

Confidential Information

INTRODUCTION	1
1. HISTORY OF AND BASIS FOR THE CAUSE OF ACTION OF BREACH OF CONFIDENCE	3
Introduction	3
From <i>Prince Albert</i> to <i>Saltman</i>	4
Statements of the underlying principles since <i>Saltman</i>	6
2. THE ESSENTIAL ELEMENTS OF THE CAUSE OF ACTION	9
Introduction	9
Stage One: The information must be confidential	11
<i>General</i>	11
<i>The exercise of skill and labour</i>	13
<i>Trade secrets</i>	14
<i>Trade secrets and confidential information in the context of departing employees</i>	16
<i>Trivial or useless information</i>	17
<i>To be protected, the information must be capable of particularisation</i>	17
<i>Prior publication</i>	19
<i>The springboard doctrine</i>	20
<i>No requirement of "objectivity" in the case of contract?</i>	23
<i>Intention to publish</i>	26
<i>Practical points to consider under Stage One</i>	26
Stage Two: The information must have been communicated in circumstances importing an obligation of confidence	28
<i>Introduction</i>	28
<i>The test is objective</i>	28
<i>Established categories of confidential relationships</i>	30
<i>Categories</i>	30
<i>Employer/employee relationship</i>	31
Stage Three: There must be threatened or actual unauthorised use of the information	40
<i>Introduction</i>	40
<i>Unintentional or "subconscious" use</i>	41
<i>Inferring misuse of confidential information from similarity of products</i>	42
<i>Negligent disclosure or use of confidential information</i>	43
<i>Factors justifying disclosure</i>	43
<i>Detriment</i>	44
<i>Detriment and Government information</i>	46
<i>Practical points to consider under Stage Three</i>	46
Stage Four: Defences	47
<i>Public interest</i>	47
<i>Other defences</i>	49

Confidential information on the internet	49
<i>Introduction</i>	49
<i>Publication of confidential information on the net - loss of "quality of confidence"</i>	49
<i>The position of the ISP - Elton John v Countess Joulebine</i>	50
3. REMEDIES	53
Interim orders	53
<i>Interim injunction</i>	53
<i>Anton Piller orders</i>	56
Permanent orders	57
<i>Permanent injunction</i>	58
<i>Account of profits</i>	58
<i>Damages</i>	58
<i>Other orders</i>	61
4. THE TORT OF BREACH OF PRIVACY	63
Does it exist?	63
What are its elements?	65
<i>Public interest</i>	65
<i>Identification of plaintiff</i>	65
<i>Offensive or objectionable information</i>	65
Remedies	66
Relationship between breach of confidence and the tort of privacy	67
Further references	68
5. STATUTORY REGIMES AND CONFIDENTIAL INFORMATION	69
Introduction	69
Official information	69
Personal information	71
Statutory immunities from disclosure	71
Other statutory immunities	76
<i>Introduction</i>	76
<i>Children, Young Persons, and Their Families Act</i>	77
<i>Protected Disclosures Act</i>	77
<i>Financial Transactions Reporting Act</i>	78
6. CONFIDENTIALITY IN LITIGATION AND ARBITRATION PROCEEDINGS	81
Introduction	81
Protection of confidential information during the discovery process	81
<i>General principles</i>	82
<i>The first step: Practical methods of protecting confidential information</i>	83
<i>The second step: What will the court consider in determining what protection is available?</i>	85
<i>The third step: The method of protection a court may order</i>	86
Protection of confidential information in the context of further and better particulars and interrogatories	87

<i>General principles</i>	87
<i>Confidential information and further particulars</i>	88
<i>Confidential information and interrogatories</i>	89
Circumstances when proceedings may be held in private (" <i>in camera</i> ")	89
Limits on publication of court proceedings	91
<i>Examples of limitations on publication</i>	91
Protection of the court file	93
<i>General principles</i>	93
<i>Documents open to the general public</i>	93
<i>Documents which may only be inspected by the parties</i>	93
<i>Documents which may be inspected pursuant to an application to the Registrar of the Court</i>	94
<i>Restricted proceedings</i>	95
<i>Procedure for inspecting documents</i>	95
<i>Conclusion</i>	95
Confidentiality in arbitration proceedings	95
7. CONFIDENTIALITY AGREEMENTS	99
Introduction	99
Drafting tips	100
APPENDIX 1: PRINCE ALBERT V STRANGE	107
APPENDIX 2: BROADCASTING STANDARDS AUTHORITY PRIVACY PRINCIPLES	117
APPENDIX 3: SUMMARY OF PRIVACY ACT 1993	119
Background	119
Purpose and nature of the Privacy Act	119
Information privacy principles	120
Complaints	121
Public registers	121
Information matching	122
How well is the Act working?	122
APPENDIX 4: EXTRACTS FROM WIPO ARBITRATION RULES	125
INDEX OF CASES	127