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THE IMPORTANCE OF CONFIDENCE

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A. Brief Overview

At its core, the action for breach of confidence enables any person who has an interest in information that is confidential to prevent others who have received, or acquired, the information with notice of its confidential quality from using or disclosing the information. The scope of the action is broad, encompassing a wide range of subject matter, from personal information to commercial ideas or trade secrets, and from the sacred rituals of particular ethnic groups to state secrets.¹ **1.01**

In its classic guise, there are four elements to the action.² First, there must be information which is confidential. Second, the claimant must show the defendant is under an obligation not to use or disclose the information. Third, the claimant must show that the defendant has used or disclosed, or proposes to use or disclose, the information in breach of the obligation. Fourth, it may be open to a defendant to attempt to justify disclosure (most obviously on the basis that it is in the public interest). **1.02**

Although these four elements of the classic action form the core considerations of this book, the various elements of the action are undergoing a process of redefinition. As Keene LJ explained, '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 The most obvious of recent changes is the modification of action, or at least the shift in its 'centre of gravity',⁴ to enable it to protect informational privacy (a process that received a considerable impetus from the coming into force of the Human Rights Act 1998). This has led to the replacement of the requirement of an obligation of confidentiality arising **1.03**

¹ For the role of trade secrets in defining communities, such as magicians, chefs, and so on, see M Madison, 'Open Secrets', University of Pittsburgh Legal Studies Research Paper No 2009-22 (available on the Social Science Research Network (SSRN)).

² The first three were famously elaborated by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47.

³ *Douglas v Hello! Ltd* [2001] QB 967, 1011 [165] (CA).

⁴ *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 (HL), 473 [51] (Lord Hoffmann).

out of, or in relation to, a pre-existing relationship, with the view that the mere understanding that information is confidential or private may justify a court treating a recipient as being under an obligation. In so doing, the focus of the action has shifted away from protecting relationships, and more towards protecting the information itself. The second element of the action has yet to be entirely abandoned, but it has been considerably modified.⁵

- 1.04** This book examines each of the elements of the action, taking account of the shifting requirements. The fundamentals of the action are reviewed in Parts III and IV. Special attention is given, in Part V, to the position of employees, both during and after employment. The position in relation to information disclosed to the state is considered in Part VI. The duration of the action is considered in Part VII. Defences to the action are examined in Part VIII, with the question of remedies considered in Part IX. Finally, the international aspects of the action for breach of confidence are reviewed in Part X.
- 1.05** One recurrent question that arises in relation to a range of legal issues relates to the ‘jurisdictional basis’ of the action. During the 1970s and 1980s legal scholars vigorously debated whether the action was best viewed as based in tort, equity, contract, or property. The jurisdictional conceptualization was thought likely to influence the development of the law in relation to questions such as when third party recipients come to be regarded as under an obligation of confidence, the remedies that are available, limitation periods, and the application of rules of private international law. The first edition of this book proposed that the action be considered ‘*sui generis*’, and while such a characterization has been embraced by the Canadian Supreme Court,⁶ elsewhere the debate over jurisdiction has remained unresolved. We revisit the issue in Chapter 4.
- 1.06** The remainder of this chapter concerns the importance of confidentiality. First, we consider the importance of ‘the action for breach of confidence’ in the protection of trade secrets, informational privacy, and governmental data. We then focus on roles of confidentiality other than as a cause of action, for example, in providing immunities from certain obligations, requirements, or conditions.

B. The Roles of Confidence

- 1.07** At the time of the first edition of this book, the significance of confidentiality lay primarily in its role as the basis of a cause of action—the action for breach of confidence—that could be brought through the courts. Almost certainly, this remains the law of confidentiality’s most important role, and there certainly does not appear to be any shortage of litigation.⁷

⁵ *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 (HL), 464–5 [13]–[14] (Lord Nicholls), 472–3 [46]–[52] (Lord Hoffmann); *Douglas v Hello! Ltd* (sub nom *OBG Ltd v Allan*) [2008] AC 1 (HL), 87 [307] (Lady Hale), 83 [292] (Lord Walker, dissenting); *Imerman v Tchenguiz* [2011] Fam 116 (CA), 150–1 [64]–[69] (Lord Neuberger MR, delivering the judgment of the Court). See paras 7.73–7.102.

⁶ See paras 4.09–4.10.

⁷ For US studies see J Lerner, ‘The Importance of Trade Secrecy’, Harvard Business School Working Paper 95-043 (where Lerner sampled 530 firms and found trade secret disputes to be the most commonplace, representing 43 per cent of the intellectual property (IP) litigation). David S Almeling reports a doubling in reported US federal trade secret litigation between 1988 and 1995, and again between 1995 and 2004. See DS Almeling, D Snyder, M Sapoznikow, W McCollum, and J Weader, ‘A Statistical Analysis of Trade Secret Litigation in Federal Courts’ (2010) 45 *Gonzaga Law Review* 291, 301–2 (federal trade secret litigation is growing exponentially); DS Almeling, D Snyder, M Sapoznikow, W McCollum, and J Weader, ‘A Statistical Analysis of Trade

The primary economic importance of the action lies in the protection it affords to trade secrets, and we consider the economic importance of such secrecy in some detail before going on to review, more briefly, the other roles of confidence.

Economic importance of trade secrets

The action for breach of confidence is the primary legal mechanism for the protection of 'trade secrets'. The importance of the action thus reflects, in part, the changing importance of trade secrecy as a vehicle for the protection of commercially valuable ideas and information. And the evidence suggests that businesses regard 'trade secrets' as important assets and rely on such secrecy as part of their innovation strategies. US law Professor Vincent Chiappetta,⁸ for example, notes the 'dramatically increased importance of trade secret law in the world of commerce' and observes that:

The case reporters burgeon with growing numbers of trade secrets disputes, big and small, involving everything from traditional commercial manufacturing processes, formulas and customer lists, through hockey franchise information to magic tricks. Trade secrets increasingly constitute a central aspect of acquisitions and licensing programs, as well as a key component of business asset portfolios used for capital raising, joint research and development, and obtaining general competitive advantage. Businesses and their legal advisors clearly believe that trade secret law matters.

It used to be imagined that 'trade secrets' and 'breach of confidence' were just a useful supplement to other intellectual property rights such as patents.⁹ However, the primary importance of trade secrecy as a mechanism for protecting innovators is now firmly established in the empirical literature, with respect to the US,¹⁰ Canada,¹¹ the European Union,¹² and the United Kingdom.¹³ According to Anthony Arundel,¹⁴ empirical surveys:

consistently show that manufacturing firms give secrecy a higher average rating [than patents] as an appropriation method for both product and process innovations.

Secret Litigation in State Courts' (2011), 46 *Gonzaga Law Review* 57, 66–7 (state secret litigation is growing, but at a less rapid rate).

⁸ V Chiappetta, 'Myth, Chameleon or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law' (1999) 8 *George Mason Law Review* 69, 71–2 (footnotes omitted).

⁹ W Landes and R Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Belknap Press of Harvard University Press, 2003) (Landes and Posner), 371 ('trade secret law plugs gaps and softens rigidities in patent law').

¹⁰ R Levin, A Klevorick, R Nelson, and S Winter, 'Appropriating the Returns from Industrial Research and Development' [1987] 3 *Brookings Papers on Economic Activity* 783–820 (the 'Yale Survey'); W Cohen, R Nelson, and J Walsh, 'Protecting Their Intellectual Assets: Appropriability Conditions and Why US Manufacturing Firms Patent (or Not)' (2000) NBER Working Paper No 7552.

¹¹ N Amara, R Landry, and N Traoré, 'Managing the Protection of Innovations in Knowledge-Intensive Business Services' (2008) 37 *Research Policy* 1530, 1537, 1542 (a survey of knowledge-intensive business services (so-called KIBS), such as engineering consultancy and computer system design, conducted in Canada, found that 15.7 per cent relied on patents, 41 per cent on copyright compared with 77 per cent on confidentiality agreements, 53.8 per cent on secrecy, and 60.1 per cent on lead time).

¹² A Arundel, 'The Relative Effectiveness of Patents and Secrecy for Appropriation' (2001) 30 *Research Policy* 611.

¹³ See also N Harabi, 'Appropriability of Technical Innovations: An Empirical Analysis' (1995) 24 *Research Policy* 981 (a study of Swiss businesses).

¹⁴ Arundel, 'The Relative Effectiveness of Patents and Secrecy for Appropriation', 612. See also N Erkal, 'On the Interaction Between Patent and Trade Secret Policy' (2004) 37 *Australian Economic Review* 427, 431 ('Studies ... consistently report that manufacturing firms regard secrecy as a more important protection mechanism than patenting').

- 1.10** Based on a survey, conducted in 1994, with research and development (R&D) managers from 1,478 laboratories in the US, Cohen, Nelson, and Walsh identified secrecy as the second most *effective* ‘appropriability mechanism’ that the company had employed in relation to product innovations in the previous three years, the first being ‘lead time’.¹⁵ The same survey found secrecy to be the most effective appropriation mechanism in relation to *process* inventions.¹⁶ These findings as to processes were consistent with an earlier Yale survey conducted in 1983, but by 1994 secrecy was regarded as a better mechanism even for the protection of *product* innovations than patenting.¹⁷ The scholars responsible for the study offered no explanation for the shift,¹⁸ though the research did identify the disclosure of information as one very important reason why innovators refused to use the patent system (and importantly one which had not featured prominently in the Yale Survey conducted a decade earlier).
- 1.11** Arundel draws similar conclusions from data collected in the 1993 (European) Community Innovation Survey (CIS).¹⁹ Taking a subset of 2,849 respondent businesses that reported that they perform R&D on a continuous basis, Arundel analysed replies to the question ‘evaluate the effectiveness of the following methods for maintaining and increasing competitiveness of product [or process] innovations introduced during 1990–1992’. The methods included lead time, secrecy, complexity, patents, and design registration, and the respondents were asked to grade the significance from ‘insignificant’ to ‘crucial’ on a five-point scale. Most gave the highest rating to lead time, but 19.8 per cent rated secrecy as ‘crucial’ for process innovations, while 16.9 per cent rated secrecy ‘crucial’ for products. This surpassed the relevant figures for patents, which were 7.3 per cent (process) and 11.2 per cent (products). Recognizing problems with the approach taken in collating these figures, Arundel took the raw data to examine the relative rating of patents and secrecy by each respondent: 44.3 per cent rated secrecy more important than patents, and only 17.5 per cent thought patents were more important than secrets.
- 1.12** Similar results in the UK are apparent from the Innovation Survey 2007. The UK survey sampled over 28,000 UK enterprises (with a 53 per cent response rate). The survey asked respondents to rank the importance of the different methods that were used to protect product innovation during the three year period from January 1, 2004 through to the end of 2006.²⁰ Confidentiality agreements ranked as the most important, with lead time and ‘secrecy’ second.²¹ In all sectors, 15 per cent ranked confidentiality as highly important, 10 per cent ranked secrecy as highly important while only 7 per cent ranked patents.²²

¹⁵ Cohen et al, ‘Protecting Their Intellectual Assets’. The results found that secrecy ranked first or second in 33 industries.

¹⁶ Ibid.

¹⁷ Levin et al, The Yale Survey.

¹⁸ Cohen et al, ‘Protecting Their Intellectual Assets’, 13 (‘We do not know what is driving the apparent growth in the importance of secrecy as an appropriability mechanism ...’).

¹⁹ The CIS 1993 contains information on this issue from Norway, Germany, Luxembourg, the Netherlands, Belgium, Denmark, and Ireland. See Arundel, ‘The Relative Effectiveness of Patents and Secrecy for Appropriation’.

²⁰ CIS 5 Questionnaire, Q 18 (<<http://www.bis.gov.uk/assets/biscore/corporate/docs/c/cis5-2004-2006-questionnaire.pdf>>). Rather disappointingly, the 2009 Survey does not ask questions about informal mechanisms of protecting innovation.

²¹ UK Innovation Survey 2007, Statistical Analysis at <<http://www.bis.gov.uk/policies/science/science-innovation-analysis/cis>>. The US study did not differentiate between different mechanisms for maintaining secrecy.

²² For the previous survey, relating to 2002–2004, the figures were 11, 9 and 5 per cent respectively.

Sectoral variations can, of course, be identified. It has long been recognized that patenting is a more attractive mechanism in some industries (such as pharmaceuticals) than others (such as aeronautical engineering).²³ In a recent study of trade secret litigation in the United States,²⁴ Lerner found that much of the litigation occurs in areas where patents have not been traditionally available, eg, software, business services, insurance, and so on. This might suggest that patenting and trade secrets are important for different sectors, and perhaps that businesses rely heavily on trade secret protection where patents are unavailable. Such a view is reinforced by the Community Innovation Survey. In the knowledge-intensive industries, 32 per cent ranked confidentiality as highly important, over double the average in all industries; while 19 per cent rated secrecy, only 10 per cent ranked patents as highly important.²⁵

1.13

Another possibility is that patenting is preferred where investment in R&D is higher, or the innovation more valuable. Katrin Hussinger has examined correlations between use of patents as opposed to trade secrecy and success in the market.²⁶ Basing her analysis on the Mannheim Innovation Panel's survey of manufacturing firms that conduct R&D and are product innovators, she found that 56 per cent protect using patents, whereas 61 per cent use secrecy, 41 per cent use both patents and secrecy, and 24 per cent said that they used neither. When this information was correlated with the firms' reports of sales figures of new products (allowing for a whole host of variables), Hussinger found a positive, statistically significant relationship between patenting and sales of new products, whereas no such effect was discernible with secrecy. This may suggest, and is consistent with, the hypothesis that patents are taken out in relation to more valuable inventions, in relation to which they secure monopoly rents. Lerner's litigation study²⁷ identified average damages awards at US\$1.5 million in 2004, one-third the mean level of damages in patent actions in the US. This may imply that courts value the protected innovations differently (though it might equally be a recognition of the weaker impact of trade secrecy law).

1.14

Of course, where patenting and trade secret protection is available, many firms will use both.²⁸ A patentee will keep an invention secret prior to application, and may well keep information not contained in the patent secret. So most patentees will inevitably rely on secrecy some of the time. Having found that patenting of product inventions correlates with sales, Hussinger suggests that the widespread use of secrecy becomes explicable on the basis that this is the form of protection used primarily during the pre-marketing stage, or alternatively as a mechanism for the protection of process inventions.

1.15

²³ C Taylor and ZA Silberston, *The Economic Impact of the Patent System: A Study of the British Experience* (Cambridge: CUP, 1973).

²⁴ J Lerner, 'Using Litigation to Understand Trade Secrets: A Preliminary Exploration' (2006) (available on SSRN), 13.

²⁵ UK Innovation Survey 2007. For the previous survey, the percentages were 25, 16 and 8 respectively. See also a Canadian survey, Amara et al, 'Managing the Protection of Innovations in Knowledge-Intensive Business Services', 1537, 1542.

²⁶ K Hussinger, 'Is Silence Golden? Patents versus Secrecy at the Firm Level', Governance and the Efficiency of Economic Systems (GESY), Discussion Paper No 37 (March 2005).

²⁷ Lerner, 'Using Litigation to Understand Trade Secrets', 13.

²⁸ Arundel, 'The Relative Effectiveness of Patents and Secrecy for Appropriation', 613. K Jorda, 'Patent and Trade Secret Complementariness: An Unsuspected Synergy' (2008) 48 *Washburn Law Journal* 1. Cf J Mazzone and M Moore, 'The Secret Life of Patents' (2008) 48 *Washburn Law Journal* 33.

Private life

- 1.16** In its guise as a cause of action, breach of confidence is not only the primary legal mechanism for the protection of business secrets but, in the last decade, has become the chief device through which English courts have given effect to the international obligation to protect an individual's 'private life'.²⁹ Of course, confidentiality has long been available to assist claimants in preventing some forms of disclosure of private information by those to whom it had been revealed in confidence, but since the turn of the millennium the volume of litigation has increased. A key development was, of course, the *Campbell* case, in which the House of Lords held that the supermodel Naomi Campbell's privacy had been invaded when *The Mirror* revealed that she had been attending Narcotics Anonymous, the article accompanied by details of the treatment she was receiving and pictures of her going to the meetings.³⁰ The extension of the law has not been uncontroversial, as became clear from the widespread public debate over anonymised injunctions and so-called 'super-injunctions' in early 2011.³¹ This controversy, however, was replaced in the middle of 2011 by the revelations of phone-tapping by journalists at *The News of the World*, resulting in the closure of that paper. Quite what the public feels about the legal protection of privacy seems to be in a state of flux.

Governmental secrecy

- 1.17** The action for breach of confidence has also been used frequently by governments to prevent the disclosure of sensitive information, supplementing the criminal law which protects 'official secrets' with valuable civil remedies. Perhaps the highest profile use of confidentiality to protect secrecy was in the *Spycatcher* litigation at the end of the 1980s, when the Government sought to stop dissemination of the former MI5 operative Peter Wright's autobiography.³² However, despite the failure of the attempt to suppress dissemination of the book—the House of Lords holding that its circulation was so widespread that the continuation of any injunction was futile—there has been a steady trickle of such cases.³³ Key advantages of the action for breach of confidence in this area have been the lower standard of proof, the ready availability of interim injunctive relief to prevent disclosure, and the possibility of financial remedies. Indeed, it was the goal of forcing disgorgement of the UK £60,000 profits of his publication *No Other Choice*, that led the Government to pursue George Blake all the way to the House of Lords.³⁴

Confidentiality's other roles

- 1.18** If commercial confidentiality, privacy, and government secrecy constitute the three most significant roles for confidence, it is worth observing from the outset that the idea of confidentiality now features in a range of legal environments, not just as the source of rights. As a consequence, the answer to the question whether someone is under an obligation of confidence or might be liable if he or she used or disclosed information in breach of an obligation,

²⁹ European Convention on Human Rights, Art 8.

³⁰ *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 (HL).

³¹ See Ch 18, esp 18.57 et seq.

³² *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HC, CA and HL); *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248 (HL) (interim decision).

³³ *Ministry of Defence v Griffin* [2008] EWHC 1542 (QB); *Attorney General v Parry* [2002] EWHC 3201 (Ch), [2004] EMLR (13) 223; *Attorney General v Barker* [1990] 3 All ER 257 (CA).

³⁴ *Attorney General v Blake* [2001] 1 AC 268 (HL). See further paras 9.130–9.132, 12.24–12.32, 12.35.

can be relevant to deciding whether a person or institution can avail itself of an immunity from disclosure or a privilege of some sort.

The existence of confidentiality, for example, plays an important role in justifying the non-disclosure of information by State organs (both in Europe and the UK). Thus, for example, when a citizen makes a freedom of information request or attempts to access a government document, the relevant branch of government may not be obliged to reveal the document or provide the information if to do so would involve a breach of confidence. In this context, confidentiality plays a legitimate and important role in protecting third parties' interests, but there is a real danger that it might be used as an excuse by government not to reveal otherwise embarrassing information. This role is reviewed in Chapter 10. **1.19**

Confidentiality also constitutes a basis for a refusal to disclose information in legal proceedings.³⁵ Thus, if a party to litigation seeks to have information disclosed, the other party can resist such disclosure on the basis that revelation would amount to a breach of confidence. That said, here confidentiality gives way readily to the public interest in the proper administration of justice.³⁶ If the information is relevant, the courts will likely order disclosure (subject to express, or implied, undertakings being given by the recipients as to its use). In the litigation context, confidentiality is also justification for modifying procedures: holding hearings *in camera* and giving judgments in redacted form (or even keeping judgments confidential).³⁷ **1.20**

Confidentiality can also justify the imposition of private law constraints that otherwise would be regarded as illegal. More specifically, while certain contracts will be regarded as unenforceable as unreasonable restraints of trade, the holding of confidential data can justify the imposition of distinct obligations on third parties, in particular restrictions on the actions of former employees. These are discussed in detail in Part V of the book, which is concerned with employment relations. **1.21**

In addition, confidentiality can prove important in the operation of systems of registered intellectual property rights, the validity of which falls to be assessed by reference of 'prior art'. If a disclosure occurs in confidence, then the material is not to be regarded as falling within the state of the art.³⁸ This is because, at least as far as English courts are concerned, material is only available to the public if the recipient is 'free in law and equity' to divulge its **1.22**

³⁵ See N Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford: OUP, 2003) Ch 27; H Malek (ed), *Phipson on Evidence* (17th edn, London: Sweet & Maxwell, 2010) Ch 23 (by Charles Hollander QC); R Pattenden, *The Law of Professional–Client Confidentiality* (Oxford: OUP, 2003); B Thanki, *The Law of Privilege* (Oxford: OUP, 2006).

³⁶ See *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405 (HL), 429B–C, 433G–4A (Lord Cross); *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 (HL), 218A–C (Lord Diplock), 230C–E (Lord Hailsham), 237–9 (Lord Simon, reviewing authorities in detail), 242 (Lord Edmund-Davies); *Science Research Council v Nassé* [1980] AC 1028 (HL), 1065E–F (Lord Wilberforce), 1071F (Lord Salmon), 1074F–G (Lord Edmund-Davies), 1080E–G (Lord Fraser), 1087E–F (Lord Scarman); *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183 (CA), 1188A–B (Lord Bingham CJ).

³⁷ Discussed further at paras 2.58–2.65 and 9.146–9.162, 9.172–9.177 below.

³⁸ The principle works to protect the inventor from being found to have disclosed his or her own invention, but also plays a role where the disclosure is by others. See eg *Re Dabrymple's Application* [1957] RPC 449 (PO); *Re Gallay Ltd's Application* [1959] RPC 141 (PAT, Lloyd-Jacob J); T782/92, *Tokai/Dual-Type Damper (Opposition by Freudenberg)* [1996] EPOR 207 (TBA); T1085/92, *Robert Bosch/Electrical Machine (Opposition by Siemens)* [1996] EPOR 381 (TBA).

contents.³⁹ A recipient of information disclosed in confidence is not free in law or equity to use or further disclose that information.⁴⁰

- 1.23** Moreover, if, before the priority date, the invention is disclosed to the public in breach of confidence, such information is excluded from the ‘state of the art’,⁴¹ so long as an application is made for a patent within six months of the disclosure.⁴² Any disclosures that are made outside of this period will not be caught by the exceptions and will thus form part of the state of the art for the purposes of assessing novelty.

C. The Importance of Confidentiality

- 1.24** This brief review suggests that confidentiality is a legal concept which is of serious, and almost certainly increasing, importance. Confidentiality is a critical tool in the regulation of the dissemination of ideas and information, and as such plays a key role in determining the boundary between ‘openness’ and ‘secrecy’. The work of the law of confidentiality thus has an impact upon personal autonomy, economic mobility, political transparency (and thus accountability), open justice, as well as innovation, competition, and economic prosperity. In the latter role, some claim confidentiality is the most important of the intellectual property rights.⁴³

³⁹ *Humpherson v Syer* (1887) 4 RPC 407 (CA), 413 (Bowen LJ); *Re Underfeed Stoker Co Ltd and Robey's Application* (1924) 41 RPC 622, 625 (Sir Henry Slesser S-G); *Bristol-Myers Co's Application* [1969] RPC 146 (Div Ct); *James Industries Ltd's Patent* [1987] RPC 235, 238 (PO, Mr Vivian); *Quantel Ltd v Spaceward Microsystems Ltd* [1990] RPC 83 (HC), 126–7 (Falconer J); *PLG Research Ltd v Ardon International Ltd* [1993] FSR 197 (HC), 226 (Aldous J); *Strix Ltd v Otter Controls Ltd* [1995] RPC 607 (HC), 629 (Ferris J). A similar approach to when material is ‘made available to the public’ is evident at the European Patent Office. Material is not regarded as ‘made available to the public’ where it is disclosed in confidence. See *Case-Law of the Boards of Appeal of the European Patent Office* (6th edn, Munich: EPO, 2010) 77ff, Part IC1, para 1.8.9. It is notable that the EPO rarely, if ever, concerns itself with the question of what is applicable law in relation to the issue of confidentiality. Presumably, it understands confidentiality in contrast to making available, and thus a concept with an autonomous meaning under the European Patent Convention (EPC).

⁴⁰ *Strix Ltd v Otter Controls Ltd* [1995] RPC 607, 633–4. See also *Re Gallay Ltd's Application* [1959] RPC 141 (PAT, Lloyd-Jacob J) (finding that disclosure of design for heat insulating elements from Opponent to Rolls Royce as part of a process of joint development was not a disclosure to the public because, while not expressly stated to be confidential, looking at the ‘nature of the business and the circumstances surrounding the transaction’ the parties ‘must be deemed to have a duty of confidence’); *James Industries Ltd's Patent* [1987] RPC 235, 238–9 (PO, Mr Vivian) (claim by applicant for revocation that a letter and sketches sent by the patentee to it prior to filing for patent anticipated was rejected on basis that the letter was sent as part of an ongoing relationship to develop net-beds, a relationship which must have been conducted on the basis of confidentiality). But cf *Carflow Products (UK) Ltd v Linwood Securities (Birmingham) Ltd* [1996] FSR 424 (HC), 249–30 (Jacob J).

⁴¹ Patents Act 1977, s 2(4)(a)(b). EPC 2000 Art 55(1)(a), EPC 1973 Art 55(1)(a). See also Strasbourg Convention, Art 4(4).

⁴² Patents Act 1977, s 2(4) refers to the period preceding the application date. According to the Enlarged Board of Appeal of the European Patent Office (EBA), under EPC Art 55(1) the ‘relevant date is the date of the actual filing of the European patent application; the date of priority is not to be taken into account in calculating this period’. G3/98 *University Patents/Six-month period* [2001] EPOR 33; [2001] OJ EPO 62 (EBA).

⁴³ R Bone, ‘A New Look at Trade Secret Law: Doctrine in Search of a Justification’ (1998) 86 *California Law Review* 241, 243 (‘Trade secrets are among the most valuable assets firms own today, and many courts and commentators believe that the law of trade secrets is crucial to the protection of intellectual property’). M Risch, ‘Why Do We Have Trade Secrets?’ (2007) 11 *Marquette Intellectual Property Law Review* 1, 3 (‘the most important and most litigated form of intellectual property’).

D. Terminology

The rapid development of the law of confidence over the last few decades has forced us to adopt certain terminological conventions. Although, as we explain in Chapter 2, we think the modern law of confidence only crystallized in the post-war period, and thus is a relatively new legal category, developments since 2000 have led to this being called the 'traditional action' for breach of confidence. We follow that usage, occasionally substituting terms such as 'old-fashioned' or 'conventional'.⁴⁴ The modified version of the action, that gives effect to Article 8 of the ECHR, and which was authoritatively recognized by the House of Lords in *Campbell*,⁴⁵ has been widely referred to as the action for 'misuse of private information'.⁴⁶ Rather than repeating this phrase, however, we occasionally refer to this as the 'extended' or 'new' form of the action. 1.25

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⁴⁴ For examination of the distinction between the two forms, see, esp, paras 7.41–7.44, 7.147–7.159, 16.02–16.04.

⁴⁵ [2004] 2 AC 457.

⁴⁶ *Campbell v MGN Ltd* [2004] 2 AC 457, 465 (Lord Nicholls).