

Stephen Stewart Lecture (2009)

Secrets and Mysteries: Fidelity, Confidentiality and Restraint of Trade

Lionel Bently*

My Chairman, ladies and gentleman, before I begin, I would very much like to thank Paul Leonard, Ian Harvey and the Council of the IPI for inviting me to give this lecture, probably the most prestigious, in the IP calendar in this country. I regret to say that I did not know Stephen Stewart, though I was very familiar with his edited collection of essays on International Copyright and Neighbouring Rights, and know well of his immense influence on copyright law as Director General of the International Federation of the Phonographic Industry from 1961 to 1979 (the Rome Convention and Geneva Phonograms Convention) and as the inaugural chairman of the IPI's predecessor, the Common Law Institute for Intellectual Property. But the honour of giving a lecture such as this is not dependent on any direct personal bond with the person whose life and work the lecture commemorates. It also comes from the stature of the previous lecturers including the likes of Robin Jacob, Joachim Bornkamm, David Edward, Sam Ricketson, Jane Ginsburg, Bill Patry, David Vaver, and, of course, Hugh Laddie. So it is indeed a privilege to stand here this evening.

My topic tonight is "Secrets and Mysteries". Earlier this year I gave a lecture arranged by IPI on "trade secrets", in particular the interpretation of the Court of Appeal decision in *Faccenda Chicken v. Fowler*. I do not intend to go over that ground, which our Chairman tonight described, in (to me bittersweet terms), as "attractive but unpersuasive." This evening, I would like to continue with the general topic of employee confidentiality, but instead to focus on four distinct matters. I describe each subject as a "mystery" and I hope, within the time allotted to render each mystery rather less obscure than it might otherwise appear. And I hope that at least some of my suggestions this time will be regarded as both "attractive AND persuasive".

* Herchel Smith Professor of Intellectual Property Law, University of Cambridge.

Mystery 1

For the first mystery, I need to seek your indulgence. For the first mystery relates to the history of the law of trade secrets, and historical work is not something, I appreciate, that busy lawyers need to spend their time on. But I do think there is something of a puzzle surrounding accounts of the history of trade secrecy that is worth further exploration. The puzzle is that - in contrast to copyright, the origins of which have been traced to publishing practices from the sixteenth century, and to “patents” which date from at least as early, textbook accounts of the protection of trade secrecy only extend back as far as the first quarter of the nineteenth century, in particular to the decisions of Lord Eldon LC, first refusing in 1817, to grant protection in *Newbery v James*,¹ and *Williams v. Williams*,² and then finally awarding injunctive relief in a remarkable volte-face, *Yovatt v. Winyard* (1820).

Yovatt v. Winyard concerned horse, dog and cattle medicines which had been developed by William Yovatt’s former business partner, the vet Delabere Blaine. Yovatt, who had premises in what we today call Fitzrovia, had agreed to employ William Winyard, and teach him the art of veterinarianism, explicitly providing that Winyard was not to learn the relevant recipes for the treatments. Soon after commencing employment, Yovatt found that Winyard became insolent, and the contract was brought to an end. Yovatt then discovered Winyard advertising the sale of Blaine’s medicines from a shop just around the corner in Tottenham Street, and brought an action before the Chancery court to prevent him. Despite prior authorities, Eldon LC granted injunction to restrain defendant from communicating the recipes for veterinary medicines “upon the ground of there having been a breach of trust and confidence”

Of course, the question as to why Lord Eldon LC changed his mind in *Yovatt* is one that would be worth exploring, but it is not the puzzle that interests me. The bigger mystery is why there were no claims relating to trade secrets before this time. And two possible answers suggest themselves: either traders and businesses did not have valuable trade secrets worth protecting before 1810, or they had other ways of protecting them. Historical evidence, as well as historical common sense, suggests the latter.

¹ 2 Mer 446 35 ER 1011 (1817) (27 March 1817).

² *Williams v Williams* 3 Mer 157, 36 ER 61 (6 August 1817)

There is, perhaps not surprisingly, plenty of evidence of traders, businesses and others valuing secrets as means of protecting innovation and competitive advantage long before 1810 (as well as scientists and researchers relying on secrecy to protect their insights in the context of the scientific revolution of the seventeenth century). Recent historical scholarship, particularly that of Professor Stephan Epstein at the LSE, has taught us that the period in which the guilds dominated trade were not, as some had previously assumed, periods in which there was no innovation. And there is evidence that such secrecy was respected for example when the guild administrators went to check on the practices of its members. For example, in December 1701 in the Company of Gold and Silver Wyre-drawers sent its inspectors to search the premises of Philip Washbourne. Washbourne complained that if his competitors were allowed into his work-room, his trade secrets would be endangered. The searchers accepted his concerns, and restricted the search accordingly. As Horace Stewart, the late nineteenth century biographer of the company observed “even in these early days, regard was had for the secrets and mysteries of the Art.”³

By the late seventeenth century, trade secrets do in fact make their way into the higher courts, but perhaps surprisingly in the context of the administration of estates. In the case of valuable secrets, the question arose whether the disclosure of a secret by a person to his wife or offspring needed to be accounted for when dividing up the estate. In *Jenks v. Holford*, in 1682, Lord Nottingham refused to do so, observing that he had no way of valuing the secret: “For aught I know”, he said, “ a receipt to make mince-pies or catch rats may be as valuable.” Virtually 40 years later (but still a century before *Yovatt v. Winyard*), in a case concerning “Tipping’s Water”, the Earl of Macclesfield indicated that the courts would take account of such assets as secrets where the information was given to the recipient by a servant or where the information was found after the death of the deceased.

Moreover, there is evidence that traders used obligations of secrecy as a primary form of protection. Take, for example, the terms of apprenticeship. Some such indentures survive from as early as the thirteenth century, and from that time right through to the nineteenth century commonly contain a requirement that the apprentice do “his master

³ E. Glover, *The Gold and Silver Wyre-Drawers* (London: Phillimore, 1979) 18, (citing Guildhall Manuscripts, 2451/1 p. 149 (3 December 1701); Horace Stewart, *History of the Worshipful Company of Gold and Silver Wyre-Drawers* (London: Printed for the Company by Leadenhall Press, 1891) 78, 87 (saying the incident showed “that, even in these early days, regard was had for the secrets and mysteries of the Art”).

secrets keep.” A late eighteenth century text explains what precisely was understood by this pithily stated obligation: the apprentice should “conceal the particular Secret of his Art, Trade, or Science, without divulging or making any one privy to them to the Detriment of his Master, whose Interest may much depend on a peculiar Management and Knowledge of his Business.”

Although, such fidelity was “the Glory and Perfection of a Servant, as his want of it is his greatest discredit and reproach”, such obligations were not always complied with. The correspondence of Matthew Boulton and James Watt, much of which survives in Birmingham and some of which has been transcribed and published, describes a revealing incident (if you will excuse the pun). By the early 1800s, the main rival to Boulton & Watt in producing engines was the Leeds firm of Fenton Murray and Wood. When Boulton discovered that two of its employees, Halligan and Hughes had left, it therefore did not take too much imagination to decide where to look. Watt Junior located them both, and persuaded Hughes landlady to allow him to look through his possessions, finding some copies of drawings of Boulton’s engines. Watt also confronted Halligan, who agreed to return to Boulton’s works in Soho. The only question facing Watt Junior was one of strategy: how long to leave him employed with Fenton, Murray and Wood to spy upon its proceedings.

Further evidence of the infidelity of servant’s is provided by the testimony of the engineer and patent agent, John Farey, to the Select Committee on Patents of 1829 that employees could not be relied on to comply with their obligations. “Such workmen”, he explained, “cannot be kept in any control, because emissaries from rival manufacturers are always on the watch to seduce them.” Even where there were bonds requiring that they continue to work for their Master, Farey pointed to other dangers, such as that they might reveal information for money “and thus spite their masters, as well as get bribes for themselves.”

If, as the evidence suggests, secrecy was an important mode of protecting innovation, and obligations were breached, why do we hear little or nothing of this until the 1810s and 20s? I think the answer is that we have been looking in the wrong places. For the obligations of apprentices and servants were not the normal currency of the high courts, but rather were dealt with elsewhere.

In London, in the eighteenth century, a special court, the Chamberlain's Court, heard complaints against (and by) apprentices. Labour historian Douglas Hay, from York University in Canada, has examined the records for the year of 1787 in the Guildhall Library. Of the 236 disputes, 183 were brought by Masters. Tellingly, he explains they complained of "absenteeism or rudeness or saucy language or idleness; also venereal disease, revealing the master's secrets, and hunting bullocks."

In addition, servants who breached their often lengthy contracts of hire were liable to be taken before magistrates and imprisoned (for up to 3 months): it is perhaps not appreciated amongst intellectual property law specialists (even those with an historical interest) that until 1875 breaching an employment contract was a criminal offence. Indeed, in the case of Boulton's employees Hughes and Halligan, we see that the threat of imprisonment (amongst other things) was some incentive for Hughes to agree to return to the Soho works. And, though there is much empirical work still to be done in the archives, both on the use of secrecy and the enforcement through criminal proceedings, there are clear indications that criminal sanctions were used to protect trade secrets.

Two examples suffice, and simultaneously indicate the continued effect of criminal law in this area well in to the nineteenth century. The first is provided in the evidence to the Select Committee on the law of Master and servant, 1866, by W.R. Roberts, a lawyer who devoted his practice to defending workers. Roberts describes the case of an employee who worked at an ironworks in Rotherham and, before he was due to leave, refused to teach his replacement the skills needed to perform the job on the ground that these were "his own talents" not those of his employer. He was jailed for 1 month in Wakefield prison for this "breach² of contract.

The second example was provided to me by another labour historian, Marc Steinberg, who encountered the example when researching a history of the potteries. John Smallwood, a potter, had a one year contract to work for Ridgeway, but three months before it ended went to work with some other ex-employees of Ridgeway. Ridgeway was furious when he found that the team was producing wares corresponding to Ridgeway's shapes which he regarded as his secret. He brought Smallwood before the magistrates (where he recused himself from the bench), and Smallwood was ordered to return to Ridgeway's to work out his contract, as well as to pay cost.

So, it seems, that there is an explanation for why the matters of trade secrets emerged only rather late before the courts of Chancery: the obligations of secrecy were, for the most part not equitable but contractual, and, in so far as they related to servants, were enforced by criminal proceedings and punishments. Although not always effective, while contracts between employer and employee were lengthy, then these mechanisms would have been more attractive, speedier, closer to hand, and much cheaper than Chancery proceedings. A claim in Chancery, after *Yovatt*, might have led to an injunction, but few employees would have been able to pay the employer's costs.

Mystery 2.

Having indulged my own interest in legal history, let me now move on to examine three issues of potential significance to an audience of legal practitioners. As all relate to the obligations of employees, it is perhaps first worth recalling the basic features of employee liability in this field.

When thinking about the obligations of employees it is necessary to draw two distinctions: first between obligations during employment and those thereafter; and secondly, between express and implied obligation.

As regards express obligations, in the post employment period these are subject to the doctrine of "restraint of trade" and thus must be proportionate to the "interests" that the courts regard as "legitimate" for the employer to protect. I will return to one aspect of this problematic area in the final section of the talk.

If there are no such express obligations, in the post employment period the court will imply an obligation of confidentiality, but this will be confined to "trade secrets or their equivalent." This aspect I covered in my previous talk on *Faccenda Chicken*.

During employment, the employee will be bound by any express contractual restrictions (subject to certain limitations, for example under the Public Interest Disclosure Act.) I do not propose to address this matter.

However, my interest is with the fourth element of the “matrix”, implied obligations *during employment*.

Professor Mark Freedland, in his brilliant book on the Personal Employment Contract, explains that during employment an employee is subject to “a juristic rag bag of rules and doctrines” couched in a “fog of terminologies”. In a recent case, Cranston J. has identified four different duties that are, or may be, implied into the employment contract. First, there is a “duty of good faith and fidelity”. Second, a duty of “mutual trust and confidence”. Third, a duty of confidentiality. And fourth, in the case of senior employees, there are potentially “fiduciary duties” in operation.

The circumstances in which an employee will be regarded as a fiduciary has been carefully analysed by Elias J, as he then was, in *Nottingham University v. Fishel*. He there observed that the duty of a fiduciary is said to be one of “single-minded or exclusive loyalty”, to act in his employer’s interests and not his own; the duty of fidelity being a less onerous obligation of loyalty – “to take into consideration the interests of another”.⁴ Consequently, it is only in certain cases - particularly occupying senior positions - that an employee would come under such duties. Although this analysis has not received universal approval from courts or commentators elsewhere in the Commonwealth, I find it convincing and do not wish to say any more about it. Instead, the mysteries I want to explore relate to the duty of fidelity and “mutual trust and confidence” and the duty of fidelity and the duty of confidence.

The first of these, Mystery No 2, relates to two different obligations, the “duty of fidelity” and the “duty of mutual trust and confidence.”

⁴ *University of Nottingham v. Fishel* [2000] I.C.R. 1462, xxxx (Elias J.); *Helmet Integrated Systems Ltd v Tunnard* [2007] F.S.R. (16) 437, 448 (para. 36) per Moses LJ.

“Fidelity” you may recall was regarded in 1797 as the “glory and Perfection of a Servant.” The so-called duty of fidelity was recognised as an implied term of a servant’s contract by Samuel Comyn as early as 1824 and by 1946 could be said to be “indisputable.” That said, its content is notoriously vague. It probably includes a duty not to compete, a duty not (during employment) to canvass the customers of the employer, and a duty not to copy documents or memorise customer lists. Moreover, its conceptual basis is equally mirky: the duty of fidelity is sometimes described as a duty not to harm the employer’s interests, sometimes as a duty to be honest or to deal fairly or honourably.

In contrast, the duty of “mutual trust and confidence” is the “new kid on the block” - with most commentators tracing its origin back to the decision of a different Mr Justice Arnold (John Lewis Arnold, who soon after became President of the Family Division, a position he occupied until 1988) in *Courtaulds Northern Textiles Ltd v Andrew* in the late 1970s (where an employee successfully claimed constructive dismissal after his manager said he “couldn’t do the bloody job anyway”). The duty was recognised at the highest level in *Malik v. BCCI* [1998] where the House of Lords accepted that BCCI had breached the implied duty when it engaged in fraudulent conduct. Lord Steyn stated that an employer must not “without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.” The duty has usually been relied on by employees, who have succeeded in complaining where they have been verbally abused, where their role or the location of their job is changed peremptorily, or where grievance procedures have not been followed.

That said, the duty is described as a “mutual” one, and thus can be used by an employer against an employee. A topical, if unsuccessful example of such a claim is provided by the recent decision of Jack J. in *Fisher v. Dresdner Kleinwort*, in which the employer had argued that the duty of mutual trust and confidence required the employees to forego voluntarily any entitlements to bonuses during the recession. And, while in *Malik*, Lord Steyn had suggested that the duty of “mutual trust” added little to the employee’s duty of good faith, - a view reiterated by Tom Croxford, who describes the duties as “distinct”, other courts and commentators have suggested that the two doctrines are connected. In *Fisher*, Elias J. suggested that the two duties are related and may “shade into one another”. Indeed, Lord Denning in *Woods v WM Car Services*, in 1981, observed explicitly that “just as a servant must be good and faithful, so an

employer must be good and considerate,” effectively seeing the two obligations as two sides of the coin – and the duty of fidelity as the employee side.

Academic labour law professors have also discussed this. Douglas Brodie, from Edinburgh, suggested that there is a need for “internal coherence” between the two duties. Mathew Boyle has sought to treat the mutual duty as overarching, with the employee’s duty of good faith as particular articulation.

Although quite some jurisprudential (not to say judicial) work would be needed before the duty of “fidelity” can be assimilated within the duty of mutual trust and confidence, I think there are at least five reasons for supporting just such a move.

First, it would remove one element of the complex layering of implied duties.

Second, it would remove the rather inappropriate language of “fidelity” from this area of the law. “Fidelity” might have been appropriate language in the 18th or early 19th century, but today it is something one might say of a dog rather than a fellow citizen. Employees are now recognised as autonomous agents with their own agendas, and it is unnecessary and unrealistic to ask that they wholly align their interests with those of the employer even during the employment period.

Third, it would clarify that the duty is a common law one and remove confusion that has arisen between legal notions of fidelity and good faith and the “fiduciary” duties known to Equity.

Fourth, it would potentially clarify the content of the duty. First, it would acknowledge that some acts may be “unfaithful” or “disloyal” but justified as having “reasonable and proper cause”. Preparations to compete and whistleblowing, for example. Second, it would highlight the need for the wrongs to be serious before they breached the duty of fidelity: they must be such as would “destroy or seriously damage” the working relationship of the parties.

Mystery 3

The third matter I would like to consider is the relationship between the duty of fidelity and the duty of confidence. Much case law, and many commentators, assume that the duty of confidentiality is a component of the broader duty of fidelity. Others, such as Cranston J., treat the duty of confidence as a distinct strand. Although in many circumstances an employee will simultaneously breach both duties, I believe there are important circumstances where a person may breach a duty of fidelity but not an obligation of confidence, or alternatively an obligation of confidence but not a duty of fidelity. Thus I prefer Cranston J.'s account. Let me elaborate.

First, let us consider a bunch of old cases where an employee was held liable for copying lists or drawings before departing employment: cases such as *Robb v. Green* [1895], where the defendant, a farm manager at the plaintiff's business selling live game and eggs copied lists of customers before leaving to set up his own game farm; or *Merryweather v. Moore* [1892] where the defendant, who had worked for the plaintiffs for ten years, copied a table of dimensions of various engines before leaving and joining a rival, Mobbs & Co.

Subsequent courts have treated these cases as unproblematic, but there remains a lack of clarity as to exactly how they are to be understood.

Firstly, we might ask whether they are cases based on breach of an obligation during or after employment? Following *Faccenda Chicken v Fowler*, I think it would be very strained to say these are cases concerning acts post employment in relation to "trade secrets". So I think they need to be considered as cases concerning wrongs during employment.

Secondly, we might ask whether these are cases of breach of duties of confidence or fidelity? *Robb v Green* could certainly be seen as either, or both. The defendant admitted the copying was surreptitious and dishonourable, and there is no question that during employment the copying was of confidential information. But *Merryweather* is

less obviously a case of confidentiality: the facts are not completely clear, but probably the engines themselves were on the market, so one might question whether the information was really confidential. And there certainly are cases which explicitly recognise that the non-copying rule applies even to non-confidential information. A recent example is *Crowson Fabrics v Rider*, where Peter Smith J. indicated there would be liability for copying and retaining supplier data, even if it was not confidential.

In contrast, there are indications in the case-law that the duty of fidelity does not operate during so-called periods of “garden leave”, that is, periods when the employment contract continues in operation but, in accordance with the contract, the employer has decided the employee should not attend work. In two cases, *Balston v Headline Filters* and *Symbian v Christiansen*, Scott J implied that the duty of fidelity might not operate during such periods. *Balston* was an interim injunction case, and the statement in *Symbian* was obiter (as the defendant was subject to an express term), so neither is a strong authority for the proposition. Nevertheless, Scott J. was later elevated to the House of Lords, and his comments doubtless carry some weight.

If Scott J. is right, and the duty of fidelity ends when the employment relationship (rather than the employment contract) comes to an end, are we to suppose that the duty of confidence also falls away? That would seem to me to be a very strange supposition, not least given that *Faccenda Chicken* suggests that the duty of confidence continues in “attenuated form” after employment has ceased. John Hull has tried to avoid the difficulty by dividing the implied duty of fidelity into a duty of fidelity and a distinct duty of good faith. However ingenious that solution may be, it just adds to the “fog of terminologies”. Better, to my mind, to recognise that an employee will be under two distinct duties: a duty of fidelity (or, in due course, a duty of mutual trust and confidence) and, where he or she is in possession of information which he understands, or ought to understand, is confidential, a duty of confidence.

Mystery 4

The fourth and final mystery takes us in to the realm of post-employment obligations. The background to the mystery is the Court of Appeal’s decision in *Faccenda Chicken* to leave open the question of whether the implied post-employment obligation not to disclose information is limited, like the obligation of non-use, to a narrow category of

confidential information called “trade secrets” or extends to all confidential information that is not trivial (and not accessible from public sources). The basis for drawing the distinction reflected, it seems, the assumption that while an obligation not to use all confidential information would operate in restraint of trade, an obligation not to disclose information would not implicate the doctrine of restraint of trade. And a number of cases seem to confirm that assumption. In *Attorney General v Blake*, for example, the House of Lords seemed untroubled by the idea of a lifelong obligation of non-disclosure of any information that Blake had acquired in the intelligence services.

I want to cast doubt upon this assumption and to argue that the restraint of trade doctrine does indeed apply to duties of non-disclosure. It may well be true that, for a variety of reasons, obligations of non-disclosure are less likely to be treated as unenforceable than obligations prohibiting the use of information, but that does not mean that the doctrine is inapplicable. Indeed, I think *Blake* supports the proposition that it does.

Let me begin with perhaps the most obvious observation: some “trades” depend on disclosure, and a restriction on disclosure would evidently then be a restriction on trade. In *Neville v Dominion of Canada News*, [1915] a newspaper received a loan from the plaintiff and agreed in return not to make any adverse comment about the company. The Court of Appeal held that the agreement was unenforceable as a restraint on trade. Clearly, then, obligations of non-disclosure can constitute restraints at least where the covenantee’s business involves expression.

Second, it is clear that some “uses” with inevitably involve disclosure of information. In these situations, if obligations on use are regulated by the doctrine of restraint of trade, it seems evident that obligations of non-disclosure ought also to be regulated in the same way. Otherwise public policy would be undermined.

Third, it seems that any restriction on disclosure could be a restraint on trade. In *Attorney General v Blake* Lord Woolf MR considered an example of the director of a company seeking to write his memoirs, including details of conversations during a takeover bid. The Master of the Rolls asked whether it would be possible to require such a person never to disclose details, no matter that the takeover attempt had succeeded and the information had become common knowledge. A clause purporting to

impose such a restraint would, he said, be an “unjustifiable restraint of trade and an unwarranted interference with freedom of speech.”

If writing ones memoirs is an activity that counts as a “trade” such as to engage the doctrine of restraint of trade, it is difficult to envisage any expression or disclosure that would not do so.

Nevertheless, while it seems to me that the doctrine of restraint of trade does apply to non-disclosure obligations, as well as non-use obligations, two further observations are worth making.

The first derives from *Blake* itself, where, despite Lord Woolf MR’s comment, the obligation went unchallenged. This was because while it related to “trade” it was no restraint at all. As Lord Woolf observed, the contractual restraint did not go beyond what was prohibited by the Official Secrets Act 1989. Or, as Lord Hobhouse indicated in the House of Lords, “its purpose and justification was to support and reinforce the provisions of the criminal law”: it was thus not a restraint of trade.

The reasoning in *Blake* reminds us that to assess whether a contract imposes a restraint, we should take care to compare the obligations with the background obligations already binding the covenantor. In *Blake*, these were criminal obligations, and Blake’s contract merely added additional civil liability. It may also be that the comparison could be made with existing civil obligations, in particular, rights of privacy under article 8. Consequently, the doctrine of restraint of trade would not be applicable to a contractual restriction on disclosure of information relating to the private life of the covenantee. This reasoning can, in retrospect at least, explain cases like *Attorney General v Barker* (1990) and *Attorney General v Parry* (2004), both of which concerned express non-disclosure obligations by members of the royal household.

The second observation relates to the application of the doctrine to circumstances where obligations of non-disclosure do “restrain trade” and thus implicate the doctrine. As is well known, such covenants are to be scrutinised to determine whether they are reasonable having regard to the interests of the covenantee and the public interest. This

test, in fact, is one of “proportionality”: the question is whether the obligation is broader or longer than is necessary to protect the interests of the covenantee. But the important point is that, if the information constitutes an interest justifying protection, it will frequently be legitimate for a non-disclosure obligation to be worldwide in scope and to last for so long as the information retains its quality of confidentiality.

Conclusion

Time is, I am afraid, not on my side. So let me close with one general comment on the importance of this area of law.

Studies - including the most recent Innovation Survey - show that businesses rely on confidentiality in order to protect their ideas and innovations much more commonly than they rely on formal intellectual property rights, such as patents. Indeed Jorda and Kaesche have described patents as “the tip of the iceberg in an ocean of trade secrets.” It is important therefore that the legal system creates an environment where information can be disclosed and ideas developed within the setting of the firm, without fear of disclosure. At the same time, we know that competition is frequently enhanced by ex-employees setting up in competition with former employers, or moving to competitors. Studies from the United States suggest there can be very significant public benefits from so called “technology spill-overs” associated with employee mobility.

The restraint of trade doctrine, as well as the limits on implied terms in the post-employment context, contribute to ensuring that the legitimate desire of employers to protect information given to, developed by, or shared between employees is not transformed into a legal mechanism that inhibits employee mobility and the development of competition. It is important, too, that duties *during* employment do not come to be interpreted in a way that inhibits unduly the capacity of employees to leave and set up in competition. Courts, inevitably, have a difficult job in deciding when legitimate preparations to compete by a person still employed become illegitimate threats to the existing employer. Broad interpretation of the duty of fidelity, particularly when coupled with notions such as the “springboard doctrine”, raise particular concern. Although these cases are notoriously fact specific, the existing law in this field lacks an appropriate level of clarity. I hope this lecture will have made the law a little less mysterious.