1. Introduction and synopsis

Breach of confidence is often thought of as a doctrine of minor importance. However, that perception must be questioned in the light of recent developments which have seen it emerge as a significant component of the intellectual property, privacy and security laws of common law jurisdictions including Australia, New Zealand, Singapore, Malaysia and Hong Kong. The authors of the newly-published second edition of Francis Gurry’s classic text on breach of confidence point out that the legal concept of confidentiality is, if anything, likely to increase in importance in the future, playing a critical role ‘in determining the boundary between “openness” and “secrecy”’.¹ On the other hand, experience shows that a breach of confidence doctrine is by no means an essential doctrine in all common law jurisdictions. For instance, in the United States the doctrine has over the last century largely been jettisoned in favour of trade secret and privacy torts and an expansive treatment of confidentiality contracts; while in Canada and New Zealand privacy law has more recently developed a *sui generis* form as a result of legislative and common law action.

There are also some suggestions that, in some of the jurisdictions that continue to rely on the doctrine (for the time being), it has lost its traditional moorings and is fracturing into a series of sub-doctrines with little binding them together in terms of principle or policy. The United Kingdom is a case in point. English judges now quite commonly refer to breach of confidence in the language of tort rather than in traditional equitable terms. In the most recent cases since the Human Rights Act 1998,² some judges may even prefer the language of an information privacy tort giving effect to the right to privacy in Article 8 of the European Convention on Human Rights,³ encompassing and going beyond ‘old-

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fashioned’ breach of confidence. There is a suggestion here that privacy is submerging breach of confidence, and that an ‘old-fashioned’ breach of a relationship of confidence may simply be a particularly egregious breach of information privacy. It is as if the values behind breach of confidence belong to an earlier age.

In our contribution to the scholarly jurisprudence, we explore the historical foundations and modern developments of this rather obscure doctrine. We conclude that despite its humble beginnings, stilted development and air of quaintness, the doctrine has modern relevance and influence, its normative standard of ‘trust and confidence’ still resonating with the information society of today. The cases show that the precise meaning of this normative standard has adapted over time, reflecting contemporary conclusions of judges about desirable social norms of behaviour in the treatment of another’s information than is manifestly ‘not . . . public property or public knowledge’. Rather than proclaiming any grand policy to guide the doctrine’s development, judges for most of the doctrine’s history appear content to rely on its adaptable language of conscience to adapt its content and operation for current situations and circumstances, in what might be described (not necessarily critically) as a process of ‘muddling through’. And if what counts as breach of confidence has become somewhat uncertain and contested in the current century, this only is to be expected given the fluid and evolving social contexts in which the doctrine now functions compared to earlier periods when things seemed relatively more stable. Even so, we suggest, there have been other periods of considerable uncertainty in the doctrine’s long history. Indeed, the doctrine’s ability to surmount an array of challenges in the past has provided one of the greatest signs of its longer-term resilience.

In the chapter that follows this one, the early history and social origins of breach of confidence are surveyed with particular reference to the small business, private and domestic relations, and master-servant dealings which characterise the early doctrine’s small but interesting body of cases – to the extent we can tell these from the limited law reports, supplemented by Lewis Sebastian’s Digest of Cases on Trade Mark, Trade Name, Trade Secret, Goodwill, &c. We find that the ancient language of

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6 Lewis Sebastian, Digest of Cases of Trade Mark, Trade Name, Trade Secret,
‘trust and confidence’ was put to a variety of uses in cases of the eighteenth century; but by the nineteenth century the equitable breach of confidence doctrine became pronounced and began to garner an identity and shape of its own. But ambiguities remained which continued to make this an obscure doctrine, little understood and often confused with other doctrines. In particular, some cases suggested it was much like contract, while others treated it as akin to the so-called common law property right in unpublished works which predated the doctrine and continued to operate alongside it until that right was abolished with the Copyright Act of 1911. More generally, the language of ‘trust and confidence’ had no determined parameters, deliberately perhaps since this allowed the doctrine to have a flexible operation in contemporary situations and circumstances. The cases show that the doctrine’s central function during this period was to express and protect relational norms of friendship, loyalty and devotion, seen as crucial to the operation of a post-feudal society’s social institutions. However, in 1825 the case of Abernethy v Hutchinson, involving surreptitious conduct by a possible stranger whose identity was never uncovered in making shorthand notes of a famous surgeon’s lectures for purposes of publication in the newly established and rather bumptious medical journal The Lancet, reveals a rather more modern set of circumstances and hence treatment of the doctrine than in previous cases.

Chapter 3 notes that the doctrine’s focus on privacy and publicity rights was also a feature of its early development. It begins with this case of Abernethy v Hutchinson, pointing out that the Lancet’s publication extended not only to the content of the lectures but also to more personal characteristics of the lecturer, John Abernethy, who was known as a great performer in the classroom. It then moves on to the 1849 royal etchings case of Prince Albert v Strange, another remarkably modern case. And again there are traces of surreptitious conduct in the background of this case, it being initially suspected that Strange and his collaborator’s possession of the royal couple’s family etchings which they intended to exhibit to the public, for a fee, complete with a catalogue which they had prepared, came by way of theft from the couple’s apartment. It was only as the case unfolded that it was determined that a more likely source was an assistant to a printer who had been given the plates for the purposes of making

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*Goodwill, &c, Decided in the Courts of the United Kingdom, India, the Colonies and the United States of America* (London: Stevens and Sons, 1878).

7. Copyright Act 1911 (UK), s 36.
8. *Abernethy v Hutchinson* (1825) 1 H & Tw 28; 47 ER 1313.
9. *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302.
Breach of confidence limited copies for private circulation and kept copies which he then sold on – and even then there was some uncertainty remaining as to whether this was the precise factual background. In this case, as in Abernethy v Hutchinson previously, we see English judges relying on breach of confidence, using language broadly framed to include not just those with whom a person knows he or she is dealing but the conduct of strangers as well. The Lord Chancellor noted that the defendants had no answer to the plaintiff’s claim that the private etchings had come into their hands by surreptitious or improper means, and held that their planned exposure of information about the etchings in the defendant’s catalogue was a ‘breach of trust, confidence or contract’, citing Abernethy v Hutchinson. Similar language of surreptitious or improper obtaining was used in other cases of the period, including Tipping v Clarke in 1843,¹⁰ where the defendant was enjoined from disclosing information about the plaintiff’s affairs ‘surreptitiously obtained’ from the plaintiff’s clerk. These cases suggest that new practices of surreptitious or improper obtaining (involving both intermediaries and third parties) were seen as requiring definite legal response, the doctrine of breach of confidence being the most convenient tool.

The chapter finishes with the 1854 case of Gartside v Outram,¹¹ in which one important exception to the application of an obligation of confidence was recognized. A firm of wool-brokers sought to prevent public disclosure of fraudulent dealings by a former sales clerk relying on Tipping v Clarke. But Wood V-C denied the injunction, stating that ‘the true doctrine is that there is no confidence as to the disclosure of iniquity’.¹² There is a certain symmetry to this finding that a conscience-based doctrine of breach of confidence must also acknowledge proper standards of social candour and conduct appropriate to a modern trading environment – the beginning, that is, of a public interest exception to the operation of breach of confidence. As with the framing of the doctrine itself, there were no clear boundaries to this exception. Indeed, the Vice-Chancellor suggested, there may be a variety of ‘exceptions to this doctrine’,¹³ their character still to be explored.

These mid-nineteenth century cases show how the embryonic doctrine of the earlier century was being fleshed out and refurbished in a transitional period between post-Revolutionary romanticism, with its focus

¹⁰ Tipping v Clarke (1843) 2 Hare 383; 67 ER 157.
¹¹ Gartside v Outram (1856) 3 Jur (NS) 39; 26 LJ Ch (NS) 113.
¹² 26 LJ Ch (NS) 113 at 114.
¹³ Ibid.
on the person, and a coming Victorian-era capitalism, devoted to the making of money. There are some sharp twenty-first century parallels in the cases themselves – including, as they do, an early case of celebrity privacy in the form of *Prince Albert v Strange*, where explicit reference was made to privacy as “the right invaded”, an early publicity rights case in the form of *Abernethy v Hutchinson*, and an early whistle-blowing case in the form of *Gartside v Outram*. In responding to these scenarios, we see breach of confidence being updated for the new conditions of an urbanized capitalist society, with its standards of trust and confidence applied in circumstances that twenty years earlier would have been hard to imagine. Nevertheless, there is still a sense that breach of confidence retained a continuing logic and impetus. It was updated not superseded by a new doctrine that retained only the older doctrine’s label of breach of trust and confidence. As long ago as 1755, Samuel Johnson in his famous *Dictionary of the English Language* defined ‘confidence’ as meaning ‘firm belief of another’s integrity or veracity, reliance’, citing as authority for this meaning the preacher Robert South’s statement that ‘Society is built upon trust, and trust upon confidence of another’s integrity’. Although the circumstances in which a person might be forced to rely on the integrity of those around may be more diverse in a complex urbanized society than one that still retained remnants of a feudal system, the general sense of breach of confidence as founded upon trust and confidence in another’s integrity remained.

By the mid-nineteenth century the doctrine had a certain philosophy as well, although there were only hints at this in the cases themselves. The philosopher John Stuart Mill said that British judges operated ‘chiefly by

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15 (1849) 1 H & Tw 1 at 26; 47 ER 1302 at 1312 – and in the earlier decision of the Vice-Chancellor the language of privacy is even more prominent: see *Prince Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293.

16 Samuel Johnson, *A Dictionary of the English Language: in which the Words are Deduced from their Originals, and Illustrated in their Different Significations by Examples from the Best Writers: To which are prefixed, a History of the Language, and an English Grammar* (London: printed by W Strahan, for J and P Knapton; T and T Longman; C Hitch and L Hawes; A Millar; and R and J Dodsley, 1755).

stealth’ in designing and developing their law. But the prevailing philosophy of mid-nineteenth century Britain was a utilitarian one, and breach of confidence could be characterized in utilitarian terms – especially once utilitarianism came to be seen as an essentially liberal philosophy. Mill was an impetus for this understanding. In On Liberty, published in 1859, he observed that, although it was already well accepted that commercial freedom promoted a vigorous capitalist economy, individuals were still subject to repressive personal constraints. Allowing individuals to make their own choices as to how to live their lives, including in their ‘private life’, Mill argued, was the best guarantee of social welfare, the individual being the best judge of his or her own welfare and able to flourish best in a free society. Thus the only proper limitation to a general principle of individual freedom was to prevent harm to others that may constrain their freedom and welfare. In Utilitarianism, published in 1861, Mill pointed out that there were certain social norms that were basic to a free society, one being ‘security’, making ‘safe for us the very groundwork of our existence’. On this reasoning, law may have only a minor role in regulating in the few cases that get to court, but a broader role in shaping social norms that operate in a society. Indeed, the normative language of breach of trust and confidence in the mid-nineteenth century cases suggests a judicial desire to shape social norms in terms of individual freedom and trust in the conduct of others, being terms not all that different from the ones that Mill was to espouse.

Nevertheless, as Chapter 4 reveals, it soon became clear that the contours of the doctrine were not completely settled. If anything, breach of confidence became more narrowly conceived as the nineteenth century

19 John Stuart Mill, On Liberty (1859), reprinted in Warnock, above n 18, 126 and especially Chapter 3 (‘of individuality, as one of the elements of well-being’).
20 See ibid, p 195.
21 John Stuart Mill, Utilitarianism, 1861, reprinted in Warnock, above n 18, 251.
22 Ibid, p 310.
progressed, and other doctrines came more to the fore in a period of high capitalism – a period that, according to Karl Marx and Friedrich Engels’ *Communist Manifesto*, was marked by an obsession with private property and profit-making enterprise.\(^\text{24}\) Firstly, there was the property right in unpublished works which was referred to in Abernethy’s case as potentially available even to unwritten works and in *Prince Albert v Strange* became an alternative basis for a remedy precluding unauthorized publication of a catalogue that clearly had commercial value. Secondly there was the rising action for breach of contract.\(^\text{25}\) In *Abernethy v Hutchinson* Lord Eldon thought it only logical that a third party should be prevented from profiting from another’s breach of contract, relying on breach of trust and confidence. In *Morison v Moat*,\(^\text{26}\) in 1851, Turner V-C went further, positing that the obligation of confidence itself was like ‘a promise on the faith of which [a] benefit has been conferred’,\(^\text{27}\) in other words hardly different from breach of a contract.

The conflation continued in later cases. Thus, the contractual-confidence obligation was treated as somehow placing obligations on third parties, while the property right in unpublished (confidential) material was extended to material with no determined written form, in the way of the older property right. An example was the case of *Exchange Telegraph Co Ltd v Gregory* in 1896,\(^\text{28}\) involving theft of stock exchange information which was circulated to the plaintiff’s subscribers. The defendant argued that the information had not been conveyed to him on any contractual terms since he had merely induced a subscriber to pass it on in breach of his contract with the plaintiff. Moreover, he added, the process of transmitting information by ticker-tape did not give it the status of a work. The arguments failed. The Court of Appeal held that the defendant’s conduct entailed violation of the plaintiff’s property in valuable and saleable information and the defendant’s inducement of the plaintiff’s breach of contract constituted a tort. At the same time, the judicial condemnation of

\(^{24}\) Karl Marx and Friedrich Engels, *The Communist Manifesto* (1848, transl into English by Samuel Moore, 1888), reprinted in Gareth Stedman Jones (ed.), *The Communist Manifesto* (London: Penguin, 2002), 218. And see at p 225 especially: ‘Modern bourgeois society with its relations of production, of exchange and of property, a society that has conjured up such gigantic means of production and of exchange, is like a sorcerer, who is no longer able to control the powers of the nether world whom he has called up by his spells’.


\(^{26}\) *Morison v Moat* (1851) 9 Hare 241; 68 ER 492.

\(^{27}\) 9 Hare 241 at 255; 68 ER 492 at 498.

\(^{28}\) *Exchange Telegraph Co Ltd v Gregory* [1896] 1 QB 147.
the defendant’s conduct as a ‘mean and contemptible act’\textsuperscript{29} suggests that the idea of trust and confidence had not been wholly forgotten. Rather than such moralizing language being anachronistic in a high-capitalist age, there is a sense of a real concern with business morality at the tail end of the Victorian era, in the same way as more generally there were concerns being expressed in the 1890s about socialism, anarchism, decadence and other forms of ‘deviant’ behaviour.\textsuperscript{30}

If so, it is not surprising that after the property right in unpublished works was abolished and replaced with a more narrowly framed copyright in unpublished works under the British Copyright Act of 1911, breach of confidence would eventually be drawn on to fill the gap – although it took a considerable amount of time for its role to be settled. Perhaps the legislature assumed the doctrine would have only a minor role when it explicitly retained breach of confidence when the property right was abolished. The Court of Appeal in the lead-up to the new legislation had referred to breach of confidence as a doctrine founded on good faith in the case of \textit{Philip v Pennell}\textsuperscript{31} involving the publication of Whistler’s diaries (although no breach of faith was found there), the language of ‘good faith’ implicitly endorsing the proposition from \textit{Morison v Moat} that breach of confidence was at most a contract-like doctrine. After the 1911 Act was passed and came into effect, Swinfen Eady LJ in the case of \textit{Lord Ashburton v Pape}\textsuperscript{32} seemed to go further in referring to the doctrine as encompassing ‘improper or surreptitious obtaining’ of material that is manifestly confidential, pointing out that there were several cases which served as authority for the proposition.\textsuperscript{33} But subsequently, in \textit{Sports and General Press Agency, Limited v ‘Our Dogs’ Publishing Company, Limited}\textsuperscript{34} the Court of Appeal (including Swinfen Eady LJ) seemed to take a narrower line again, suggesting a contractual restriction would be needed to preclude the unauthorized taking of photographs at the plaintiff’s exhibition.

British courts were not the only arbiters of the breach of confidence doctrine in the early 1900s, so attention must be given also to what was

\textsuperscript{29} See [1896] 1 QB 147, Lord Esher MR at 153 (‘a mean and contemptible act’), Kay LJ at 155 (‘a grossly fraudulent act’), Rigby LJ agreeing.
\textsuperscript{31} \textit{Philip v Pennell} [1907] 2 Ch 577.
\textsuperscript{32} \textit{Lord Ashburton v Pape} [1913] 2 Ch 469.
\textsuperscript{33} [1913] 2 Ch 469 at 475.
going on in other parts of the common law world. As noted in Chapter 5, eyes turned to America, reflecting the country’s rising power and influence. And it is clear that here the British common law system was seen as a highly conservative system which treated precedent in a rigid and mechanical fashion and offered limited opportunities for development to deal with modern circumstances. In response, American judges supported by activist legal realist scholars began to make explicit use of policy to reform the law and refashion it to suit the needs of a contemporary and distinctly American society – a society that in some quarters was seen as having more in common with a modernizing Europe artistically and culturally than with Britain. Particularly admired was an influential article written by Samuel Warren and Louis Brandeis (who had been educated in Germany) published in the 1890 Harvard Law Review.35 These authors construed the British breach of confidence doctrine as an antiquated doctrine focused on relations between a confider and confidant, citing Prince Albert v Strange but overlooking or ignoring its broader language of surreptitious obtaining, and argued that such a doctrine was inadequate for a modern American society characterized by an intrusive yellow press and the pervasive camera. Using dignitarian reasoning, Warren and Brandeis also re-interpreted the ‘right to privacy’ talked about in Prince Albert v Strange as a right of ‘inviolate personality’ and insisted that new law framed in terms of privacy was needed to support it. Their article inspired the twentieth century development of a range of privacy torts in various states of the US36 – although perhaps taking a rather different shape, and more delimited by the constitutional right of free speech, and generally reflecting some rather different social concerns in the modern American environment than in the original Warren and Brandeis conception.37

Another important American development was the ‘misappropriation doctrine of the 1918 International News Service v Associated Press case.38 In the wake of the First World War, a majority of the Supreme Court in this case used the Lockean language of ‘reaping without sowing’ to justify

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36 For the classic catalogue of the torts in terms of intrusion upon seclusion, public disclosure of private facts (the closest tort to what Warren and Brandeis had in mind), false light publication, and appropriation of name or likeness, see William Prosser’s article, ‘Privacy’, (1960) 48 California Law Review 383 and further Restatement of the Law, Second, Torts (St Paul, MN: American Law Institute, 1977), Division 6A.
Breach of confidence

a misappropriation tort covering the plaintiff news service’s valuable news and other information, and giving it a ‘quasi-property’ status. While this was not a case where breach of confidence might have been argued (as the plaintiff’s news had been published in East Coast newspapers when the defendant copied it for its client newspapers) the breadth of the misappropriation doctrine as pronounced in that case gave little scope for any breach of confidence doctrine. The impression that breach of confidence was viewed as having very limited significance in protecting the news was further confirmed by the dissent of Brandeis J (author of ‘The Right to Privacy’) who argued that any decision about the merits of controlling access to the news should be made by the legislature, given the sensitive problem of freedom of speech and the media. Further, Holmes J relied on an expansive reading of the doctrine of passing off rather than breach of confidence to address the morally questionable character of the defendant’s conduct, characterized as simply a failure to disclose that the news being published in its newspapers had not been gathered through its agency. Elsewhere, Holmes J had been reluctant to treat trade secret protection in an expansive fashion, saying in *El Du Pont de Nemours Powder Company v Masland* in 1917 that the law merely makes ‘some rudimentary requirements of good faith’. These narrower views did not prevail, although the majority’s view did not survive intact either. The misappropriation doctrine was wound back to a ‘hot news’ doctrine (recognized in some states), in deference to the constitutionally pre-emptive statutory intellectual property rights, while trade secret protection expanded under *sui generis* doctrines developed specifically for the purpose.

These developments could not help but be noticed in other parts of the common law world. The various disruptions of the War years ensured that few cases reached the courts in the United Kingdom, and even fewer were reported, with the result that even potentially significant authorities were obscured or overlooked. For instance, the 1928 case of *O Mustad & Son v Dosen*, a case concerning the secret design of fishhooks, was not actually reported until well after the Second World War, although it went as far as the House of Lords. On the other hand, the 1937 Australian case of *Victoria Park Racing and Recreation Grounds Company Limited v* 

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39 *El Du Pont de Nemours Powder Company v Masland* 244 US 100; 37 S Ct 575 (1917).
40 And see *National Basketball Association v Motorola, Inc* 105 F3d 841(1997) and *Restatement of the Law, Third, Unfair Competition* (St Paul, MN: American Law Institute, 1995), Ch 4.
41 *O Mustad & Son v Dosen and Another* [1963] RPC 41; [1963] 3 All ER 416.
Taylor was fully reported, and this case became the main authority on the (negative) ‘British’ position on the American International News Service’s misappropriation doctrine. But the case also shows how conservative the Australian High Court was in the late 1930s – eschewing any judicial role of law reform in an era of legal positivism. Not only was the US Supreme Court’s pronouncement of a misappropriation doctrine rejected by (a majority of) the High Court as contrary to the British approach, but the British approach was characterized as one that admitted no development of existing doctrine. As Dixon J put it,

‘[c]ourts have not in British jurisdictions thrown the protection of an injunction around the intangible elements of value’ as shown by ‘the history of the law of copyright and by the fact that the exclusive right to invention, trade marks, designs, trade names and reputation are dealt with in English law as special heads of protected interest’.

If breach of confidence was conspicuously missing in that catalogue, this merely reflected its generally low status at the time. But that was to change. Just twelve years later in Saltman Engineering Co Ltd v Campbell Engineering Co Ltd the equitable doctrine was noted and construed broadly to mean that ‘[i]f a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff’s rights’.

Nevertheless, as we point out in Chapter 6, the main body of British cases between and immediately after the Wars concerned employment relations rather than privacy, on the other hand, or commercial secrecy, on the other. Moreover, here we see the beginning of a sui generis treatment of employment and post-employment confidentiality tailored to post-War employment conditions – presaging a more general recognition that labour relations required their own body of law. The decisions show a growing judicial acceptance that, notwithstanding a substantial body of nineteenth century cases holding present and former employees bound by obligations of confidence constraining any use of their employer’s information, there were good reasons now for carving out a new exception to that principle to

42 Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479.
43 (1937) 58 CLR 479, Dixon J at 508–9.
44 Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203.
45 65 RPC 203, Lord Greene MR at 213.
accommodate the needs of a more mobile workforce. Although the principle of fidelity governing employer-employee relations during employment was still treated as absolute (subject to the iniquity defence of *Gartside v Outram*), the same did not apply once the employment ended. Former employees were still precluded from using their former employer’s ‘trade secrets’, but the term was narrowly construed in this context to mean only particular secrets of such obvious significance and importance to the employer as to be recognized as belonging to the employer, effectively granted a proprietary status. Former employees were given broad latitude to exploit their skill and labour acquired in previous employment in their new work, latitude not available to other parties bound to an obligation of confidence. The result was to remove the employment cases from the general rubric of breach of confidence. The question still to be addressed is whether the same might apply to other aspects of the doctrine’s operation, with commercial secrecy, privacy and government secrecy potentially also emerging as distinct bodies of law.

At least in first instance, no such trend could be observed in the post-War development of breach of confidence when that doctrine was revived and began to be applied again to a wider array of cases in the later years of the twentieth century. Our survey in Chapter 7 shows rather the doctrine regaining strength as a doctrine in its own right and given a coherent form from the 1960s onwards. Three important cases – *Argyll v Argyll*, *Seager v Copydex Ltd* and *Coco v AN Clark (Engineers) Ltd* – were especially influential in the doctrine’s re-establishment. Each was concerned with what might loosely be called confidential relations, the first in the private sphere of a marriage partnership, the second and third in more explicitly commercial settings of information disclosed and received in confidence. So it may have seemed only logical for Megarry J in the last of this triumvirate to talk of the ‘normal’ elements of breach of confidence in relational terms of confidential information disclosed by a confidant to a confidant on the understanding that it should be used for limited purposes, later to find that it is used instead for other purposes. Nevertheless, the relational language would soon prove inadequate for a modern world of tabloid press and commercial and more politically motivated forms of espionage.

Many judges after *Coco* treated its ‘normal’ standards as requirements

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46 *Argyll v Argyll* [1967] Ch 302.
47 *Seager v Copydex Ltd* [1967] RPC 349.
48 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.
(as Megarry J had probably intended), with the effect that very limited protection in fact seemed to be accorded by the doctrine. The impression was reinforced in *Malone v Metropolitan Police Commissioner*\(^5^0\) where Megarry V-C held that breach of confidence did not extend to a case of telephone tapping by the police, a decision which the European Court of Human Rights subsequently held meant that the United Kingdom government had failed to give effect to the right to private life in Article 8 of the European Convention on Human Rights.\(^5^1\) Not all courts were so stringent. In Australia surreptitious or improper obtaining was accepted as raising an obligation of confidence in the 1978 Queensland case of *Franklin v Giddins*\(^5^2\) and broad language was also employed by Mason J in *Commonwealth v John Fairfax & Sons Ltd*\(^5^3\) in 1980, showing how far the Australian courts had moved beyond the strictures of the 1930s Dixon High Court. The UK courts took longer. But in *Francome v Mirror Group Newspapers*\(^5^4\) in 1984, breach of confidence was relied on to enjoin a newspaper’s publication of information obtained by an intermediary through an unlawful telephone tap, with *Malone* distinguished as a case of a lawful tap placed by the police. Eventually this was to pave the way for surreptitious or improper obtaining to become again a focus of the doctrine; indeed for a broader idea of breach of confidence centred around confidentiality of information, knowledge or notice of the desire of the party lawfully in the control of the information to limit its use to certain purposes, and another party’s misuse.

In the course of Chapter 7 we point to a variety of reasons for a push towards a broader understanding of the scope of breach of confidence by the late 1980s. Some had to do with socio-economic circumstances. In particular, there was the rise of tabloid journalism, with an arguably associated ‘dumbing down’ of media reporting and the lack of respect for individual privacy in parts of the press and media more generally.\(^5^5\) The defendant newspaper’s blatant attempt to obtain and publish a scoop in the case of *Kaye v Robertson* in 1990,\(^5^6\) where the star of the British

\(^5^0\) *Malone v Metropolitan Police Commissioner* [1979] Ch 344.
\(^5^2\) *Franklin v Giddins* [1978] Qd R 72.
\(^5^3\) *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.
\(^5^4\) *Francome v Mirror Group Newspapers Ltd* (1984) 2 All ER 408.
\(^5^6\) *Kaye v Robertson* [1991] FSR 62.
television programme 'Allo 'Allo was ‘interviewed’ and photographed in hospital after a serious motor accident for a story in the Sunday Sport, was a high point. The Court said there is no actionable right to privacy under UK law, suggesting legislative reform was needed – although the prospect of that was rather limited even after a number of reviews.57 But breach of confidence was not argued in the case and in Francome a differently constituted Court of Appeal was prepared to find breach of confidence when The Mirror sought to publish its transcripts of unlawfully tapped telephone conversations, and further sought to argue that Gartside v Outram’s iniquity defence provided a blanket authority for a roving attempt to uncover possibly fraudulent conduct. The Court accepted that there might be a public interest defence of even more far-reaching character than the original iniquity defence, but expressed concern at the idea of applying it in aid of the defendant’s self-serving argument.

Moreover, even the mainstream British press was becoming more openly rebellious in the 1970s and 1980s. This was evident in the press’s response to the British Government’s efforts to block publication of the book Spycatcher, the unauthorized memoir of retired British spy Peter Wright which severely criticized the operations of the Secret Service. The book itself was banned from publication in the United Kingdom but was published in the United States and, after litigation, by Heinemann Publishers in Australia where Wright was resident. The British press embarked on a project of serializing extracts. The Government brought action, claiming breach of confidence and arguing that the public interest supported an injunction (largely unsuccessfully as it turns out, given the material was already easily available in Britain from sources overseas by the time most of the serialization had occurred). The Spycatcher case, as it became known,58 was in fact one of a line of government secrecy cases of the period. In these cases, the doctrine was treated somewhat differently from that applicable to private claimants – the onus on the government to show the public interest favoured secrecy rather than on the defendant to show it favoured publication. But there was no suggestion of a sui generis doctrine for the misuse of government secrets, as had been developed for employment secrets, when the Spycatcher case came to the House of Lords. Rather, the opportunity was taken by Lord Goff to give a broader formulation to breach of confidence cover-

57 Including the extremely cautious Home Office United Kingdom, Report of the Committee on Privacy and Related Matters (Chairman David Calcutt QC) (Cmd 1102, 1990).
58 Attorney General v Observer Ltd; Attorney General v Times Newspapers Ltd (No 2); Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109.
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...ing not just government secrets but other kinds of information as well. That formulation would eventually become the new orthodoxy of breach of confidence. Indeed, Lord Goff’s dualistic formulation of a general principle of confidentiality and notice balanced against a general principle of public interest in disclosure to decide which should prevail in a given case has been relied on in English cases at the highest level after the Human Rights Act finally came into force. For it was seen as particularly well suited to the judicial task of bringing into UK law the European Convention, including its actionable right to privacy in Article 8 balanced against its Article 10 right to freedom of speech – although its compass is certainly not limited to confidential information of a private and personal nature.

Some may view Lord Goff’s formulation in *Spycatcher* as broadly sitting within the restitution school, with a focus on preventing and remedies ‘unjust enrichment’ at another’s expense. Lord Goff was after all a co-author with Gareth Jones of the revisionist text *The Law of Restitution*. And Jones was also the author of an influential article published in 1970, which argued that breach of confidence should be viewed as a restitutionary doctrine, of significance as much in the commercial sphere as to the sphere of privacy. Others may find certain parallels with human rights reasoning, being another form of reasoning that refuses to allow a human being to be exploited for the benefit of others, contrary (they may argue) to utilitarianism. But there are still those who argue that limiting the scope for unconscientious advantage-taking may be understood also in utilitarian terms – reflecting a progressive idea that the ability to trust that certain social standards will be met in the treatment of confidential information that is lawfully under individual control stands to benefit individuals as well as their communities. We do not reach a final conclusion on these lines of reasoning and nor do we foreclose alternative

60 See Robert Goff and Gareth Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1st edn, 1966; 7th edn, 2009). Note that these authors do not recognize restitution for wrongs as distinct from restitution for unjust enrichment (a distinction made by Peter Birks and his followers) and nor do they suggest that an ‘unjust enrichment’ doctrine needs to be characterized in a particular way, with certain legal elements to be satisfied.
approaches. However, we point out that, while many scholars and judges in recent years have been loath to look to utilitarian foundations for their reasoning about breach of confidence, especially in the privacy sphere, its policy may yet again be recognized as a utilitarian one of ‘making safe the very groundwork of our existence’, as Mill said long ago.

63 And we note that the authors of *Gurry on Breach of Confidence* especially consider this a rather ‘strained’ analysis, see Aplin, Bently, Malynicz and Johnson above n 1 at [4.08], notwithstanding that the original Gurry endorsed it: Francis Gurry, *Breach of Confidence* (Oxford: Clarendon Press; 1984), Ch 3 at p 60 especially.