

FOOTNOTES

1. I. Fife and E.A. Machin, *Health & Safety at Work* (1980).
2. Robens Committee, *Safety & Health at Work* (1972).
3. Occupational Health & Safety Bill 1983 (Vic.), introduced October 1983 and withdrawn October 1984.
4. Occupational Health Safety & Welfare Bill 1984 (W.A.).
5. Interim National Occupational Health & Safety Commission, *Report* (1984).
6. South Australian Steering Committee on Occupational Safety, Health & Welfare, *Protection of Workers' Health & Safety* (1984).
7. W. Creighton, W. Ford and R. Mitchell, *Labour Law — Materials & Commentary* (1983).

Breach of Confidence, by FRANCIS GURRY, LL.M.(Melb.), Ph.D.(Cantab), (Clarendon Press, Oxford, 1984), pp.i-xxvii, 1-487, with Table of Cases and Index. Recommended retail price £40. (ISBN 0 19 825378 8).

The action for breach of confidence has recently become of great practical importance. Not surprisingly it has attracted the attention of writers of books¹ and of journal articles.² It has also been investigated by law reform bodies.³ Dr Gurry's work is, however, the first book devoted exclusively to a consideration of the current English law of confidence. It is therefore an important addition to the literature on the subject, especially as Gurry's analysis of the law is exhaustive, stimulating and generally excellent. There are only a few portions of that analysis with which the present reviewer would take issue.

First, it is not correct to say that "(b)efore the Judicature Act of 1873 the common law courts were powerless to grant injunctions for breach of contract" (page 36). The common law courts had possessed the power to issue injunctions since the Common Law Procedure Act of 1854.⁴ Historically this point may be of some substance, for if the common law courts were prepared to issue injunctions in the concurrent jurisdiction on a different basis to courts of equity,⁵ any reluctance to issue injunctions in the auxiliary jurisdiction on the basis that there was not present an express or implied negative covenant⁶ could have been overcome. The point would only be relevant today if it were assumed that: (a) the historical basis of the jurisdiction is important; (b) that basis had not been affected by section 37 of the Supreme Court Act 1981 (Eng.); and (c) different principles obtain in the concurrent jurisdiction. None of these assumptions

can, or should, be made. In any event, as Gurry correctly points out (page 410), an injunction will not readily be refused in a confidence case: it has become the primary remedy for breach of confidence.

Secondly, Gurry sees as one of the inherent differences between damages in equity and damages for breach of a contractual obligation the limitation of contractual damages to compensation for past loss (pages 434, 441). But the point is too widely stated. Whilst the point no doubt reflects the factual situation in most breach of contract cases, there is nothing inherent in the action for breach of contract which prohibits the recovery of prospective loss.⁷ Indeed, except for the possibility of awarding damages under Lord Cairns' Act where there is no completed cause of action at law,⁸ it is now difficult to discern any real difference between equitable and legal damages.

Thirdly, in at least two instances Gurry's arguments are unconvincing and/or inconsistent. The first is his support for the view that "property" is an independent basis for the breach of confidence action, and provides the answer to the problems of the industrial spy or the "gutter press" journalist (page 56). Yet his own discussions of "espionage as confidentiality" (pages 162-8) and of third-party liability in confidence (Chapter XIII) show that equity can deal with these problems without any resort to a "property" basis, which, given the consequences normally flowing from a "proprietary" analysis, would surely lead to difficulties in many areas, a conclusion which Gurry accepts (page 168).⁹ The second instance concerns the "two valuable extensions" which the tort of inducing interference with contractual relations supposedly adds to the breach of confidence action. The first such extension is based on the unavailability of damages for breach of the equitable obligation of confidence, a premise which, at least since *Seager v. Copydex Ltd*,¹⁰ is questionable.¹¹ The second extension is based on the inadequacy of the equitable jurisdiction against third parties where an attempt is made to impose liability on an employer for the actions of an employee. But there is no real indication that the jurisdiction is as limited as Gurry indicates (page 295); indeed, *Printers and Finishers Ltd v. Holloway*¹² suggests that it is not.

Apart from these trivial quibbles with Gurry's analysis, three broad criticisms can be made of the style of the book. First, although the treatment of the law is exhaustive, it is also, in places, repetitious. Consider, for example, the repetition on page 244 of the facts of *Sunderland v. Barclays Bank Ltd*¹³ which had already been given on page 147. It is perhaps this more than

anything else which results in the work's reading like a thesis rather than a legal text. Secondly, perhaps greater consideration could have been given to secondary sources. The importance of secondary sources is often underestimated in legal texts, yet when they are used wisely they can produce, for example, a *Fleming*.¹⁴ Thirdly, it is difficult to understand why a book devoted to English law should be content with the unauthorized citation of many of the leading cases, e.g., *American Cyanamid Co. v. Ethicon Ltd.*¹⁵

Whilst on the subject of style it should be mentioned that the book has been well printed and bound in the tradition of the Clarendon Press. It is a joy to read footnotes in their proper place, that is, at the bottom of the page, rather than in the text or at the end of a chapter. Presumably this elegance is reflected in the horrific price of the book. The book has few typing errors.¹⁶

There are a number of reasons why this book deserves a place on the shelf of all Australian lawyers, and not just those who have an immediate concern with the law of confidence. This is said even though the book is an analysis of English law and there is little discussion of Australian authorities.

In the first place, Gurry addresses himself at various parts of the book to what, as Dr Finn has recently pointed out,¹⁷ is the fundamental but little discussed question why the law protects confidences.

Lord Denning's answer that it is the public interest which requires that information received in confidence should not be used for other purposes required the immediate qualification that the public interest can well dictate the very opposite result,¹⁸ for "(t)here is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer".¹⁹ The resolution of the tension between these two "public interests" must vary with the type of confidence involved, and it must be remembered that the information which may be the subject of an action for breach of confidence extends over such diverse areas as commercial and technical secrets, personal confidences, artistic and literary confidences and communications in a governmental context.²⁰ Gurry's discussion of the reasons for the enforcement of each of these confidences will be of interest to lawyers concerned with all those areas of the law, such as privacy and defamation, in which there are tensions between "information flow" in the broadest sense and the particular interest involved.

Secondly, the action for breach of confidence demonstrates the declining importance of arguments founded on jurisdictional considerations in the formulation of rules and principles of law. Gurry's conclusion in Chapter III that the action is now *sui generis* is surely inescapable. The importance of determining the jurisdictional basis relates, as Gurry points out (page 27), to the determination of the available remedies. Yet if the action is *sui generis* the only question in relation to the relief in any particular case is which remedy is the most appropriate. Normally, an injunction will be appropriate (page 410). But in the realm of pecuniary relief the most appropriate remedy in the case at hand may well be either damages or an account of profits. Yet if the action for breach of confidence is equitable, jurisdictional arguments would deny damages (except in the Lord Cairns' Act jurisdiction). *Seager v. Copydex Ltd*²¹ makes it plain that jurisdictional arguments will not be allowed to achieve this result. Yet Gurry regards the decision in *Seager v. Copydex Ltd*²² as an "awkward one" (page 420). He prefers to regard it (page 435), as does Slade J. in *English v. Dedham Vale Properties Pty Ltd*²³ — a case to which Gurry does not refer — as a case in the Lord Cairns' Act jurisdiction. Yet *Seager v. Copydex Ltd*²⁴ was clearly not a Lord Cairns' Act case,²⁵ and it is difficult to see why Gurry should be at pains to regard it as such once he has decided that the action for breach of confidence is *sui generis*. It is true that he thereby avoids a "fusion fallacy".²⁶ But, *pace* Meagher, Gummow and Lehane,²⁷ the vile waters of the common law and the pure waters of equity have long since filtered into one another,²⁸ and to explain *Seager v. Copydex Ltd*²⁹ as a Lord Cairns' Act case creates the unnecessary limitation on relief by way of damages that the Lord Cairns' Act jurisdiction must be attracted in the first place.

This book, then, is highly recommended.

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FOOTNOTES

1. See R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984) Ch. 41; P.D. Finn, *Fiduciary Obligations* (1977) Ch. 19; S. Ricketson, *The Law of Intellectual Property* (1984) Pt V; R. Goff and G. Jones, *The Law of Restitution* (2nd ed. 1978) Ch. 35.

2. Especially G. Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 *Law Q. Rev.* 463; P.D. Finn, "Confidentiality and the 'Public Interest' " (1984) 58 *A.L.J.* 497.
3. A.L.R.C. 22, *Privacy* (1983) 1, paras 827-862; Law Commission, England, Report No. 110, *Breach of Confidence* Cmnd 8388 (1981).
4. 17 & 18 Vict. c.125 (Eng.).
5. See *Astor Electronics Pty Ltd v. Japan Electron Optics Laboratory Co. Ltd* [1966] 2 N.S.W.R. 419, 424-5.
6. Consider *Robb v. Green* [1895] 2 Q.B. 315. And see *Doherty v. Allman* (1878) 3 App. Cas. 719, 720 *per* Lord Cairns L.C.
7. See H. McGregor, *McGregor on Damages* (14th ed. 1980) para. 293.
8. See G.H. Treitel, *The Law of Contract* (6th ed. 1983) 783.
9. A property analysis would also add nothing in the remedies area: Gurry, p.364 note 5.
10. [1967] 1 W.L.R. 923.
11. *Infra*.
12. [1965] 1 W.L.R. 1.
13. (1938) 5 *Legal Decisions Affecting Bankers* 163.
14. J.G. Fleming, *The Law of Torts* (6th ed. 1983).
15. [1975] A.C. 396.
16. P.15 line 27, omission of 'of' after 'Organization'; p.114, omission of quotation marks before footnote 17; p.124 line 2, 'drawn' for 'draw'; p.155 line 28, 'information'; p.157 line 22, 'be' for 'he'; p.170 line .3, 'to'; p.210, lines 24-5 'employer'; p.213, full stop before footnote 85; p.242 line 24, 'is' for 'in'; p.338 line 19, 'misled'; p.357 line 30, 'it' for 'if'; p.397 line 23, 'statement'; p.431 line 22, 'the' for 'this'; p.441 line 31, 'contemplated'; p.446 note 9 line 3, omission of 'be'.
17. Note 2 *supra*.
18. *Norwich Pharmacal Co. v. Customs and Excise Comrs* [1974] A.C. 133, 140.
19. *Lion Laboratories Ltd v. Evans* [1984] 2 All E.R. 417.
20. Gurry, Ch. 5.
21. Note 10 *supra*.
22. *Ibid*.
23. [1978] 1 W.L.R. 93, 111.
24. Note 10 *supra*.
25. Accord: Finn, note 1 *supra*, 163 note 43.
26. See Meagher, Gummow and Lehane, note 1 *supra*, paras 220-222.
27. *Id.*, *passim* and especially Ch. 2.
28. See especially *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] A.C. 904, 924 *per* Lord Diplock. *Cf.* Meagher, Gummow and Lehane, note 1 *supra*, xi.
29. Note 10 *supra*.

The Law of Fiduciaries, by J.C. SHEPHERD, LL.B.(Osgood) LL.M.(Toronto), Barrister at Law (Ontario), (Carswell, Toronto, 1981), pp.i-xxix, 1-386, with Table of Cases and Index. Recommended retail price \$51. (ISBN 0 459 34300 9).