Reflections on the Concept of "Property" with Particular Reference to Breach of Confidence

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I: INTRODUCTION

The boundaries of "property" have never been well defined. In recent years particularly, they have been stretched and blurred to accommodate new subject matter. These "extended concepts of property"[1] recognise a need but address it in terms of the old property concept. In fact, what constitutes "property" is unclear and impossible to define because it differs from context to context, and is influenced by policy considerations. The distinction between property and obligations, which has long been fundamental to our law, is now being questioned.

Information as property is a controversial topic. Confidential information is often referred to in proprietary terms, but is it property, and on what basis are proprietary remedies awarded in actions for its misuse? The action for breach of confidence, with its uncertain jurisdictional basis, provides a useful context in which to consider what is meant by property and when property rights should be recognised.

The purpose of this paper is to consider the concept of property and the distinction between property and obligations, in the context of the action for breach of confidence, and with particular regard to the proprietary nature or otherwise of confidential information, and the growing tendency of the courts to award an appropriate remedy from the "full range"[2] available. It will therefore first

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1 As referred to by Hammond in *Personal Property Commentary and Materials* (1990) 82.

2 As referred to by Cooke P (as he then was) in *Aquaculture Corporation v NZ Green Mussel Co Ltd*

be necessary briefly to outline the meaning and significance of property rights, and to consider contrasting approaches to defining property. Next, the action for breach of confidence will be examined, with particular reference to the flexibility which the courts have exercised in this context. Finally, it will be considered whether it is appropriate to treat confidential information as "property", and an alternative conceptual structure will be suggested for the action. This approach recognises a property interest as arising from the right to a remedy which flows from any breach of an obligation of confidence, and is based largely on propositions put forward by Samuel[3] questioning the usefulness and indeed the reality of the historical distinction between the law of property and the law of obligations.

This structure has application in many parts of the law where property and obligations are concerned and at times collide, and because of its flexibility is useful as a predictive tool. It is particularly applicable to cases involving a conflict between interests which are in fact, or arguably, proprietary and non-proprietary. In the area of confidential information specifically, it leaves room for the wide variety of remedies – including proprietary ones – which have in fact been awarded in the cases, without categorising confidential information as property. It allows for remedial flexibility and further development of the action in the future, and accords with other recent developments in the law and with the award of appropriate remedies. This approach will therefore be of more value in analysing this area of the law and guiding its future development than any approach which attempts rigidly to classify confidential information, or indeed any other subject matter, as property.

II: DEFINING PROPERTY

> [T]he essential nature of "property" has beguiled thinkers for many centuries.[4]

It is as well initially to clarify what is meant in this article by "property". Although objects described in everyday English as "property" may be the object of "property" rights in the legal sense, the respective uses of the word are entirely different. As Bentham has pointed out:[5]

> [I]n common speech in the phrase "the object of a man's property", the words "the object of" are commonly left out; and by an ellipsis, which ... is now become more familiar than the phrase at length, they have made that part of it which consists of the words "a man's property" perform the office of the whole.

[1990] 3 NZLR 299, 301.

3 Samuel, "Property Notions in the Law of Obligations" [1994] 53 CLJ 524.

4 Gray, "Property in Thin Air" [1991] 50 CLJ 252, 292.

5 Ibid.

The Property Law Act 1952 defines "property" very broadly and in such a way as to cover both these concepts:[6]

> "Property" includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest.

This definition is of particular interest for its width and for the fact that it encompasses "rights", and will be referred to later.[7] In this article then, what is meant by "property" is subject matter which is or may be the object of property rights in law or in equity.

In this section I will first consider property as a legal institution, and discuss the nature and significance of property rights. I will then briefly outline the traditional approach to defining property, as expressed by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*.[8] Alternative approaches put forward by Gray[9] and Samuel will then be considered and compared, and the similarities between them noted.

1. Property as a Legal Institution

In the early nineteenth century Bentham expressed the utilitarian recognition:[10]

> [T]hat there is no such thing as natural property, that it is entirely the work of law. Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it .... Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.

In other words, property as a legal concept is a creation of the law.

(a) The Nature of Property Rights

As a legal concept, property has often been considered as comprising a number of rights including rights to possess, to use, to the income from a resource, and to leave by will. In his well known "Dialogue on Private Property" Cohen concludes that private property is:[11]

> [A] relationship among human beings such that the so-called owner can exclude others from

6 Property Law Act 1952, s 2.
7 See text infra, at Part V, para 5(a).
8 [1965] AC 1175, 1247-1248.
9 Supra at note 4.
10 Bentham, *Principles of the Civil Code* (1830) ch VIII.
11 Cohen, "Dialogue on Private Property" (1954) 9 Rutgers L Rev 357.

> certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision.

Gray describes property as "a legally endorsed concentration of power over things and resources" rather than "itself a thing or resource",[12] and Waldron has said: "The concept of property is the concept of rules governing access to and control of material resources".[13] Although the last of these definitions refers to the law only by implication (for someone must make and enforce the rules) it can be seen that they all include the element of legally enforceable power.

Gray goes on to suggest that "if 'property' is not a thing but a power-relationship, the range of resources in which 'property' can be claimed is significantly larger than is usually conceded by orthodox legal doctrine".[14] Indeed, Samuel takes the next logical step by questioning the property/obligations distinction itself and asking: "If obligations are things why is it that they cannot be owned?"[15] Going one step further, he then suggests that "[all] legal entitlements ... are forms of property including the entitlements ... themselves".[16]

I suggest that it is conceptually only a series of short steps from seeing property as a bundle of legally enforceable rights in an object, to classifying certain obligations (for instance, debts) as property, and thence to regarding all legal and equitable obligations as property. Boundaries between different areas of the law are becoming less sharp, reflecting perhaps a greater willingness by the courts to come to results through policy choices rather than rigidly to adhere to existing categories. Such a change in approach to the matter of property would be consistent with other current developments, and would have beneficial consequences as will be illustrated in the context of confidential information.

(b) The Significance of Property Rights

> We have made property so central to our society that anything and any rights that are not property are very apt to take second place.[17]

There are two main reasons why it is important to be able to determine whether a party has property in a given object. First, the granting of a proprietary rather than a personal remedy may depend on the establishment of a proprietary interest, and of course is critical in insolvencies. The obvious example is the retention of title clause, which effectively grants an unregistered security and hence priority in

12 Supra at note 4, at 299.

13 Waldron, *The Right to Private Property* (1990) 35.

14 Supra at note 4, at 299.

15 Supra at note 3, at 528.

16 Ibid, 528-529.

17 Macpherson, "Human Rights as Property Rights" (1977) 24 Dissent 72, 77, cited in Gray, "Equitable Property" Current Legal Problems (1994) 47 (II) 157, 210.

an insolvency to suppliers who would otherwise be mere unsecured creditors.[18] Second, whether or not an object is classed as property will have a major effect on who and what is caught by certain statutes, such as the Matrimonial Property Act 1976.

A further, more elusive, aspect of the label "property" is the connotations which it may invoke. Edgeworth has pointed out that "property" has two meanings — a *denotative* meaning, which includes the characteristics generally accepted as denoting what property is (such as exclusiveness and commodifiability) and a *connotative* meaning, which communicates the evaluative, ideological, and political messages that come with the denotative meaning. However, according to Edgeworth:[19]

> [T]hese two aspects are not connected by a natural bond, but like all meanings, are negotiated, influenced and modified by debate, struggle and power. Yet this modern concept of property with its connotative meaning that embraces the values of an exclusivist, productivist, individualist and capitalist culture, is nonetheless portrayed as a timeless, Platonic form, above and beyond the grubby terrains of politics and economics. This belief lies at the heart of our legal culture.

Waldron also addresses this point, noting that where parallels are drawn between exclusive rights in, for example, one's reputation, and the idea of owning a material object:[20]

> Such talk may take on a life of its own so that it becomes difficult to discuss the law of defamation except by using this analogy with property.

Property and property rights, therefore, as well as having important implications in terms of remedies and statutory definitions, also carry with them certain powerful connotations which can at least strengthen an argument, and at best ensure the success of a plaintiff.[21]

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18 See, for example, *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

19 Edgeworth, "Post-Property?: A Postmodern Conception of Private Property" (1988) 11 UNSWLJ 87, 89.

20 Supra at note 13, at 34.

21 See, for example, *Boardman v Phipps* [1967] 2 AC 46, 107 where Lord Hodson agreed with the trial judge and the Court of Appeal's opinion that "the confidential information acquired in this case which was capable of being and was turned to account can be properly regarded as the property of the trust". Lord Upjohn in his well known dissent, however, said at 127-128 "[information] is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship".

III: CRITIQUING THE DEFINITIONS OF PROPERTY

Because of the importance of being able to establish proprietary interests and classify objects as property, many attempts have been made to define "property". I will briefly outline the traditional approach to defining property, the "excludability" approach suggested by Gray,[22] and the approach put forward by Samuel which questions the property/obligations distinction and suggests that all legal entitlements may be forms of property.

1. The Traditional Approach

In *National Provincial Bank Ltd v Ainsworth*[23] Lord Wilberforce said that before a right or interest can be admitted into the category of property, it must be definable, identifiable by third parties, have some degree of permanence or stability, and be capable in its nature of assumption by third parties. This represents a traditional definition of property, but it is neither exhaustive nor easy to apply. For instance, many physical objects are definable, identifiable and permanent but are not, and sometimes could never be, the object of property rights. Sand on the beach and wild animals for example meet the criteria but cannot be called property unless they have been "appropriated". Particular human beings and ideas may meet the criteria but have never been considered appropriate objects for property rights.

Little need be said concerning the criterion of assignability, which is often mentioned in the context of traditional definitions of property. As has frequently been pointed out, this criterion is circular in nature[24] since the answer to the question, "What is assignable?", is generally "property". A similar criticism was expressed in the High Court of Australia in *Cummings v Claremont.*[25] In fact, attempts to define property with reference to the attributes of its objects will necessarily be unsuccessful. They will fail either to include all the varied subject matter which is generally accepted to be property, or to exclude that generally accepted not to be, or, in using criteria involving recognition by the law, will achieve only circularity. In this respect they will be of no value in providing guidance as to whether new or difficult subject matter should be the object of property rights.

2. Gray's "Excludability" Approach

Using as an illustration the well known Australian case *Victoria Park Racing*[26]

22 Supra at note 4.

23 [1965] AC 1175, 1247-1248.

24 See for example Gray, supra at note 17, at 160.

25 (1996) 137 ALR 1, 12 per Dawson and Toohey JJ.

26 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

Gray argues that because "property" resides in control over benefits, the criterion of "excludability" leads to a better identification of property than does the traditional approach, which he describes as tending "to link property status incestuously with proprietary consequence".[27] However, Gray's approach lacks internal consistency and is equally incestuous, particularly in the area of legal excludability. What follows then is a critical discussion of that approach, which involves considering whether given subject matter, potentially to be classed as property, is physically, legally, or morally non-excludable.

(a) Physical Non-Excludability

According to Gray: "No one can claim 'property' in a resource in relation to which it is physically unrealistic to control, consistently over prolonged periods, the access of strangers".[28] The beam of light thrown out by a lighthouse is cited as an example of such a physically non-excludable resource.

Many resources which are not physically excludable in any practical sense are, however, accepted without question to be property. For example, it is physically unrealistic to exclude strangers from large empty tracts of land but they are property nonetheless. In addition, under Gray's approach the resource must be excludable in its existing form, so the fact that strangers could theoretically be excluded by erecting a fence would be irrelevant, since this would alter the nature of the land (as the erection of a dome over Victoria Park would have done).

Likewise, the hypothetical car parked in a neighbourhood with a high incidence of car theft[29] is, according to Gray, still "property", although it would not be if the taking away of cars was a virtual inevitability. Yet the incidence of theft in my neighbourhood has no effect on whether my car is "property" and an unlocked car with the keys in the ignition is just as much "property" as one equipped with security measures. Indeed, given that even a locked, guarded, and booby-trapped car (or anything else) may still be taken by a determined enough stranger, it becomes clear that almost nothing is truly physically excludable.

To consider physical excludability as a criterion for property rights is also to forget that the law has in the past created property rights in physically non-excludable resources, such as new inventions (patents) and literary works (copyright). This was done for policy reasons to encourage the creativity of inventors and authors by allowing them to reap a reward for their skill and labour and to prevent others from reaping where they had not sown. Would anyone argue that such property rights should not have been created because, there being no excludability, there could be no property?

It must be recognised then that for a resource to be physically excludable in a meaningful way one must be able to enlist the assistance of the law to make it so.

27 Supra at note 4, at 301.

28 Ibid, 270.

29 Ibid, 270 n 11.

Indeed, as mentioned above, Gray himself calls property "a legally endorsed concentration of power".[30] Even so, the law cannot exclude but can only give a remedy if my exclusive zone is breached. Either way, physical excludability essentially amounts, in practice, to legal excludability, to which I now turn.

(b) Legal Non-Excludability

Gray suggests that where a plaintiff fails to use available legal means "to regulate the access of strangers to the benefits of a resource, then the resource must be deemed non-excludable in relation to those strangers who actually succeed in gaining access".[31] It can be seen at the outset that this approach is inconsistent with Gray's approach to physical excludability, which would not penalise those who fail to erect physical barriers to access.

It is clear that a resource which can be propertised (such as a patentable invention) but is not, will be legally non-excludable in the absence of circumstances giving rise to other forms of legal protection. But even accepting for the moment that it is possible to avoid this argument becoming circular, I suggest that Gray's proposition is without authority and indeed could lead to great injustices. Why should failure to take advantage of one form of potential legal protection lead to refusal by the courts to enforce another form, proprietary or not, if it is available?

According to Gray, contract provides a means of propertising a resource, but the benefit of a contract remains a mere personal obligation and renders the resource itself (the subject of the contract) no more propertised than before. And in the context of *Victoria Park Racing*, Gray's suggestion that the plaintiff could have "conferred upon itself a 'property' in [the spectacle] by contractual means"[32] is incorrect; contracts with every patron who had paid to enter the racecourse would have helped the plaintiff not at all against the defendant, who had neither paid nor entered. It is also difficult to see how an effort by the plaintiff to "propertise" the spectacle by way of contracts with others would in itself have convinced the Court that the plaintiff should have a remedy against a defendant with whom it had no contract and who would otherwise have done no wrong.

Rather, with a few notable exceptions such as *Victoria Park Racing*, the courts seem to strain to find a category of wrong when defendants have reaped where they have not sown, and will stretch existing categories if necessary.[33] In the confidential information context, commercially valuable information or ideas are often divulged in confidence without the benefit of a contract. Indeed, the information has not always been specifically flagged as confidential. However,

30 Ibid, 299.

31 Ibid, 273-274.

32 Ibid, 275.

33 See, for example, the passing off cases where the traditional requirement of a common field of activity was abandoned, in effect extending protection to personality rights. Examples include

this has not been a bar to relief for breach of confidence, and is not referred to by the courts as weighing against such plaintiffs.[34]

In the intellectual property field Gray seems to suggest that a plaintiff's failure to take advantage of intellectual property protection may lead a court to deny it protection against unfair competition.[35] The case he cites in support of this proposition is *Kellogg Co v National Biscuit Co*[36] which concerned the manufacture and sale by the defendant, Kelloggs, of shredded wheat biscuits in the same form as those made by the plaintiff, National Biscuit Co, and under the same name, "Shredded Wheat". Gray states, "in the absence of any recourse by the plaintiff to intellectual property protection, the Supreme Court refused to condemn the defendant as having engaged in unfair competition".[37]

But there was no formal intellectual property protection because the patent on the product had expired, and trade mark registration had been refused because the name "shredded wheat" was generic. The respective products were sold in readily distinguishable cartons, Kellogg had taken every reasonable precaution to prevent confusion, and there was in fact no evidence of passing off or deception. This then was the true basis of the decision; the competition was not unfair. The National Biscuit Co's lack of patent or trade mark protection did not weigh against it on the ultimate issue because it was irrelevant.

Circumstances of this kind are common enough. Cases in passing off and more recently under s 9 of the Fair Trading Act 1986 frequently involve the misuse of words and devices unprotected by trade mark registration. Yet this has no effect on the success of plaintiffs under these other causes of action.[38]

Goodwill was an issue in another case referred to by Gray, *Hospital Products Ltd v United States Surgical Corporation.*[39] One of the defendants, Blackman, distributed in Australia the surgical products of the plaintiff, USSC. He used his position to reverse engineer USSC's products and set up his own manufacturing operation, ultimately terminating the distributorship before beginning to fill new and held over orders of existing customers with his own products. Unlike the judge at first instance and the New South Wales Court of Appeal, the majority of the High Court of Australia refused to recognise any fiduciary relationship and USSC was therefore limited to an award of damages for breach of contract.

Henderson v Radio Corporation [1969] RPC 218 and *Hogan v Pacific Dunlop Ltd* (1989) 87 ALR 14.

34 See, for example, *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] NZLR 595; *Talbot v General Television* [1981] RPC 1; *Aquaculture Corporation v NZ Green Mussel Co Ltd* (1986) 1 NZBLC 102,567.

35 Supra at note 4, at 276.

36 305 US 111 (1938); 83 L ed 73.

37 Supra at note 4, at 276.

38 See for example *Customglass Boats v Salthouse Brothers* [1976] 1 NZLR 36; *Shotover Gorge Jet Boats v Marine Enterprises* [1984] 2 NZLR 154; *Taylor Bros Ltd v Taylors Textile Services* (1988) 2 NZBLC 102,839; and the *Champagne* case, *Wineworths Group Ltd v Comite Interprofessionel du Vin de Champagne* [1992] 2 NZLR 327.

39 (1984) 156 CLR 41.

According to Gray, the majority's "uncompromising refusal to propertise the resource of product goodwill"[40] may have been due to USSC's failure to patent its products or register its trade mark in Australia, and most importantly to protect its interests by means of a formal, detailed, written agreement with Blackman. But none of this would have helped USSC achieve the proprietary remedy it sought. Chief Justice Gibbs commented that "the equitable doctrines sought to be invoked have no application to the present circumstances."[41] Justice Deane remarked that the apparent inadequacy of relief resulted at least in part from the manner in which USSC had framed its claims "rather than any inability of the law to provide adequate remedies".[42]

These remarks suggest that the refusal to recognise a fiduciary relationship and hence to grant proprietary relief resulted from nothing other than the circumstances of the case, which were indistinguishable from any manufacturer/ distributor relationship.

I suggest then that there is nothing in any of these cases to support Gray's assertion that failure to take advantage of available legal protection will result in refusal by the courts to "propertise" a given resource. If a cause of action is proved, the courts will grant a remedy, despite failure by the plaintiff to set up additional legal rights for itself ahead of time.

Further, while Gray suggests that the legal excludability criterion can be saved from the circularity of the traditional approach by focusing on whether a particular claimant is asserting "property" in the resource,[43] Gray himself focuses on what the courts protect. Claimants' assertions are not decisive of a resource's property status, even given physical, legal and/or moral excludability. What is decisive is whether a claim is recognised by the law as an appropriate vehicle for property rights, and if it is, a proprietary remedy will be available, thus making the resource legally excludable.

Hence, the real focus must be on the nature of the claim, and particularly on whether the law recognises property rights in the given circumstances. Thus the focus of legal excludability arrives back at that which the law protects, and Gray's argument becomes circular.

(c) Moral Non-Excludability

Gray suggests that some resources may be "morally non-excludable" (that is, their propertisation would be antisocial) and that these resources must therefore be left available for all to use. Examples such as information,[44] words,[45] and very

40 Supra at note 4, at 278.
41 Supra at note 39, at 73-74.
42 Ibid, 125.
43 Supra at note 4, at 274 n 20.
44 *Victoria Park Racing* supra at note 26.
45 *Davis v Commonwealth of Australia* (1988) 166 CLR 79.

large tracts of land[46] are cited. Information and words are, of course, protected from unauthorised use in certain circumstances – information, for example, when the elements necessary for an action for breach of confidence are present, and words when they are associated with the goodwill of a particular business, or have been truly propertised by means of trade mark registration. In the trade mark registration context it is, however, important to note that even registration does not grant a monopoly on the use of a word and hence impose limits on freedom of speech. Rather, the statutory monopoly allows the registered owner only to prevent others from using the trade mark, or a similar trade mark, in the course of trade, on the goods or services covered by the registration, or on similar goods or services.[47]

This then is another instance of the propertisation of an object depending not on its intrinsic nature but on the circumstances, and of course on an earlier decision by Parliament to pass legislation allowing such propertisation. More fundamentally, this illustrates that Gray's moral excludability criterion is in fact subsumed in that of legal excludability. It is the legislature and the courts, in enacting and interpreting statutes or in developing the common law, which determine the broad categories of resources which may be propertised, and the circumstances which will lead to their propertisation in any particular case. That moral considerations, such as the protection of fundamental human freedoms and the common good, weigh heavily against propertisation, does not make moral excludability the determining factor. Rather it is the choices of the legislature and the courts, sometimes of one good over another, that dictate the boundaries of property. Hence, in attempting to define those boundaries one must look once again to legal excludability as the defining characteristic of property.

(d) Conclusion

All three of Gray's categories appear to collapse into legal excludability. Therefore, like the traditional approach, the excludability approach to defining property is valid in a descriptive sense but of limited use as a normative or predictive tool. What is needed is an approach which allows consideration of the fact of individual cases and the development of new structures and principles in response to new needs. The approach suggested by Samuel, to which I now turn, allows for that greater flexibility.

3. Samuel's Approach

Geoffrey Samuel has recently questioned the distinction between property and obligations, concluding that the law of property has moved on from its institutional

46 *Gerhardy v Brown* (1985) 159 CLR 70.

47 Trade Marks Act 1953, s 8; Trade Marks Amendment Act 1994, s 3.

roots in tangible people and tangible things and become its own reality, and that:[48]

> [Only] the Gaian model of persons, things and actions will survive since it is a model that can react to (if not construct) the facts of litigation.

Samuel begins by asking whether there is in fact a fundamental difference between, for example, a debt claim and a claim for the return of money paid to another in error - or between a claim for the payment of money in performance of a promise and a claim for a lost item of property.[49] Going back to the fact that Gaius recognised the distinction between actions *in rem* and *in personam*, but listed *obligationes* as a form of property, Samuel suggests that obligations therefore gave rise to two kinds of legal relationship:[50]

> [A] relationship *in personam* which consisted of a *vinculum iuris* [legal bond] between two legal subjects (*personae*) and enforceable by an action *in personam* ... [and] a proprietary relationship between legal subject (*persona*) and legal object.

Thus:[51]

> [T]he distinction between real and personal relations was merely a question of the relativity of rights .... Owners and creditors both have entitlements, a right *to* something, and the role of remedies is simply to vindicate these rights.

Samuel illustrates this principle with reference[52] to the case of *Lipkin Gorman v Karpnale Ltd*[53] in which the plaintiff solicitors were able to recover from a gaming club money which had been embezzled from their client account by a partner in the firm and used to purchase gambling chips. Lord Goff stated that the debt owed by a bank to a customer in credit (in this case the money in the solicitors' client account) "constitutes a chose in action, which is a species of property; and since the debt was enforceable at common law, the chose in action was legal property belonging to the solicitors at common law".[54]

It is this proposition which forms a basis for the suggestion later in this paper[55] that not only debts but other obligations and the rights they create (such as the right to specific performance of a contract and the right to a remedy for breach of confidence) can be seen as a form of property, and hence capable of giving rise to proprietary rights of a kind, in certain contexts at least.

48 Supra at note 3, at 544-545.
49 Ibid, 524-525.
50 Ibid, 528.
51 Ibid.
52 Ibid, 530-534.
53 [1991] 2 AC 548.
54 Ibid, 574.
55 See text, infra at Part V, para 5(c).

As Samuel points out:[56]

> [G]iven that a claim in debt has no relation whatsoever to the actual damage suffered by a plaintiff's patrimony ... there is no reason why restitution lawyers should not accept that all debt claims, even those in contract, are more proprietary than obligational.

Further:[57]

> Owning and owing become a matter of viewpoint in that they appear and disappear depending upon whether the right-holder is looking towards the thing as an empirical reality or the thing as an abstract entity.

I suggest that this difference in viewpoint is possible because "the thing as an empirical reality" is in fact the object of the property rights, while "the thing as an abstract entity" is the property rights themselves. The two are not one and the same. Since property rights are not the "things" themselves then, it is not a great logical jump to envisage property rights as subsisting in rights to legal remedies or, as Samuel puts it, legal entitlements.[58]

By returning to the roots of property, Samuel demonstrates that the dichotomy between the law of property and the law of obligations has never been as sharp as is sometimes thought. I suggest that Samuel's approach to the institution of property is an attractive one, for its accordance with the present law, and for its potential application in the law's future development. In particular, this approach enables the courts to focus more on the facts of particular cases than on how facts can be made to fit existing legal categories, and allows greater flexibility in reacting to those facts and in the choice of a remedy.

4. An Appraisal of Gray and Samuel – The Same Result?

Although it has been concluded that Gray's excludability criteria as regards property rights is circular and so of limited use, in fact Gray's conclusions have much in common with Samuel's views and with the direction being proposed in this article. While Samuel points out that:[59]

> The moment one replaces the idea of two separate legal relations, one between person and person (*in personam*) and one between person and thing (*in rem*), with a single conception of a right consisting of a relationship between *persona* and *res incorporalis* the whole property and obligation dichotomy begins to disappear.

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56 Supra at note 3, at 534.
57 Ibid, 535.
58 Ibid, 529.
59 Ibid, 535.

Gray describes "property" as:[60]

> [I]n large part, a category of illusory reference: it forms a conceptual mirage which slips elusively from sight just when it seems most attainably three-dimensional.

Gray concludes that "property" is a relative concept. While suggesting that this is because excludability varies according to time and circumstances in that, for example, "I may have property in a resource today, but not tomorrow", Gray also recognises that:[61]

> [It] is not even inevitable that there should be a quantum step between having "property" in a resource and not having "property" in it. Propertiness is represented as a continuum along which varying kinds of "property" status may shade finely into each other.

This conclusion accurately reflects the way property rights are and should be treated by the law, and moreover can be applied to the area of remedies in support of the doctrine of awarding an appropriate remedy, whether proprietary or not, depending in part on the importance (or "propertiness") of the right infringed or the obligation breached.

Further, Gray's conclusion that propertiness is a continuum accords with Samuel's assertion that:[62]

> [The] construction of an axiomatic scheme of legal relations, rights or categories based upon a fundamental distinction between owning and owing is no longer viable as a logical model.

Further, in concluding that "property" is assimilable within consensual theory, Gray accepts that the validity of any sharp dichotomy between contract and property is doubtful.[63] In a passage which sounds remarkably similar to Samuel's arguments, Gray speaks of:[64]

> [A] spectrum of "propertiness" in which obligations which derive their moral force from discrete acts of affirmative consent shade gradually and almost imperceptibly into obligations whose social persuasiveness rests upon the collective acceptance of sustained acts of assertive control [ie the historic chain of title and the acceptance of the historic distribution of holdings which lie behind every title in real or personal property].

In other words, rights *in personam*, which stem from personal obligations, and rights *in rem*, which arise from the legally recognised ownership of property, are

60 Supra at note 4, at 305.
61 Ibid, 295-296.
62 Supra at note 3, at 536.
63 Supra at note 4, at 302.
64 Ibid, 302-303.

not separated from each other by a sharp boundary but rather shade gradually one into the other. This accords with other developments in the law, such as the development of the boundary between fiduciary and non-fiduciary obligations from a sharp line into a continuum. This was illustrated in *LAC Minerals Ltd v International Corona Resources Ltd*,[65] which will be discussed more fully in Part IV.

The recognition of a continuum rather than a dichotomy between personal and property rights not only reflects the reality of what is occurring in the law, but is preferable to the traditional and excludability approaches. It allows the courts more flexibility, not only in choosing a remedy, which will be discussed more fully in Part IV, but also in determining whether or not an actionable wrong has occurred in borderline cases such as *Victoria Park Racing*.[66] This development also accords with, for example, the courts' willingness now to grant injunctive relief where jurisdiction to do so would traditionally have been refused on the basis that damages would be an adequate remedy. It has been pointed out that "the current approach now seems to be to consider whether it would be more just to grant an injunction than to award damages",[67] an approach which was taken by the Court of Appeal in *TV3 Network v Eveready NZ Ltd*.[68]

In summary, to view the property category as one with no sharp boundaries at all is consistent with the conclusions of both Gray and Samuel, and with the recent development of the law. It also allows the courts greater flexibility to award appropriate remedies on the facts of individual cases.

IV: CONFIDENTIAL INFORMATION

No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless, once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence.[69]

1. The Action for Breach of Confidence

It has often been pointed out that the jurisdictional basis of the action for breach of confidence is uncertain. As Jones has pointed out:[70]

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65 [1990] FSR 441.

66 Supra at note 26.

67 Maxton, "Intermingling of Common Law and Equity" in Cope (ed), *Equity Issues and Trends* (1995) 30.

68 [1993] 3 NZLR 435.

69 *Fraser v Evans* [1969] 1 All ER 8, 11 per Lord Denning MR.

70 "Restitution of Benefits Obtained in Breach of Another's Confidence" [1970] 86 LQR 463, 464.

> A cursory study of the cases, where the plaintiff's confidence has been breached, reveals great conceptual confusion. Property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment, have all been claimed, at one time or another, as the basis of judicial intervention. Indeed some judgments have indiscriminately intermingled all these concepts.

What is generally accepted is that there are three elements to the action: the information must be of a confidential nature; it must have been communicated in circumstances importing an obligation of confidence; and there must be an unauthorised use of the information to the detriment of the party communicating it.[71]

The action thus generally depends on an obligation having arisen. This obligation may be express[72] but is more usually implied, for example, because it would have been obvious from the circumstances,[73] or through moral usage in the profession in question.[74] One could therefore conclude that in the absence of circumstances giving rise to an obligation of confidence, recipients of information are free to use it. However, in some circumstances an obligation is imposed on an otherwise innocent recipient.

2. The Problem of Innocent Recipients

Third parties may come under an obligation not to use or publish the information once they are aware that it has been obtained in breach of confidence, and even where they had no initial cause to suspect that their informant was in breach of an obligation. As Lord Denning MR said in *Fraser v Evans*, "[e]ven if he comes by it innocently, nevertheless, once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence."[75] As Ricketson points out, an innocent recipient can apparently be fixed with knowledge that the information is confidential by the original owner starting an action in breach of confidence against the innocent recipient. In other words:[76]

> [T]he original owner has no right of action against an innocent recipient but can give himself this right by simply starting an action against the former, who, if he does not cease his use of the information, can be restrained as being in breach of good faith!

This is difficult to justify if the basis of the action is a mere personal obligation rather than a proprietary interest.

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71 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41; *Talbot v General Television Corporation Pty Ltd* [1981] RPC 1.

72 *Wilson v BCNZ* (1988) 2 TCLR 674.

73 *AB Consolidated v Europe Strength Food Co* [1978] 2 NZLR 515.

74 *Fraser v Thames Television Ltd* [1983] 2 All ER 101.

75 [1969] 1 All ER 8, 9.

76 Ricketson, "Confidential Information – A New Proprietary Interest?" 11 Melb ULR 223(I) & 289(II), 240-241.

Even innocent third party purchasers for value of commercially valuable information may also, at least in some circumstances, be prevented from using it. Thus in *Wheatley v Bell,*[77] a New South Wales case, a plaintiff was granted an interim injunction to prevent use of confidential information relating to a franchised advertising system, by third parties who had purchased the information in good faith from the initial confidee. However, Helsham CJ in the New South Wales Supreme Court emphasised that his conclusions must be weighed in light of the fact that the application was for interlocutory relief and that it was important that the decision "be given forthwith and without full consideration of the problems".[78]

Had the proceedings reached a substantive trial, a result more satisfactory to the innocent third parties may have been reached. It has been suggested in dicta that the action for breach of confidence should not extend to bona fide purchasers for value without notice[79] and a full discussion of this point would have been valuable. Further, an alternative defence of change of circumstances has been proposed for good faith defendants told later that information has been given to them in confidence[80] and this too may have been applicable.

Damages may also have been considered a more appropriate remedy than a permanent injunction, given the lack of wrongdoing by the third parties – viz the damages award for what amounted to innocent, because unconscious, copying in *Seager v Copydex.*[81]

3. Conclusion

The action for breach of confidence extends to initial and subsequent recipients of information known to have been imparted in circumstances of confidence, whether such knowledge arises before or after the imparting, and to innocent recipients of the information, subject to the possible defences of bona fide purchase and change of circumstances. These parameters will be particularly important when it comes to the discussion in Part III of whether confidential information can be categorised as property.

77 [1984] FSR 16.

78 Ibid, 17.

79 *Morison v Mouat* (1851) 9 Hare 241, 263-264; 68 ER 492, 501-502; *Printers and Finishers Ltd v Holloway* [1965] RPC 239, 253.

80 See for example Jones, supra at note 70, at 473-474.

81 [1967] 1 WLR 923.

4. Remedies

> [The] multi-faceted jurisdictional basis for the action provides the court with considerable flexibility in fashioning a remedy.[82]

A very wide range of remedies has been granted in actions for breach of confidence, and the circumstances of the case and practical effect of potential remedies are often important influences on the court's choice. Injunctions, damages, and accounts of profits are all available. But two other remedies, the constructive trust and what can only be called a creative remedy, will illustrate the flexibility the courts exercise in this area.

(a) Constructive Trust

A controversial remedy awarded on occasion is the constructive trust. In the notable Canadian case of *LAC Mineral v International Corona Ltd*[83] a senior mining company, LAC, acquired for itself a property which it knew, through confidential information supplied to it by a junior mining company, Corona, for the purposes of a possible joint venture, was likely to include mineral bearing deposits. Only two of the five judges in the Canadian Supreme Court found that LAC owed a fiduciary obligation to Corona, and hence that a constructive trust over the gold mine ultimately developed by LAC on the property was the appropriate remedy. However, of the other three judges, who found that there was no fiduciary relationship, Lamer J was also prepared to award a constructive trust so that was the final remedy. Two points made by the judges are particularly relevant for present purposes.

First, the obligation breached by LAC was characterised by Wilson and La Forest JJ as a fiduciary obligation, although there was no ongoing fiduciary relationship.[84] This suggests the helpful concept of a continuum between fiduciary and non-fiduciary relationships, rather than the dichotomy generally seen, not only between different types of relationships but also between different duties within a relationship - such as the fiduciary duty and the duty of care which coexist between solicitor and client. The disadvantage of the dichotomy approach, but no doubt a factor contributing to its existence, is the gross difference in the remedy which may be available, and the fact that an "all or nothing" award is the norm in these situations. So, for example, in *Hospital Products*,[85] because a majority of the High Court of Australia held (rightly in my view) that no fiduciary relationship existed,

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82 Supra at note 65, at 495 per Sopinka J.

83 Ibid.

84 See the judgment of Wilson J, ibid, 444.

85 Supra at note 39.

the plaintiff was limited to personal rather than proprietary remedies against the defendant.

Second, both La Forest and Wilson JJ would have awarded a constructive trust for breach of confidence as well as for breach of fiduciary duty. They emphasise the *appropriateness* of a remedy, whatever the cause of action. For example, Wilson J states:[86]

> It seems to me that when the same conduct gives rise to alternative causes of action, one at common law and the other in equity, *and the available remedies are different,* the court should consider which will provide the more appropriate remedy to the innocent party and give the innocent party the benefit of that remedy .... Full compensation may or may not be achieved through an award of common law damages depending upon the accuracy of valuation techniques. It can most surely be achieved in this case through the award of an *in rem* remedy. I would therefore award such a remedy. The imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damages award.

This accords with the following view expressed by Jones, discussing the account of profits and proprietary relief in general:[87]

> *Only if the court thinks it just, in all the circumstances of the case,* that the plaintiff should have the additional benefits which a right of property entails should he be awarded a proprietary remedy.

The approach also seems consistent with that of the Court of Appeal in *Aquaculture* in holding that for breach of the duty of confidence "a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute"[88] - and referring with approval to *LAC.*

It must of course be mentioned that Sopinka and McIntyre JJ strongly disagreed with the imposition of a constructive trust in *LAC,* noting that such a remedy was virtually unheard of in confidential information cases, and suggesting that the focus should be on the plaintiff's loss, and that the plaintiff can generally be restored to its previous monetary position by an award of damages. However, on the facts of *LAC* it would clearly have been virtually impossible accurately to quantify the damage to Corona. Perhaps more importantly, it is the fiduciary obligation arising from the trust placed by Corona in LAC, and recognised by Wilson and La Forest JJ, which puts these facts in a different light. If the law is concerned to protect relationships which, although not fiduciary, involve a greater degree of vulnerability or trust than, say, an arms length contract, then an element of deterrence may appropriately enter into the reasoning as to what remedy is appropriate. If an award of damages were the worst that could happen to companies such as LAC, as a consequence of a gross breach of trust, then there

86 Supra at note 65, at 444-445.

87 Supra at note 70, at 487 (emphasis added).

88 Supra at note 2, at 301.

would be no deterrent at all to taking advantage of another party's confidence.

The constructive trust award was therefore, I suggest, the appropriate remedy for the circumstances, and interestingly Sopinka J did indicate that such a remedy may be appropriate for misuse of confidential information in very special circumstances.[89] Perhaps the difference between the majority and minority views on this point rested merely on how "special" the circumstances were.

(b) Creative Remedy

In the 1930 United States case of *Shellmar Products Co v Allen-Qualley Co*[90] a creative approach to remedies for breach of confidence was taken, perhaps before its time. The plaintiff had disclosed to the defendant, in confidence, a secret machine it had made for manufacturing candy bar wrappers. It was intended that the defendant make its own machine and manufacture wrappers under licence to the plaintiff. In fact the defendant passed on details of the machine to its patent attorneys, who searched the relevant records and located a patent owned by a third party, Olsen. The plaintiff's wrapper infringed this patent, which the defendant proceeded to purchase. The Circuit Court of Appeals, Seventh Circuit affirmed the trial judge's order that the defendant assign the Olsen patent to the plaintiff. This would put the plaintiff so far as possible in the position it would otherwise have been in had the information not been disclosed to the defendant. The Court said: "We can see no [other] way by which [the plaintiff] can be fairly and adequately protected".[91] This novel approach in unusual circumstances bears some similarity to that of the majority in *LAC* and illustrates the appropriateness, in certain circumstances, of granting a proprietary remedy in a commercial context.

It is therefore clear that in breach of confidence cases the courts have chosen to award remedies appropriate to the particular facts, and that in some circumstances – and in my view rightly – proprietary remedies have been awarded.

V: CONFIDENTIAL INFORMATION AS PROPERTY

> In the last resort, if the thing resembles the elephant we all know so well, but are unable to define, what reason is there for denying it the name?[92]

The courts have occasionally considered confidential information to be property, have more frequently used the language of property in dealing with it, and have granted proprietary remedies for its misuse. Some legal scholars believe

89 Supra at note 83, at 497.

90 36 F 2d 623(1930).

91 Ibid, 625.

92 McPherson, "Information as Property in Equity" in Cope, supra at note 67, at 242.

that confidential information could usefully be regarded as property of one sort or another, and the defence of bona fide purchase is sometimes spoken of as applying to the action. All this suggests that confidential information is a form of property.

In this section I will first consider confidential information, and particularly that which is protected by the courts, in the context of different approaches to property, including those discussed in Part III above. It will be seen that confidential information per se does not fit well in the "property" category, although it has a proprietary character because of the effect of the protection afforded it by equitable doctrines and remedies.[93]

Next I will outline and critically discuss Ricketson's argument that confidential information may be the subject of a new equitable proprietary interest, and briefly note how the action for breach of confidence may be viewed in terms of Samuel's approach to property. Finally I will suggest an alternative structure within which the action may be analysed, drawing in particular on Samuel's approach to property, Ricketson's argument for a proprietary interest in confidential information, and Gummow J's remarks[94] in the Federal Court of Australia as to the proprietary character of confidential information. This structure is applicable also to other types of cases where the "property" nature of particular rights is in issue.

Furthermore, the action for breach of confidence, which has always been troublesome for those who prefer clear categories of cases, provides a useful illustration of the migration which Samuel has noted is already taking place between the "property" and "obligations" categories.

1. Confidential Information as Property – The Traditional Approach

As Ricketson has pointed out,[95] confidential information is difficult to identify and its permanence cannot be taken for granted. It is protected by the courts only in limited circumstances. To classify that confidential information which is in fact accorded protection we must consider the cause of action itself and the circumstances required before protection will be granted. It is only the information encompassed by those circumstances which can possibly be classified as property at all.

Because an obligation of confidence is critical to a successful cause of action, confidential information per se could never constitute property. If anything, the information in combination with another's obligation of confidence could be regarded as property (but this takes us even further from the traditional criteria of identification, permanence, and stability). The protectability of the particular information appears and disappears depending on its confidential quality and the

93 As was stated by Gummow J in the Federal Court of Australia in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* (1990) 95 ALR 87, 135-136.

94 Ibid.

95 Supra at note 76, at 307.

existence of the obligation. The obligation depends on the circumstances in which the information is imparted. The remedy may or may not be proprietary depending on the relationship of the parties, the honesty or otherwise of the defendant, and other circumstances. Identification of just what, when, and how protection will be granted becomes impossible. Yet the application of the property concept to confidential information depends on that very protection.

Hence, confidential information as it is protected by the courts cannot without great difficulty be categorised as property, as it is traditionally defined.

2. Confidential Information as Property – Gray's Excludability Approach

Gray's approach to the propertisation of resources requires that the criterion of excludability be met before property rights are recognised. While it appears that all three of Gray's criteria – physical, legal, and moral – depend on the right to exclude others by legal means, each criterion will be considered separately relative to confidential information.

(a) Physical Excludability

Confidential information by its nature appears well suited to protection from intrusion by strangers. However, confidential information the subject of legal proceedings has by definition already been imparted to at least one other party, and apart from the obligation of confidence, which is enforced legally, there is no means – physical or otherwise – by which its further dissemination can be prevented.

Further, confidential information is often embodied in documents or physical objects. Again, strangers may theoretically be excluded but certain kinds of confidential information - customer lists and manufacturing processes for example - must be divulged to others, often employees, if they are to be put to economic use. Although strangers can be kept away from the information there is no physical means of preventing confidante from disclosing information to strangers, particularly information which they carry in their heads. Thus it seems that confidential information itself is *not* excludable by physical means.

(b) Legal Excludability

In actions for breach of confidence the courts have often been willing to grant a remedy even where a plaintiff has failed to take advantage of alternative legal protection which may have been available through contract. In considering whether any specific confidential information may be the subject of legally enforceable rights, one must return to the fundamental elements of the action. The difficulties that arise when one attempts to categorise confidential information as property under the traditional approach have equal force here. Unless an

obligation of confidence can be established, there is no right to exclude others from confidential information by legal means and confidential information per se is therefore not legally excludable. We must therefore conclude that confidential information cannot be classed as property under Gray's legal excludability criterion.

(c) Moral Excludability

In the realm of moral excludability a number of factors are relevant to confidential information. The rationale for the action – the protection of confidential relationships – exists because of a policy choice. The public interest defence likewise results from a balancing of competing considerations.

Further, the action for breach of confidence comes closest in our law to protecting "mere ideas", far closer than does copyright law which at least purports to leave ideas free for all to use in the interests of technological and artistic development. Given the anticompetitive implications of the action, it must be asked whether there should be a limit on what may be protected as confidential information, and for how long. Hammond has suggested that the result of the espousal in the United States of proprietary theory in the confidential information field "has been to encourage the evasion of the deliberate equilibrium created by the statutory monopolies."[96] Confidential information may theoretically remain secret indefinitely, unlike inventions, industrial designs, and literary and artistic works, which are protectable by statutory monopoly for limited periods.[97] Yet this aspect of the protection of confidential information does not yet appear to have been considered by the courts, perhaps because the action did not develop in the commercial context.

Many policy or moral issues therefore have a bearing on the action for breach of confidence. Moral limits on excludability are to some extent enforced, particularly as regards the public interest defence.[98] In this area then, moral excludability, as exercised by the courts, has limited the cause of action and should perhaps limit it more in the future. But where an obligation of confidence has arisen, confidential information is regarded by the courts as prima facie excludable under this criterion.

(d) Conclusion

In general, confidential information as it is protected by the courts ill fits Gray's criteria of excludability, although it is sometimes described as property and

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96 "Property Rights to Information" (1981) 27 McGill Law Journal 47, 57-59.

97 Under the Patents Act 1953, the Designs Act 1953, and the Copyright Act 1994 respectively.

98 See, for example, *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417; *Attorney-General for the United Kingdom v Wellington Newspapers* [1988] 1 NZLR 129, 176-177 per Cooke J and at 178 per McMullin J.

more often treated as such. I have suggested above that Gray's three criteria all finally depend on that of legal excludability, which is useful only in a descriptive sense. In that sense, then, it can be said that confidential information may be propertised to the extent that the circumstances of the case give rise to an obligation which the courts are prepared to enforce. However, as to whether confidential information per se is property, given that its legal excludability depends on the existence of such an obligation, it must be concluded that it is not.

3. Ricketson's Argument

Ricketson has argued that rights in confidential information should be conceived as constituting a loose sort of proprietary interest perhaps best described as an "undefined equity".[99] This approach stems from an alternative test of "propertiness" proposed by Jackson, which depends on "whether or not in relation to some subject-matter ... there is a right enforceable against a party not in contractual relations with the party seeking to rely on it."[100] In this context "enforceability" means only that a remedy is available, including a simple award of damages. Something may be characterised as property if a remedy is available against a party not in privity, even if it is available against a limited number, or only one other person. Proprietary interests may thus be ranged in order of descending importance, according to the number of parties against whom a remedy is available.[101] It is on this approach that Ricketson suggests that a proprietary interest in confidential information may be recognised, noting that the action is available against persons not in privity with, or in a fiduciary relationship towards, the plaintiff.[102]

According to Ricketson, this analysis would provide a number of advantages: it would help to clarify those cases difficult to resolve on any other ground, without artificially extending a good faith principle; it would allow the court a high degree of flexibility; and it would avoid unfortunate results in other areas of the law, such as privilege, caused by an emphasis on good faith and the sanctity of conscious obligations of confidence.

While any analysis which clarifies difficult cases is to be welcomed, I suggest that this one raises its own difficulties. In particular, it takes no account of the initial obligation of confidence which has almost invariably been required before confidential information is protected. Although an obligation of confidence could conceivably be implied in cases involving the surreptitious obtaining[103] or theft of obviously confidential information, it would be extending the action too far to dispense altogether with this requirement. Even given that Ricketson would leave

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99 Supra at note 76, at 315.

100 Jackson, *Principles of Property Law* (1967) 23 ff, cited in Ricketson, ibid, 307-308.

101 Supra at note 76, at 307-308.

102 Ibid.

103 See, for example, *Linda Chih Ling Koo v Lam Tai Hing* (1992) 23 IPR 607.

with the courts the final discretion as to whether relief was granted, this approach would transform the action beyond recognition and sever it completely from its historical base, the protection of confidences. If such an extension is warranted (and indeed under the TRIPS Agreement[104] it may be necessary) then this should be a matter for the legislature, not the courts.

Commercially valuable information (to which Ricketson's argument is limited) may be protectable under the patent system if it constitutes a new invention and meets the other requirements of the Patents Act 1953, which include novelty and lack of obviousness. Exactly what may be protected by way of a patent has been closely defined by the Act and by the courts over the years. For example, new methods of medical treatment for human beings are not patentable for policy reasons.[105] Patents give powerful monopoly rights, even allowing a patentee to prevent use of protected ideas by those who have developed them quite independently after the date of the patent. It is therefore appropriate that the scope and duration of patent protection is limited. There are no such limits on the protection of confidential information, however, and if any movement was to take place away from the basis of the action – the obligation of confidence – then the imposition of such limits should be carefully considered, again requiring action by the legislature.

Further, it is not obvious that the courts need any more flexibility in confidential information cases. Great flexibility exists already, and the courts frequently do not attempt to justify results in terms of existing categories and principles, which of course has contributed to the confusion concerning the action.

Rather than introduce a new equitable proprietary interest, itself difficult to define, it should be recognised that difficult cases can never be placed in clear categories but fall in the grey areas between. The subject matter of these cases may, for example, be property for some purposes but not for others.

I also suggest that the courts' emphasis on the sanctity of obligations of confidence is not misplaced. Situations giving rise to such an obligation, while not demanding the level of protection due to true fiduciary relationships, must merit greater protection than situations where confidence is not an issue; hence the point made above concerning the use of the remedy of a constructive trust as a deterrent in breach of confidence cases. That the courts emphasise good faith and obligations of confidence may be attributed first to the fact that it is on these that the cause of action rests, and second to the need to protect these obligations for their own sake. Any overemphasis on these values at the expense of, say, privilege, may easily be cured within the present confines of the action.

One final criticism of Ricketson's proposal concerns his assertion that it is

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104 Article 39 of which requires New Zealand to ensure protection of undisclosed information which is secret, has commercial value because it is secret, and has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

105 *Wellcome Foundation Ltd v Commissioner of Patents* [1979] 2 NZLR 591 (SC); [1983] NZLR 385 (CA).

supported by the acceptance of a defence of bona fide purchase.[106] This defence has not in fact been clearly accepted[107] and indeed has been criticised as too inflexible to allow for the wide variety of possible circumstances in confidential information cases. An alternative defence of change of circumstances has been suggested, rightly in my view, as preferable.[108] Further, the defence of bona fide purchase virtually presupposes a proprietary interest and hence, while it accords by definition with a proprietary approach, hardly thereby lends its support to that approach. As Ricketson also points out, the bona fide purchaser rule does not provide a solution as to which of the original owner of information and a subsequent good faith recipient who has given value for it should prevail, since both will be claiming the same interest.[109] Resorting, as Ricketson suggests, to the rule that the first in time should take, creates the same inflexibility as the bona fide purchase rule itself. While this would no doubt increase certainty, it is not likely to result in greater justice in cases where the circumstances of the respective parties, the weight of the obligation owed and the flagrancy of the breach will vary and should all be taken into account by the courts. Hence, Ricketson's proposed equitable proprietary interest in confidential information, while conceptually attractive, would detract from rather than add to the courts' ability to reach just results in confidential information cases.

In one aspect, however, Ricketson's proposal accords with Samuel's approach to the property/obligations distinction, and will be taken up again later. The concept of proprietary interests arising by virtue of the availability of a remedy enforceable against a party not in privity comes close to Samuel's proposition that obligations enforceable in law give rise to legal entitlements, in the form of remedies, which are themselves forms of property.[110] Thus, if Ricketson's suggested equitable proprietary interest is seen as subsisting not in the information itself, but in the right to a remedy arising from the obligation of confidence, it holds promise as a conceptual tool which provides a bridge linking legally enforceable remedies with property interests.

4. Confidential Information – Samuel's Approach

On Samuel's approach, the obligation of confidence is enforceable in law and the remedy available is a legal entitlement and hence a form of property. Samuel's approach can be woven together with other proposals to form a coherent structure for the action, which is in accordance with other recent developments in the law, and with the Court of Appeal's view that the historical distinctions between

106 Supra at note 76, at 313.

107 See, for example, Ricketson's discussion of the defence, ibid, 244-245.

108 Supra at note 70, at 473-474; Stuckey, "The Liability of Innocent Third Parties Implicated in Another's Breach of Confidence" (1981) 4 UNSWLJ 73.

109 Supra at note 76, at 314.

110 Supra at note 3, at 529.

common law and equity are of decreasing importance. This structure will now be explained and placed in context.

5. Legal Entitlements as Property

> [Equity] will intervene wherever appropriate to protect rights in confidential information.[111]

It has been concluded above that confidential information itself cannot be regarded as property on any of the approaches so far discussed. However, drawing on a combination of Ricketson's suggestion of an "equity in confidential information", Samuel's approach, and a view expressed by Gummow J in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health*,[112] another approach will be suggested which it is hoped will provide both a useful structure for analysing confidential information cases, and an indication of the direction in which the action is moving.

In *Smith Kline & French* Gummow J said:[113]

> The degree of protection afforded by equitable doctrines and remedies to what equity considers confidential information makes it appropriate to describe it as having a proprietary character. This is not because property is the basis upon which that protection is given, but because of the effect of that protection.

Taking these comments as a starting point, it can be concluded that the action for breach of confidence, depending as it does on an obligaition arising and on the right to a legal remedy that arises in turn when the obligation is breached, may properly be seen as giving rise to a property right, not in the information itself but as a result of the nature of the action. I will discuss this proposition with reference to "rights", remedies, confidential information, and the fusion of common law and equity.

(a) The Language of Rights

Obligations recognised in equity by their nature give rise only to personal remedies and hence to rights *in personam*. However, as Samuel notes, "English lawyers have used the property structure, together with the idea of a right which the property structure has spawned, as a reasoning device".[114] Once the terminology of "rights" has been invoked, whether as a reasoning device or as a tool of

111 Ricketson, supra at note 76, at 304.
112 Supra at note 93.
113 Ibid, 135-136.
114 Supra at note 3, at 542.

persuasion, it is then difficult to avoid invoking the stronger connotations which surround the positive rights *in rem* traditionally seen as going with ownership of property. Equitable proprietary rights can thus come to be treated as rights *in rem*, perhaps partly through the use of "rights" terminology loosely in relation to these two different senses of "rights" – property rights and the right to a remedy.

There are parallels here with Waldron's argument, discussed in Part III, that the use of property as an analogy when speaking of other "rights" of individuals tends to take on a life of its own. It is of interest here that the Property Law Act 1952 definition of "property" includes "any other right or interest",[115] leaving the way open to recognise rights in law and equity as property, in this context.

Uncertainty over property rights is compounded when equitable rights come to have the effect of property rights, for example, where an equitable proprietary remedy such as the constructive trust effectively shuts out unsecured creditors in insolvencies.

(b) Rights in Rem and Rights in Personam

Insofar as an *in personam* right is a right to a remedy, it seems that the right arises only when an obligation is breached (for example, when a contract is not performed, when a bailee of goods fails to reach the required standard of care, or when a fiduciary makes a profit from her position). In contrast, rights attaching to property have been regarded as more in the nature of positive rights – to use, to assign, and perhaps to exclude. It is possible, however, to see these rights also as arising only when a breach has occurred, particularly given that property and the rights going with it are created by the law and, as suggested above, depend on the legal right to a remedy when the exclusive zone is breached. My "right" to exclusive use of my land depends on my right to a remedy in the law of trespass, if the former right is infringed.

Granted, it is difficult to argue that all the world has a duty not to damage or misappropriate another's property. But if property rights are seen as essentially rights to legal remedies, then does it matter whether the law, in granting a remedy, is recognising a right to the exclusive use of property or is acknowledging that all the world does indeed have an obligation not to intrude on the zone which, as is well known, I can invoke the law's assistance to protect?

Even rights to real tangible property are never absolute. They are pruned and compromised to make way for the needs of normal life, and for policy reasons - viz the fiction of the implied licence to enter another's property at least as far as the front door,[116] and provisions of the Crimes Act which allow the police to enter private property with impunity where, for example, they have reason to believe a serious offence is about to be committed.[117] Rights to real property may even be

115 See supra at note 6 and accompanying text.
116 *Robson v Hallett* [1967] 2 All ER 407.
117 Crimes Act 1961, s 317.

taken against the will of the owner - viz the powers of taking and compulsory acquisition of land, on payment of monetary compensation where appropriate, available under the Resource Management Act 1991.[118]

It therefore seems that the distinction between rights *in rem*, which traditionally stem from the ownership of property, and rights *in personam*, which stem from obligations, may not be as sharp as it appears.

(c) Remedies and Property Rights

Further, in the context of remedies it is apparent that even the right to, say, rescission of a contract for mistake or fraud is something of a property right in that the remedy may include the return of goods the property in which has already passed under the contract. Likewise, and to an even greater extent, the right to specific performance of a contract for the sale and purchase of land can function as a property right through its capacity to negate or limit the rights of, say, a second purchaser of the same property under a later agreement. Assuming the property had not yet been transferred, those latter rights would be reduced to a mere personal remedy for breach of contract. Thus a contractual right, though arising from a mere personal obligation, not only brings into existence an item of assignable property in the form of the benefit of the contract, but also gives rise to what resembles a true property right in the form of the right to specific performance, which may be exercised against all the world (except a bona fide purchaser for value without notice). No obligation need have been undertaken nor breached by the second purchaser before the right to specific performance will prevail.

It is not going much further to suggest that the right to specific performance is itself a form of property, that the right to performance of a contract is therefore property, and hence, as Samuel suggests, that all legal entitlements are forms of property.[119] It can be seen then that the right to performance of a contract may, where appropriate, be treated as a property right. This is because of the effect of the protection equity affords to contractual arrangements, not because the benefit of a contract is the object of property rights, although it is of course an assignable chose in action. An analogy may be made here with *Lipkin Gorman*[120] where the debt owed by the bank to the solicitors (that is, the money in the client account) was said to be legal property by virtue of its being enforceable at common law.

Taking this reasoning further, it can be argued from the very existence of an action in defamation that, as Waldron suggests, individuals have rights not to be defamed, and thus arrive at the idea of exclusive rights in one's reputation.[121] Although reputations do not fit the traditionally accepted criteria of property (not

118 See, for example, ss 185, 186, and 197.
119 Supra at note 3.
120 Supra at note 53.
121 Supra at note 13, at 34.

being assignable, for example) they are at least theoretically protectable by means of injunctions, and they can be valuable in economic terms. It is therefore not so far fetched to suggest that an individual may have a property interest in her reputation.

In a different context, that of police action, the extension of property concepts to remedies for breach of a right is evident from the judgments of the majority of the Court of Appeal in *Simpson v Attorney-General (Baigent's Case),*[122] where it was held that damages may be awarded for breach of the rights guaranteed by the Bill of Rights Act 1990. There is a significant overlap between the right to freedom from unreasonable search and seizure protected by s 21 of that Act, and the property rights protected by the law of trespass. The application of the usual remedy for trespass to the Bill of Rights context is a further example of the migration of property concepts into another part of the law. By beginning with the concept of a right existing independently of property and enforceable in law, one can arrive at a remedy more usually seen as protecting rights in real property but nevertheless appropriate in the circumstances. This illustrates the benefits of the appropriate remedies approach, the use of the property structure as a reasoning device as noted by Samuel, and the normative connotations which go with the language of property and rights.

In the context of remedies, then, it seems that property concepts are indeed being used to allow plaintiffs to succeed and to enable the courts to award appropriate remedies.

(d) Confidential Information in this Context

In the action for breach of confidence, the right to a remedy may be seen as a form of property giving rise to the possibility of a property right without the need to categorise confidential information as property. To adopt Samuel's terminology, the relationship between the right to a remedy (the action) and the confidential information itself (the thing) can be seen as having normative force thus justifying the recognition of a property right.

This approach accords with a suggestion of McPherson J of the Queensland Court of Appeal, that the essence of a person's interest in confidential information is that it is at law and in equity a chose in action and so can be reduced into possession by obtaining judgment to enforce the chose.[123] It is important to note that it is not the information that is a chose in action and hence property, but the person's *interest* in the information, the existence of which depends on the right to enforce another's obligation. This view avoids the difficulties as to definability, identifiability, and assignability that go with attempts to categorise information itself as property, and allows for the fact that the action depends in the end not on

122 [1994] 3 NZLR 667.
123 Supra at note 92, at 239.

the proprietary nature of the information but on the obligation whose existence in turn depends on the circumstances.

This structure is also capable, where appropriate, of being applied to third party recipients. If a property right exists then this may, in some circumstances, prevail over the rights of a bona fide "purchaser" of the information. If the information itself is not property then that purchaser cannot be said to have purchased any property recognised by law or equity, and at best has an equity which must be weighed against that of the original confider of the information.

To this end Ricketson's suggested recognition of an "equity of confidence"[124] (although not, I submit, amounting to a proprietary interest in the information itself) may prove a useful tool in dealing with situations where competing rights must be weighed - such as the bona fide purchaser situation. If it is recognised that an innocent third party does have an equity, to be balanced against that of the discloser, then this together with the concept of an "equity of confidence" provides a structure within which the courts may decide "how the competing equities of the wronged discloser and the innocent third party, both of whom have been taken unfair advantage of by the misbehaving confidant, are to be balanced in terms of compensation".[125] The attractiveness of the competing equities approach lies, as Ricketson points out, in its flexibility, in the wide range of relief at its disposal, and in its potential to enable the court to take into account a large number of different factors such as the conduct of the parties or the harm to the defendant's interests.[126]

Although information itself cannot be property, then, if a right to a remedy in law or in equity is recognised as itself comprising a property right, then the proprietary character of the action for breach of confidence is explained by the law's recognition and enforcement of the obligation that lies on recipients of confidential information, received in circumstances importing that obligation. This property right may, where appropriate, extend to innocent third parties, who may be prevented from misusing the information, or merely ordered to pay damages, depending on the circumstances. The concept of an equitable proprietary interest gives the courts the flexibility which they need and have so far maintained in dealing with the varied circumstances attending confidential information cases, and allows for the equity of innocent third parties also to be considered.

(e) Fusion

The structure put forward above is also consistent with the acceptance in New Zealand of a fusion between common law and equity which has accorded the courts greater flexibility to select appropriate remedies according to the

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124 Supra at note 76, at 310-311.

125 Stuckey, supra at note 108, at 74.

126 Supra at note 76, at 310-311.

circumstances rather than the jurisdictional basis of the action. Factors indicating a remedy's appropriateness may include the "propertiness" of the right breached, the seriousness of the breach, and other circumstances such as flagrancy, the adequacy of damages or an account as a remedy, the actual damage done (if any), any change of position by a third party, and the conduct of that party.

The trend toward granting appropriate remedies is to be welcomed, and has particular application to the confidential information cases. It is noteworthy that it was in the context of a confidential information case that Cooke P, as he then was, made his much quoted assertion that "equity and common law are mingled or merged" and accepted that "a full range of remedies should be available as appropriate".[127]

It is the legal scholars, not the courts, who have been troubled by the uncertainty as to the basis of the action for breach of confidence. With the fusion disease now apparently rampant, focusing on the roots of the action may be recognised as the futile exercise that it perhaps always was, and a new more productive direction of inquiry be taken - such as towards the question of what factors *should* influence the courts in determining the appropriate remedy in any given case.[128]

VI: CONCLUSION

There is nothing absolute about property rights. They are created by the law and the law can and does override, limit, and refuse to recognise them.[129] Various approaches to defining property have been put forward, but none is wholly successful. Yet plaintiffs who can establish property rights may have the possibility of more favourable results than those who cannot, obvious examples being the priorities granted in insolvencies and the provisions of the Matrimonial Property Act 1976. This disparity is not always justified - for example, who would argue that those suppliers of goods who have the benefit of a retention of title clause are more deserving than those who do not, or than suppliers of services, to whom that option is not available?

Inflexible rules can never result in justice in every case, which is why the courts of equity developed in the first place. Rather than focusing on whether or not a particular right or subject matter is in the nature of property, the courts should be

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127 Supra at note 2, at 301.

128 For a fuller discussion of some of these factors see Maxton, "Intermingling of Common Law and Equity", supra at note 67, at 43-45.

129 See, for example, the statement by Lord Keith of Kinkel in the British *Spycatcher* case, *Attorney-General v Guardian Newspaper Ltd (No 2)* [1988] 3 All ER 545, 645, that the British courts would not enforce a claim by Peter Wright or his publishers to the copyright in a work the publication of which they had brought about contrary to the public interest.

able to award remedies appropriate to the circumstances of cases.

In breach of confidence cases the courts, perhaps assisted by the action's uncertain jurisdictional basis, have taken a flexible approach to remedies and on occasion broken new ground. Confidential information has been described and treated as property and attempts have been made to justify this with reference to an equitable proprietary interest. This, I submit, is to perpetuate the error of focusing on the object of the property right rather than the right itself. Rather, in the confidential information context the property right should be seen as subsisting in the right to enforce an obligation of confidence. As has been illustrated, this analysis suggests a structure within which other causes of action, particularly difficult ones, may be considered with a view to choosing appropriate remedies, and accords with other recent developments.

If the above structure is accepted, the classification of a particular object as property need no longer be the crucial and deciding factor that it has often been. Rather, property rights should be seen as forming a continuum, existing in different degrees and sometimes depending on the context and the purpose for which their establishment is sought. Inherent in this structure is a flexibility which will better allow the courts to utilise property concepts outside their traditional boundaries, without straining to categorise particular subject matter as property, and to concentrate on choosing the *appropriate* remedy in any fact situation.

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New Zealand Red Cross Provides:

* Emergency Relief and Response, in times of Disaster or Conflict in New Zealand and around the World.

* Education and Information for all New Zealanders on International Humanitarian Law.

* Emergency Preparedness and training including emergency aid to those in need of support in our communities.

The Northern Region fulfills the aforementioned through its 'on call' Emergency Relief Team and Response Units; the Meals on Wheels programme which delivers approximately 1500 meals daily throughout the Region; training courses which include First Aid, CPR, Humanitarian Law and caring for the elderly; and its Emergency Preparedness programme.

* * * *

An appropriate form of bequest would be:

'I give and bequeath the sum of $..... to the Northern Region of New Zealand Red Cross to be paid for the general purposes of the Northern Region to the Regional Director for the time being of such Region, whose receipt shall be good and valid discharge for same.'

It is important to ensure that the words 'Northern Region' appear in the form of bequest if it is the testator's wish that the funds be used for the benefit of people in the North.