in mind that both actions are very similar.[43] The assertion that both actions are closely related is historically accurate.[44] Both are actions founded in equity. However, it is the present writer's view that what began as an accident in history should not continue to dictate the development of the law of confidence.[45] There are enough differences between an action for breach of confidence and breach of fiduciary duty to justify a distinction between both actions.

The policy reason behind fiduciary law is quite different from that of the law of confidence.[46] Fiduciary law is designed to ensure that fiduciaries honour their undertaking and act accordingly. Equity takes a very cynical view of fiduciaries. Harsh profit-stripping rules were evolved to ensure that this underlying policy behind fiduciary law was achieved.[47] In short, these rules were meant to act as a strong deterrent and have a prophylactic effect to discourage the fiduciary from breaching his duty.

The law of confidence proceeds on an entirely different footing. It has often been said that the basis of the law of confidence rests on the equitable principle of good faith.[48] However, this assertion does not take us very far. What exactly are the boundaries of the equitable principle of good faith? It is unclear whether good faith is a standard to be adhered to or a legal obligation. Gurry advances an alternative approach. He says we should treat the law of confidence as a *sui generis* action.[49] He argues that the authorities have frequently drawn from principles of contract, equity and property that it is more realistic to treat the action as one of a composite jurisidictional basis. The two dominant characteristics that illustrate this characterisation have been pragmatism and flexibility. While this is a plausible approach, the present writer is of the view that it does not aid in the future development of the law. Further, if the action in

43. In *Coco v A N Clark* [1968] FSR 415 at 420–421, Megarry J described confidence as the cousin of trust.

44. See L S Sealy 'Fiduciary Relationships' (1962) CLJ 69; R G Hammond 'The Origins of the Equitable Duty of Confidence' [1979] Anglo-Am LR 7; see J Phillips 'Prince Albert and the Etchings' (1984) 12 EIPR 344.

45. See R P Meagher, W M C Gummow and J R F Lehane *Equity Doctrines and Remedies* (Sydney: Butterworths, 3rd edn, 1992) pp 869–870, where the learned editors explained that the reference of the classic authorities to 'trust and confidence' was made when both terms were used interchangeably. They are of the opinion that the better view is that the equitable duty of confidence be regarded as a specific field of its own.

46. See J Glover 'Is Breach of Confidence A Fiduciary Wrong? Preserving the Reach of Judge-Made Law' (2001) 21 LS 594; P Birks *An Introduction to the Law of Restitution* (Oxford: Oxford University Press, 1994) pp 332–333; P Birks 'The Content of Fiduciary Obligation' (2002) 16 Trust Law Int 34.

47. *Keech v Sanford* (1726) Sel Cas Ch 61.

48. See *Saltman v Campbell* (1948) 65 RPC 203; see also G Jones 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 LQR 463 at 466; and Cornish, n 7 above, pp 305–307.

49. F Gurry *Breach of Confidence* (Oxford: Oxford University Press, 1984) pp 58–60; F Gurry 'Breach of Confidence' in P D Finn (ed) *Essays in Equity* (Sydney: The Law Book Company Ltd, 1985) p 110. This analysis seems to have the support of Binnie J of the Supreme Court of Canada in *Cadbury Schweppes Inc v FBI Foods* (1999) 167 DLR (4th) 57.

confidence is *sui generis*, then it should innovate it own unique remedial response and not borrow from the constructive trust, which is steeped in history. A more serious indictment of Gurry's proposal is that it confuses the jurisdictional origins with the substantive classification of the cause of action. While it may true that the courts have drawn from other areas of the law in the past, this does not answer the question, ie substantively where should we place the law of confidence in the taxonomy of the law?

It is time to realise that it is no longer possible to analogise the law of confidence with one single area of law. There are two kinds of breaches of confidence – personal and trade secrets. It can be argued that personal secrets are protected under a developing right of privacy.[50] This is due to the 'horizontal' effect of the Human Rights Act 1998.[51] Thus, the protection of personal secrets stems from the individual's entitlement to respect to his or her private and family life. Sedley LJ in *Douglas v Hello! Ltd*[52] insightfully noted:

> 'The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.'[53]

With regard to trade and commercial secrets, the argument premised on privacy is less cogent.[54] There are two competing analyses – confidential information as property of the claimant and breach of confidence as a civil wrong. The present writer is of the view that it is more helpful to characterise the law of confidence as a species of civil wrongs[55] not unlike wrongs committed in the law of negligence.[56] The resistance to look towards the law of torts in analysing the law of confidence stems from two principal reasons. The first reason is that historically we do not associate torts with equitable wrongs. However, Birks has pointed out:

> 'it is difficult to find or to create any theoretical interest in or justification for the continued separation between legal and equitable wrongs. If one

50. See M Richardson 'Whither Breach of Confidence: A Right of Privacy For Australia?' (2002) 26 MULR 381.

51. This development is heartening as it was only ten years ago that it was emphatically said that English law does not recognise the tort of privacy: see *Kaye v Robertson* [1991] FSR 62.

52. [2001] 2 WLR 992.

53. [2001] 2 WLR 992 at 1025.

54. Cf *E I Du Pont de Nemours & Co Inc v Christopher* (1970) 431 F 2d 1012 at 1015, which referred to 'commercial privacy'.

55. See J Edelman 'Equitable Torts' (2002) 10 Torts LJ 64.

56. See A M Tettenborn 'Damages For Breach of Confidence: An English Perspective' (1987) Intellectual Property J 181 at 197. See also G Wei 'Surreptitious Takings of Confidential Information' (1992) 12 LS 302 at 304, who described the test for determining liability set out by Megarry J in *Coco v AN Clark* as being 'Atkinian' in nature. A rival characterisation is to see a breach of confidence as a form of interference with contractual relations. However, as seen by the case of *Douglas v Hello! Ltd* [2001] 2 WLR 992, it may be quite difficult to establish that the defendants had instigated or been involved in a breach of contractual relations.

observes the restriction of tort to common law, one confines one's discussion to a sub-set of wrongs identified by history rather than by any rational principle.'[57]

The second explanation why the law of confidence is not often associated with tort law is the erroneous assumption that if we do so, we would have to proceed by way of analogy with the tort of conversion – which, in turn, leads to the inevitable conclusion that confidential information is property.[58] This need not necessarily be so. Quite apart from conversion, it is possible to argue that the duty of confidence is quite similar to a duty of care in negligence. The philosophy underpinning the law in this area is the promotion of 'the policy of holding confidences sacrosanct'.[59] On reflection, the inquiry on whether a duty of confidence is imposed on a defendant mirrors the three-stage inquiry in determining a duty of care in negligence.[60] First, there is the element of foreseeability, ie whether the circumstances are such that any reasonable man would have realised that the information was received in confidence. Secondly, the concept of proximity is also present. The confidential information must have been received in circumstances where the recipient had knowledge or is held to have agreed that the information is confidential. Finally, the courts must also consider whether it is just and reasonable to impose such a duty of confidence on the defendant. The final inquiry finds its expression most acutely in third party recipients of confidential information and intentional takings of confidential information.[61]

57. P Birks 'The Concept of a Civil Wrong' in D G Owen (ed) *Philosophical Foundations of Tort Law*, (Oxford: Oxfors University Press, 1995) pp 31, 35. See also Law Com no 110 *Breach of Confidence* (Cmnd 8388, 1981); *Clerk & Lindsell on Torts*, n 7 above, pp 1517–1540; J Edelman 'Equitable Torts' (2002) 10 Torts LJ 64.

58. Eg see P M North 'Breach of Confidence: Is There A New Tort?' (1972) 12 LS 149; and Birks, n 46 above, pp 343–347, who argue that the analogy with conversion is a useful one to make. Cf Gurry, n 49 above, p 56, who concludes that the role of tort is a peripheral. See also Cornish, n 7 above, p 306, who, perhaps unfairly, dismisses arguments premised on tortious principles as being attributed to rash disputation by 'scientifically-minded jurists'.

59. Gurry, n 49 above, p 59.

60. See Lord Goff in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 281, where he said: 'I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all circumstances that he should be precluded from disclosing the information to others.' See also M Richardson 'Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law' (1994) 19 MULR 673 at 699.

61. See Cornish, n 7 above, pp 306–307, who perceptively lists down the points that matter in the jurisdiction debate. They are: (a) innocent recipients; (b) circumstances where damages may be awarded for breach; (c) possibility of damages for injury to feelings; (d) liability of indirect recipients; and (e) the effect of dealings that treat the information as property. Although it is beyond the scope of this paper, it is the present writer's view that there are distinct advantages in analysing the law of confidence with reference to the law of negligence, as issues (a)–(d) could be dealt with more effectively. See eg *Cadbury Schweppes Inc v FBI Foods* (1999) 167 DLR (4th) 577 at 600, where Binnie J suggested that tort principles could have an impact on the assessment of damages for a breach of confidence.

In addition, the standard mandated for a duty of confidence is quite different from a fiduciary duty. The touchstone of liability is pegged to that of the reasonable man, as explained by Megarry J in *Coco v A N Clark*.[62] Some eminent Australian equity lawyers[63] have astutely observed, 'the reasonable man labours at law not in equity which sets higher standards for fiduciaries, despite the contrary view of Megarry J in *Coco v A.N. Clark*'. This shows that the fundamental standard of the law of confidence and fiduciary law is very dissimilar. Liability for the former is premised on the reasonable man, whereas the latter is based on the notion of utter selflessness. The latter is a much higher standard than what can be expected from the ordinary man on the Clapham bus or the Bondi tram. Therefore, it is a fallacy to argue that since the law of confidence and the fiduciary duty are very similar actions, the harsh profit stripping rules in fiduciary law would apply as a matter of course in the law of confidence.

Further, although profit-stripping rules are theoretically available for a breach of confidence[64] in the form of an account of profits, they are seldom ordered.[65] Besides the serious practical difficulty in assessing an order for an account of profits, there is considerable doubt when an account of profits should be ordered. Gurry valiantly tries to distil principles of when an account of profits should be ordered. He lists down situations of when an account of profits should not be ordered.[66] However, he points out the cases do not give us any guidance of when an account of profits is to be ordered. Professor Jones has argued that the defendant should be made to account for profits[67] or hold property on constructive trust[68] where the breach of confidence is a conscious breach. This suggestion is unpersuasive. It is more convincing to deal with conscious breaches as instances where the inquiry is centred on whether exemplary damages should be ordered. The decision of *Aquaculture Corpn v New Zealand Green Mussel Co Ltd (No 2)*[69] suggests that an exemplary award could be made[70] for a breach of confidence.

Thus, it would seem that a personal profit stripping remedy is rarely employed in a breach of confidence in absence of a breach of fiduciary duty. It is also uncertain in what situations they should be ordered. Therefore, since a personal profit stripping remedy is rarely granted for a breach of confidence, it is the

62. [1968] FSR 415 at 420–421.

63. Meagher, Gummow and Lehane, n 45 above, p 51.

64. See *Peter Pan Manufacturing Corpn v Corsets Silhouette Ltd* [1964] 1 WLR 96; *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1972] RPC 811; *AB Consolidated Ltd v Europe Strength Food Co* [1978] 2 NZLR 515.

65. See eg *Seager v Copydex Ltd* [1967] RPC 349; and *Aquaculture Corpn v New Zealand Green Mussel Co Ltd (No 2)* [1990] NZLR 299. See also Gurry, n 49 above, pp 417–427. Cf the courts are more willing to grant an account of profits when the breach of confidence involves a breach of fiduciary as well. See *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749; *Normalec Ltd v Britton* [1983] FSR 318.

66. Gurry, n 49 above, pp 417–427.

67. G Jones 'Benefits Obtained in Breach of Confidence' (1970) 86 LQR 463 at 486–488.

68. Goff and Jones, n 5 above, pp 764–765.

69. [1990] NZLR 299. See also *Aquaculture Corpn v New Zealand Green Mussel Co Ltd (No 3)* (1986) 1 NZIPR 678 at 691.

70. Cf Meagher, Gummow and Lehane, n 45 above, p 4127.

present writer's view that the courts should exercise even more restraint when granting a proprietary right.[71]

V. Proprietary base

The argument in favour for the declaration of a constructive trust would go something like this.[72] Confidential information is property belonging to the claimant. Hence, there is what is known as a 'proprietary base'.[73] When the defendant uses the confidential information without the claimant's authority or knowledge, this is equivalent to the defendant misusing the property of the claimant. The benefits obtained or gains made using this 'proprietary base' belong to the claimant. The unjust factor would be the ignorance of the claimant of the unauthorised use of the confidential information.[74] Thus, it would be appropriate to grant the claimant a proprietary right. This argument need not detain us too long. There is a fatal flaw – the basic premise that confidential information can be equated with property is unsustainable.[75] The prevalent judicial view is that information is not property.[76] Since information is not regarded as property, the proprietary base argument fails.

71. See the recent case of *Cadbury Schweppes Inc v FBI Foods* (1999) 167 DLR (4th) 577, where the Supreme Court of Canada refused to declare a constructive trust.

72. There is a growing disenchantment with the 'proprietary base' analysis. It does not explain adequately why a claimant is entitled to enlarge his proprietary base. See C Rotherham 'Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies' (2000) 1 Theoretical Inquiries in Law 205 at 228, who argues: 'The attraction of the notion of a subsisting proprietary base seems to lie in its capacity to suggest that the courts are not involved with the redistribution of property rights. However, the proprietary base is too anaemic and unfamiliar a concept to convince us in this regard.' His ideas are developed fully in C Rotherham *Proprietary Remedies In Context: A Study In The Judicial Redistribution Of Property Rights* (Oxford: Hart Publishing, 2002).

73. See Birks, n 46 above, pp 378–379.

74. Birks, n 46 above, p 346.

75. In any case, the debate on the definition of proprietary quality often suffers from the vice of circularity. See K Gray and S F Gray *Elements of Land Law* (London: Butterworths, 2001) pp 107–110. Gray and Gray point out the absurdity of the inquiry: 'On conventional reasoning, a claim comprises "property" if *enforceable against a stranger*; and claims are enforceable against strangers provided that they are *proprietary* in character. Such propositions are entirely tautological in so far as proprietary character is supposedly made to depend on some criterion of "permanence" or "stability". It is radical and obscurantist nonsense to formulate a test of proprietary character in this way' (emphasis in original).

76. See *Boardman v Phipps* [1967] 2 AC 46 at 128, where Lord Upjohn said that confidential information was not 'property in any normal sense, but equity will restrain its transmission to another if in breach of some confidential relationship'. See also *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652. The High Court of Australia has also rejected the proprietary analysis – see *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 at 438. More recently, the property argument was also rejected in *Cadbury Schweppes Inc v FBI Foods* (1999) 167 DLR (4th) 577. For an examination of why a 'property approach' to information should be rejected, see Institute of Law Research and Reform Edmonton, Alberta *Trade Secrets Report No 46* (July 1986) pp 137–140. See also Cornish, n 7 above, pp 330–332; P Kohler and N Palmer 'Information as Property' in N Palmer and E McKendrick (eds) *Interests in Goods* (Lodon: LLP, 1998) p 1. Cf *Linda Chih Ling Koo v Lam Tai Hing* (1992) IPR 607.

VI. Deemed agency gains

This part of the paper examines whether the declaration of a constructive trust may be justified on Goode's 'deemed agency gains' thesis. These are cases where the defendant's gain derives not from the claimant's asset but from activity undertaken by the defendant 'for his own benefit which he was under an equitable duty, if he undertook it at all, to pursue for ... [the claimant]'.[77] Goode asserts:

> 'The typical case is that of the company director who uses his position to pursue for himself in dealings with T business opportunities, which should have been pursued on behalf of his company ... In this case there has been no diminution in P's [the claimant's] estate. All that has happened is that D [the director] has broken a fiduciary obligation to subordinate his own interests to those of P and perhaps also the separate obligation not to make a secret profit.'[78]

Goode argues that since the gains should have been pursued for the claimant, there is a case for allowing the claimant to obtain the gain in specie, so long as this is not done to the detriment of the general creditors and secured creditors. Goode's 'deemed agency gains' theory is controversial. It has been attacked on many fronts.[79] This thesis has been examined and criticised thoroughly by Wright[80] and the arguments need not be repeated here. However, even if one accepts Goode's 'deemed agency' thesis, it does not have any application to a breach of confidence. Where there is an abuse of confidence, the use of the information was *unauthorised.* It would be the height of artificiality to say that the defendant was under an agency duty to pursue the gains made for the claimant – the claimant's complaint is essentially that the defendant had used the confidential information without his permission. Thus, the basic premise to argue for a 'deemed agency gain' is missing where there is a breach of confidence.

VII. Analogy with *A-G for Hong Kong v Reid*[81]

A further justification for a constructive trust is by extending the Privy Council's decision in *A-G for Hong Kong v Reid.*[82] In this case, Reid was the Director of Public Prosecutions for Hong Kong. Reid had accepted bribes. He used these bribes to purchase property in New Zealand. The Crown argued that due to Reid's breach of fiduciary duty, it had a proprietary interest in the New Zealand property. The Privy Council accepted this argument.

How did Reid's obligation to make restitution for his wrongdoing translate into a proprietary right for the Crown?[83] Several reasons can be discerned from

77. R Goode 'Proprietary Restitutionary Claims' in Cornish, n 25 above, p 63.

78. Goode, n 77 above, p 74.

79 D Wright 'The Remedial Constructive Trust and Insolvency' in F Rose (ed) *Restitution and Insolvency* (Oxford: Oxford University Press, 2000) pp 212–216; P J Millet 'Bribes and Secret Commissions' [1993] RLR 7 at 15–16 criticised this thesis as impractical and impossible to apply in practice; S Worthington 'Three Questions on Proprietary Restitutionary Claims' in Cornish, n 25 above, p 7.

80. See D Wright 'The Remedial Constructive Trust and Insolvency' in Rose, n 79 above, p 206.

81. [1994] 1 AC 324.

82. [1994] 1 AC 324.

83. See P J Millet 'Bribes and Secret Commissions' [1993] RLR 7 for a defence of the conclusion reached in *Reid.* See also P J Millett 'Equity – The Road Ahead' (1995) 9 Trust Law Int 35.

the judgment. First, the moment Mr Reid accepted the bribe, he was under an obligation to turn over the bribe to the Crown. Since equity regards as done what ought to be done, the bribe belonged to the Crown the moment it was received. The second possible rationalisation of the case is that if a proprietary right was not granted in this case, it would result in a windfall to the other creditors. A proprietary right is apt because the Crown did not take the risk of Mr Reid's insolvency. A third justification is one based on public policy. It was said in *Reid* that bribery is an 'evil practice which threatens the foundations of any civilised society'.[84] Thus, the constructive trust was declared as deterrence against such behaviour. The fourth reason in favour of a proprietary right in this context is the risk of dissipation of assets by the wrongdoer. If a constructive trust was not declared there was the danger the wrongdoer would whisk the asset to some 'Shangri La' that hides bribes and other corrupt moneys. Lord Millett writing extra-judicially offers yet a further rationalisation of *Reid*:

> 'The decision of the Privy Council in *Att-Gen for Hong Kong v Reid* does *not* decide that a breach of fiduciary duty inevitably gives rise to a constructive trust ... it [the reason] is fairly obvious ... Mr. Reid had no authority to receive payments for his employer's account at all; and it follows that he had no authority to mix them with his own money and use them for his own purposes, subject only to a duty to account.'[85]

If the reasoning in *Reid* is to be extended to a breach of confidence, then it may be possible to justify a proprietary right for a claim for abuse of confidence. However, for such an extension to be defensible two propositions must be established. First, it must be possible to analogise a fiduciary obligation with an obligation of confidence. Secondly, the reasons given in the *Reid* decision on why a proprietary right was granted must be defended. It is suggested that both propositions cannot be made out. On the first level, it is wrong to conflate a fiduciary duty with a duty of confidence. As shown above, both actions, although originating in equity, proceed on very different policy considerations. Further, the *Reid* decision can be attacked. Detractors of this decision are many.[86] The reasons articulated in *Reid* to justify a proprietary right, ie deterrence, non-acceptance of the risk of insolvency of the fiduciary by the claimant, prevention of an unjust windfall to the claimant's creditors and fear of dissipation of assets by the defendant are unconvincing.[87] It is not the intention of the present writer to rehearse all the arguments why the *Reid* decision is wrong. Suffice to say powerful arguments such as the fact

84. [1994] 1 AC 324 at 330.

85. P J Millett 'Restitution And Constructive Trusts' [1998] 114 LQR 399 at 407.

86. Eg D Crilley 'A Case Of Proprietary Overkill' [1994] RLR 57; R A Pearce 'Personal and Proprietary Claims Against Bribees' [1994] LMCLQ 189; W J Swadling 'Property And Unjust Enrichment' in J W Harris (ed) *Property Problems From Genes To Pension Funds* (London: Kluwer, 1997) pp 130, 141–143.

87. It is doubted that a proprietary remedy would deter an insolvent defendant. Non-acceptance of risk of insolvency per se cannot be an explanation for a proprietary remedy. Eg a tort victim who did not accept risk of insolvency is not granted priority. Next, the 'windfall' argument is also suspect because this is not a situation of unjust enrichment but restitution for wrongs. Finally, the risk of dissipation argument is better dealt with an application for a freezing order.

that the *Reid* decision would result in: (a) unfairness to the interest of unsecured creditors in the event of insolvency; (b) the inconsistent treatment of claimants of civil wrongs; and (c) the lack of certainty of when a proprietary right would be ordered suggest that the critics of this decision are correct. If the foundation of a declaration of a constructive trust for a breach of confidence is based on the authority of the *Reid* decision, then it is this writer's view that the foundation is decidedly shaky.

VIII. Reversal of unconscionable conduct

It is often said that a constructive trust arises due to the unconscionable conduct of the defendant. In the well-known decision of *Beatty v Guggenheim Exploration Co*,[88] Cardozo J used this formula to describe the constructive trust:

> '[a] constructive trust is the formula through which the conscience of equity finds expression. *When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee* ... A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief' (emphasis added).[89]

It can be argued that this approach has the support of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[90] where he said that a fundamental principle is that 'equity operates on the conscience of the owner of the legal interest'. With regard to a breach of confidence, the learned editors of *The Law of Restitution*[91] argue that:

> 'The confidant may be declared to be a constructive trustee of specific assets, or a lien may be imposed over those assets, if confidential information is characterised as property or possibly, if his conduct is said to be unconscionable. It should be a significant consideration that the confidant had consciously broken confidence.'

The reference to the constructive trust arising due to the defendant's unconscionable conduct is troubling. An objection to this formula is that the term 'unconscionable conduct' is unspecific. It is tantamount to granting an unguided discretion to judges in dealing with proprietary rights. It is hard to see how the terms 'conscience' and 'unconscionable conduct' assist judges in deciding whether to grant a claimant a proprietary right. La Forest J, in *Lac Minerals*, disavowed such an approach. He said:

88. 122 NE 378 (NY, 1919).
89. 122 NE 378 at 380, 381 (NY, 1919). See also *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 147, where Mason CJ and Wilson and Deane JJ said that: 'the foundation for the imposition of a constructive trust ... is that [the defendant's] refusal to recognise the existence of [the claimant's] equitable interest amounts to unconscionable conduct and ... the trust is imposed as a remedy to circumvent that unconscionable conduct.'
90. [1996] AC 669 at 705. See also *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400.
91. Goff and Jones, n 5 above, pp 764–765.

> 'I do not countenance the view that a proprietary remedy can be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be. To allow such a result would be to leave the determination of proprietary rights to "some mix of judicial discretion" ... and "the formless void of individual moral opinion",'[92]

The label 'unconscionable conduct' does not clarify matters at all.[93] Professor Arthur Leff has commented that:

> '[unconscionability] tends to permit to make the true bases of decisions more hidden to those trying to use them as the basis of future planning. But more important, it tends to permit a court to be non-disclosive about the basis of its decision even to itself ... Subsuming problems is not as good as solving them, and may retard solutions instead.'[94]

While it is true that equity began as a court of conscience, she has since developed in a principled manner to avoid the charge of arbitrariness and roguishness. It is apposite to pay heed to Selden's articulation made in the seventeenth century of the usual complaint of equity: that justice was being dispensed according to the each Chancellor's differing notion of conscience.[95] More recently, Professor Birks echoed Selden's caution and delivered stinging criticisms to the proposition that equity is premised on the defendant's unconscionable conduct.[96] He rightly points out that such an endeavour displays an alarming 'anti-analytical mentality'. He argues that the term 'unconscionable' is so unspecific that 'it simply conceals a private and intuitive evaluation'.[97]

It may very well be that the criticisms above may be totally misplaced. If Lord Browne-Wilkinson had a technical meaning in mind of the word 'conscience', then his formulation of the principles on trust law may be salvaged.[98] Equity has evolved such that the meaning of conscience is a technical one, where it can be said that the conscience of the defendant is affected even though there may be no moral turpitude. However, if the term conscience is understood to have a technical meaning and totally divorced from wrongdoing,

92. *Lac Minerals v International Corona Resources* (1989) 61 DLR (4th) 14 at 51.

93. See *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 392.

94. A Leff 'Unconscionability And The Code – The Emperor's New Clause' (1967) 115 UPaLR 485 at 557–559.

95. F Pollock (ed) *The Table Talk of John Selden* (London: Quaritch, 1927) p 43.

96. P Birks 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 W Australian LR 1 at 16–17; P Birks 'Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment' (1999) 23 MULR 1 at 17–23. See also D R Klinck 'The Unexamined "Conscience" of Contemporary Canadian Equity' (2001) 46 McGill LJ 571 at 610–611, where Klinck concludes tentatively 'that the persistence of conscience ... is simply a matter of inertia. The word is part of the traditional discourse of equity, and it is simply being reiterated in an "automatic" way'. See A F Mason 'Contract, Good Faith And Equitable Standards In Fair Dealing' (2000) 116 LQR 66.

97. Birks, n 96 above, at 16–17.

98. See W J Swadling 'Property and Conscience' (1998) 12 Trust Law Int 228 for a thorough analysis of trusteeship arising without knowledge and wrongdoing of the defendant. See also R Chambers *Resulting Trusts* (Oxford: Oxford University Press, 1997) pp 203–210.

dishonesty or moral turpitude on the defendant's part, then this formula does not add very much to our understanding of the constructive trust. As a matter of general principle, rather than guiding us, it has the potential to mislead us.[99]

CONCLUSION

The law of constructive trust has been hamstrung by the lack of clarity both in terms of terminology and analysis. It is hoped that this paper has cleared some of the clutter in this area with regard to a declaration of a constructive trust for a breach of confidence. On balance, it is suggested that the justification given for the declaration of a constructive trust in *Lac Minerals*[100] is unconvincing. While an order for *specific restitution* for a wrongful interception of a unique property may be defensible, there appears to be no reason why priority in insolvency should be granted to a claimant for an abuse of confidence. The conclusion reached by the present writer is that there are no compelling grounds why claimants for an abuse of confidence should be granted a proprietary right.

99. See Virgo, n 5 above, pp 630–634 on the formidable problems of using conscience as the touchstone of the constructive trust. Two aspects need to be worked out – the degree of fault required and the point in time that the defendant's conscience is said to be affected.
100. *Lac Minerals v International Corona Resources* (1989) 61 DLR (4th) 14.