

1 Ch.

A

[COURT OF APPEAL]

FACCENDA CHICKEN LTD. v. FOWLER AND OTHERS

FOWLER v. FACCENDA CHICKEN LTD.

B

1985 Oct. 21, 22, 23;  
Dec. 5

Kerr, Neill and Nourse L.JJ.

*Confidential Information—Breach of confidence—Employment—Salesmen acquiring skill and knowledge during course of employment—Salesmen leaving and forming company in competition with employer's business—Whether knowledge of employer's customers confidential—Whether use of knowledge in breach of implied term of contract—Whether actionable conspiracy*

C

D

E

F

G

H

The first defendant, while employed as the plaintiffs' sales manager, established an operation whereby fresh chickens were daily offered for sale from itinerant refrigerated vans. Each of the van salesmen employed by the plaintiffs covered a different sector in the plaintiffs' business area and, after a few weeks, knew the names and addresses of the customers in their sector; the detailed routes taken for the supplying of customers; the customers' requirements; the times of deliveries; and the prices paid, which varied from customer to customer (the "sales information"). The first defendant subsequently resigned from the plaintiffs' employment and formed his own company to carry on a similar business in the same area. Eight of the plaintiffs' employees, including several van salesmen, went to work for him. In an action brought by the plaintiffs against the first defendant, his company, and the eight former employees, the plaintiffs alleged that the employees had used and disclosed the sales information for the assistance of the first defendant's business to the plaintiffs' detriment and in breach of the alleged implied term of their contracts of employment that neither during the currency of their employment nor thereafter would they use confidential information or trade secrets gained by them in the course of their employment. The plaintiffs claimed, *inter alia*, an injunction and damages for breaches of the respective contracts of employment and/or breach of confidence. The first defendant brought an action against the plaintiffs for alleged commission due to him from them and the plaintiffs counterclaimed damages for breach of contract by the abuse of confidential information. None of the employees' contracts of employment with the plaintiffs contained express terms against the unauthorised use of confidential information or trade secrets gained by them in the course of their employment.

Goulding J. held that information gained by an employee in the course of his employment fell into three classes: information which was so easily accessible to the public that an employee was at liberty to impart it to anyone during his employment or afterwards; confidential information which he could not use or disclose during his employment without breaching his duty of fidelity to his employer, but which, in the absence of an express restrictive covenant, he was at liberty to use thereafter; and specific trade secrets which he was not entitled to use either during or after his employment. He held that the sales

information came within the second category of confidential information and that, accordingly, there being no express term in the contracts of employment restraining its use, the employees were at liberty to use and disclose it in competition with the plaintiffs once they had left their employment. He accordingly dismissed the plaintiffs' action and counterclaim.

On the plaintiffs' appeal:—

*Held*, dismissing the appeal, that, in the absence of express terms, an employee was bound by his implied duty of good faith to his employer not to use or disclose for the duration of his employment confidential information gained in the course of the employment, and was furthermore bound by an implied term of his contract of employment not to use or disclose, either during his employment or thereafter, information which was not merely confidential but which was properly to be described as a trade secret; but that no term was to be implied which imposed upon him an obligation binding upon him after his employment had ceased not to use or disclose confidential information short of a trade secret; and that, accordingly, since neither the sales information nor the information relating to prices amounted to a trade secret, the employees were at liberty to use and disclose the information once they had left the plaintiffs' employment (post, pp. 135G–H, 136B–D, 137B–E, 138C, D, 140C–F).

*Robb v. Green* [1895] 2 Q.B. 315, C.A.; *Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239; *Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80, C.A. and *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1; [1965] R.P.C. 239 applied.

*Per curiam*. An employer cannot extend the period of protection of confidential information of the category that is only protected during the duration of the employment by means of a restrictive covenant (post, p. 137E–G).

Decision of Goulding J. [1984] I.C.R. 589 affirmed.

The following cases are referred to in the judgment of the court:

*Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239

*Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293; [1964] 3 All E.R. 289

*Leng (Sir W. C.) & Co. Ltd. v. Andrews* [1909] 1 Ch. 763, C.A.

*Littlewoods Organisation Ltd. v. Harris* [1977] 1 W.L.R. 1472; [1978] 1 All E.R. 1026, C.A.

*Marshall (Thomas) (Exports) Ltd. v. Guinle* [1979] Ch. 227; [1978] 3 W.L.R. 116; [1978] I.C.R. 905; [1978] 3 All E.R. 193

*Morris (Herbert) Ltd. v. Saxelby* [1916] 1 A.C. 688, H.L.(E.)

*Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1; (Note) [1964] 3 All E.R. 54; [1964] 3 All E.R. 731; [1965] R.P.C. 239

*Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.* (1932) 49 R.P.C. 461

*Robb v. Green* [1895] 2 Q.B. 1, 315, C.A.

*Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, C.A.

*Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923; [1967] 2 All E.R. 415, C.A.

*United Indigo Chemical Co. Ltd. v. Robinson* (1931) 49 R.P.C. 178

*Vokes Ltd. v. Heather* (1945) 62 R.P.C. 135, C.A.

*Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80, C.A.

*Worsley (E.) & Co. Ltd. v. Cooper* [1939] 1 All E.R. 290

A The following additional cases were cited in argument:

*Ackroyds (London) Ltd. v. Islington Plastics Ltd.* [1962] R.P.C. 97

*Baker v. Gibbons* [1972] 1 W.L.R. 693; [1972] 2 All E.R. 759

*Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41

*Commercial Plastics Ltd. v. Vincent* [1965] 1 Q.B. 623; [1964] 3 W.L.R. 820; [1964] 3 All E.R. 546, C.A.

*Coral Index Ltd. v. Regent Index Ltd.* [1970] R.P.C. 147

B *Diamond Stylus Co. Ltd. v. Bauden Precision Diamonds Ltd.* [1973] R.P.C. 675

*Hivac Ltd. v. Park Royal Scientific Instruments Ltd.* [1946] Ch. 169; [1946] 1 All E.R. 350, C.A.

*Lamb v. Evans* [1893] 1 Ch. 218, C.A.

*Louis v. Smellie* (1895) 73 L.T. 226, C.A.

*Mason v. Provident Clothing and Supply Co. Ltd.* [1913] A.C. 724, H.L.(E.)

C *Stephenson Jordan & Harrison Ltd. v. MacDonald & Evans* (1951) 69 R.P.C. 10, C.A.

*Under Water Welders & Repairers Ltd. v. Street and Longthorne* [1968] R.P.C. 498

*United Stirling Corporation Ltd. v. Felton and Mannion* [1974] R.P.C. 162

*Yates Circuit Foil Co. Ltd. v. Electrofoils Ltd.* [1976] 2 F.S.R. 345

#### D APPEALS from Goulding J.

By writ dated 10 September 1981 in the first action (in the Chancery Division) the plaintiffs, Faccenda Chicken Ltd., claimed against the defendants (the first nine being individuals formerly in the employment of the plaintiff but being subsequently employed by the tenth defendant, Fowler Quality Poultry Products Ltd.) (1) an order that the nine named defendants be restrained from using and disclosing confidential trade secrets and other confidential material of and appertaining to the plaintiffs' business and obtained by them whilst they were severally in the employment of the plaintiffs; (2) an order that the tenth defendant be restrained from using and disclosing any and all of the aforesaid confidential trade secrets and other confidential material of and appertaining to the plaintiffs' business and communicated to it or to any of its servants or agents on its behalf by any of the other defendants to the action, their servants or agents; (3) damages against the individual defendants for breaches of their several contracts of employment with the plaintiffs and/or for breaches of confidence and/or for conspiracy to use and disclose confidential material obtained by them of the plaintiffs' business affairs and arising out of the activities of the tenth defendant in the business as wholesalers and/or retailers of poultry products and those of the first nine defendants in permitting and/or assisting in the operation of such business to the detriment of the plaintiffs' business goodwill and connection; (4) further and other relief; (5) costs.

By writ dated 16 September 1982 in the second action (in the Queen's Bench Division and transferred to the Chancery Division on 15 March 1983) Barry Fowler, the first defendant in the Chancery action, claimed against Faccenda Chicken Ltd. £22,975 for outstanding commission said to be due to him and interest on that sum. In a counterclaim Faccenda Chicken Ltd. sought damages under three heads: (1) breach of contract by abuse of confidential information; (2) alleged wrongful disposals or conversion of chickens in November 1980;

(3) alleged conspiracy between Barry Fowler and two of the defendants to obtain the disclosure to him of certain weekly costings of Faccenda Chicken Ltd. A

Giving judgment on 8 November 1983, Goulding J. [1984] I.C.R. 589 held that the individual defendants had necessarily acquired the sales information in the course of their employment with the plaintiffs; that the information, which had become part of their skill and knowledge, was confidential; and that although those defendants could not use or disclose the information while they remained in the plaintiffs' employment without breach of their implied duty or fidelity, once they had left the employment they were free to use the information in competition with the plaintiffs. The judge dismissed the plaintiffs' claim and counterclaim. B

By notice dated 12 December 1983 and amended on 11 May 1984, the plaintiffs appealed against the judge's order on the grounds that (1) the judge erred in law in holding that in addition to non-confidential information there were two categories of confidential information that might be acquired by an employee in the course of his service (i) that which (unless restrained by express covenant) he was free to use or disclose for his own benefit and/or to his ex-employer's detriment once his employment had terminated; and (ii) that which he was never free to use or disclose, except for his employer's benefit. (2) The judge should have held that where confidential information had been acquired by an employee in the course of his service (i) he did not become free to use or disclose it for his own benefit and/or to his employer's detriment, merely by leaving his employer's service; and (ii) that was so whether or not a covenant in restraint of trade had or could have been validly imposed on the employee in order to protect that information. (3) Alternatively, that on the pleadings in the action it was not open to the judge to find in relation to the confidential information the subject of the action which had been acquired by the first defendant in the course of his service that he was not free to use or disclose it for his own benefit or to the plaintiffs' detriment during his employment but was free to do so after the cessation thereof. (4) Alternatively, that if contrary to the plaintiffs' contention the judge had not erred in the respects mentioned above he misdirected himself in holding on the facts found that the sales information and prices charged to the plaintiffs' various customers, being part of the sales information, fell within paragraph (1)(i) above and not into paragraph (1)(ii) above. (5) The judge failed to distinguish between the effect in law of the different constituent parts of the sales information. In particular, the plaintiffs would contend that the information of the prices charged by them to their several customers was secret, and that if (contrary to the plaintiffs' contentions) the judge had not erred in the respects mentioned in (1) above, he misdirected himself in holding that the information fell into category (1)(i). (6) The judge having held that (a) the sales information would be of value to competitors of the plaintiffs; (b) persons outside the plaintiffs' employment could only obtain approximate knowledge of the prices at which the plaintiffs sold their goods to their several customers and (c) a difference of even 1p per pound might be important in the competitive trade, the judge misdirected himself in placing that C  
D  
E  
F  
G  
H

A information regarding prices acquired by the plaintiffs' former salesmen in category (1)(i). It was alleged that if such category rightly existed, the information should have been placed in category (1)(ii). (7) The judge should have held on the facts found by him that the sales information and the prices were trade secrets of the plaintiffs. (8) The judge erred in law in holding that the so called springboard doctrine was considerably limited by a servant's freedom to compete with his former employer after lawful termination of his employment.

B The facts are stated in the judgment.

C *Conrad Dehn Q.C.* and *John Trench* for the plaintiffs. The issue in this case is whether the first defendant, when setting up a business in competition with his previous employers, and in employing their former employees, was entitled to make use of information gained by reason of that former employment.

D The judge erred in holding that there were three categories of information acquired by an employee in the course of his employment: (1) non-confidential information which was trivial or easily accessible from public sources; (2) confidential information which an employee could not use except for his employer's benefit during his employment but which, unless restrained by covenant, he was free to use or disclose for his own benefit or to his employer's detriment once his employment terminated (this would include information which an employee had to treat as confidential but which, once learned, "necessarily" remained in his head and became part of his skill and knowledge applied in the course of his employer's business); and (3) confidential information which an employee was never free to use or disclose except with his employer's authority.

E The judge was wrong as to the content and legal effect of such classification and if his classification was correct he was wrong in holding that the confidential information consisting of the sales information, in particular the prices charged to the plaintiffs' customers, fell into category (2) and not (3).

F If confidential information is imparted by X to Y in circumstances which involve an obligation of confidence, the law is that Y is not permitted to use or disclose it except with X's authority, alternatively, to X's detriment: see *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, 213, 215, 216, 218; *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293, 1295D, 1310G, 1311G; *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 931, 933; *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 46-48, 51 and *United Stirling Corporation Ltd. v. Felton and Mannion* [1974] R.P.C. 162, 167. The acquisition by an employee in the course of his service of information which he must treat as confidential is an example of this situation: see *Louis v. Smellie* (1895) 73 L.T. 226, 228; *Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239, 245; *Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.* (1932) 49 R.P.C. 461, 462, 480, 481; *Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80, 89 (an example of an employee's breach of duty of good faith after his employment has terminated); *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293, 1310-1311;

*United Stirling Corporation Ltd. v. Felton and Mannion*, at p. 167; *Yates Circuit Foil Co. Ltd. v. Electrofoils Ltd.* [1976] 2 F.S.R. 345, 380–381 and *Thomas Marshall (Exports) Ltd. v. Guinle* [1979] Ch. 227, 247–248. To copy information acquired in the course of employment is a breach of the employee's duty of good faith to his employer. It would be difficult to accuse an employee of bad faith where he could not help but learn information, but it would be a clear breach of his duty of good faith intentionally to learn information for the purpose of using it to his employer's detriment. A

There is no special law of confidential information which applies in the case of master and servant. In such cases the court will imply a contractual term at least as restrictive as that above and as alleged and admitted here: see also *Under Water Welders & Repairers Ltd. v. Street and Longthorne* [1968] R.P.C. 498, 507; *Thomas Marshall (Exports) Ltd. v. Guinle*, at p. 247 and *Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.*, at p. 480. B

There is only one category of confidential information. Once acquired it may never be disclosed except with permission. However, some confidential information is more important than others and its importance will determine whether and if so to what extent a covenant against competition imposed on an employee to protect it will be regarded as reasonable and upheld by a court. Confidential information sufficiently important to be described as a trade secret will generally justify a covenant against competition. An employee is entitled to make use, after his employment, of matters of a general nature learned as a result of good instruction. But it would be a breach of his duty of good faith to reveal at any time confidential information let alone trade secrets such as, in this case, prices. C

The judge was wrong in confining category (1) information to that which was trivial or easily accessible from public sources. It is a necessary but not sufficient condition of information being confidential that it should be neither trivial nor easily accessible from public sources: see *Salman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, 65 R.P.C. 203, 215. There is much information which is not trivial and easily accessible but which is not confidential; for example, information about the employer's organisation and general method of business (*Sir W. C. Leng & Co. Ltd. v. Andrews* [1909] 1 Ch. 763, 774; *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, 704–705 and *Stephenson Jordan & Harrison Ltd. v. MacDonald & Evans* (1951) 69 R.P.C. 10, 14–16); general technical knowledge (*Commercial Plastics Ltd. v. Vincent* [1965] 1 Q.B. 623, 641B) and the names of customers (*Baker v. Gibbons* [1972] 1 W.L.R. 693, 694, 700, 702), as distinct from the particular prices which individual customers are charged. The covenant against competition which can be imposed to protect goodwill is not to restrain the use of names of customers but the abuse of influence over them: see *Herbert Morris Ltd. v. Saxelby*, at pp. 702, 709, 710. This explains why an ex-employee, unless restrained by covenant, is permitted to canvass his former employer's customers: see *Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80, 89. D

E

F

G

H

A As to the judge's category (2), while there may be information which is subject to a limited restriction during the continuance of the employee's employment, it is not confidential information. Such information includes information about the employer's organisation and general methods of business, general technical knowledge, the things a good employer will teach an employee, and the names of his customers. An employee will generally not be able to use such information for his own benefit during his employment because of restraints imposed by his contract of employment: see *Wessex Dairies Ltd. v. Smith*, at pp. 85, 88 and *Hivac Ltd. v. Park Royal Scientific Instruments Ltd.* [1946] Ch. 169, 174, 180. Employees have been restrained from using, after termination of their employment, lists of names made during their employment (as in *Lamb v. Evans* [1893] 1 Ch. 218, 226, 229-230, 235-236 and *Robb v. Green* [1895] 2 Q.B. 1, 13, 16-17; 315, 316-317) not because the information was confidential, but because of the employees' improper conduct in making the lists: see also *Coral Index Ltd. v. Regent Index Ltd.* [1970] R.P.C. 147, 149 and *Diamond Stylus Co. Ltd. v. Bauden Precision Diamonds Ltd.* [1973] R.P.C. 675, 678.

C  
D The judge's definition of category (2) information cannot be correct: what necessarily remains in an employee's head and forms part of his skill and knowledge will include non-confidential information; the definition applies equally to category (3) information (compare *Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239, 242); the same information may remain in one employee's head but not another's; and the information may not remain in the employee's head for ever. In *United Indigo Chemical Co. Ltd. v. Robinson* (1931) 49 R.P.C. 178, 179, 181, 186, the employee was not told and did not know that the process in question was confidential. Likewise in *E. Worsley & Co. Ltd. v. Cooper* [1939] 1 All E.R. 290, 307, the information was not imparted in confidence: see also at pp. 308A-D, 310A. The fact that confidential information is not embodied in a document but is carried away in the employee's head is not a reason against the grant of an injunction preventing its use or disclosure: see *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1, 5A and *Amber Size and Chemical Co. Ltd. v. Menzel*. Although it may not be physically or by injunction possible to stop the employee using the information, because of difficulties of proof and enforcement, it does not follow that damages should not be awarded where misuse and damage are proved: see *United Indigo Chemical Co. Ltd. v. Robinson*, 49 R.P.C. 178, 187, 194 and *Littlewoods Organisation Ltd. v. Harris* [1977] 1 W.L.R. 1472, 1478-1479.

E  
F  
G The judge's category (2) is inconsistent with *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, in which the House of Lords distinguished between the general skill and knowledge which an employee of any ability must necessarily obtain from any employer in that line and knowledge of any matter or skill in which his former employer could be said to have any property at all (see at pp. 704-705, 710, 711, 714). That distinction was also suggested to constitute the distinction between non-confidential information and possible confidential information, at pp. 705, 714: see also *Mason v. Provident Clothing and Supply Co. Ltd.* [1913] A.C. 724, 740-741, where Lord Shaw of Dunfermline distinguished

H

between knowledge which was as “real and objective as the possession of material goods” and the subjective equipment of the workman which becomes part of himself and was to be used for his own maintenance and advancement.

The judge was wrong in deciding what the effect of information being in each category was. An employee might, whilst employed, be restrained by his obligation of good faith from disclosing even non-confidential information to a competitor. There is no good reason why an employee who has acquired confidential information should be freed from his duty not to disclose it merely by leaving his employment, possibly after a very short time (*Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.*, 49 R.P.C. 461, 481), whereas confidential information acquired by, for example, an independent contractor would be protected indefinitely: see *Ackroyds (London) Ltd. v. Islington Plastics Ltd.* [1962] R.P.C. 97, 103–104, 105. The effect of the judge’s classification leads to uncertainty and unfairness. In order to explain and justify differing restraints on recipients of confidential information depending on whether or not they acquired the information in the course of their employment, would require the implication of a term in the contract of employment dealing with the matter, but there is no justification for such a term. Such a term would be inconsistent with the implied obligation of faithful service, and contrary to public policy. Because of the implied obligation of faithful service in a contract of service the restraints on an employee should be even greater after termination than upon others: see *Robb v. Green* [1895] 2 Q.B. 315 and *Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80.

The judge was wrong in saying that an employer could restrain the use by the employee of category 2 information after the termination of the employment by means of a restrictive covenant. Such a covenant is in general of only limited use because of the difficulty of proving a breach: see *United Indigo Chemical Co. Ltd. v. Robinson*, 49 R.P.C. 178, 187 and *Littlewoods Organisation Ltd. v. Harris* [1977] 1 W.L.R. 1472, 1479B. But a covenant against competition is only enforceable if it is reasonable: see *Commercial Plastics Ltd. v. Vincent* [1965] 1 Q.B. 623, 640. A covenant to protect confidential information short of a trade secret may not be valid: see *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, 711–712 and *Commercial Plastics Ltd. v. Vincent*, at pp. 642 and 647. On that basis the purpose of such a covenant would be to make more effective the protection after termination of employment of information in category 3, not to protect information in category 2. The court’s reluctance to grant an injunction to enforce an implied obligation of confidence because of the difficulties of proof of breach, is no reason for saying that no such obligation exists. Proof of breach and conspiracy to commit such breaches may be proved and damages awarded: see *Robb v. Green*, at pp. 19–20; and *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 932. Thus, on the basis of the judge’s categorisation, category 2 could only be protected, after termination of the employment, by claims for an injunction to restrain threatened wrongful use or disclosure, or for damages on proof of wrongful use or disclosure.

A Contrary to the judge's findings, the sales information was protected from disclosure after the first defendant's employment ended. In as much as the court upholds his categorisation, he was wrong to put the sales information in category 2 and not category 3. The judge found that the sales information would be of value to competitors; that persons outside the plaintiffs' employment would only obtain approximate knowledge of the prices charged to individual customers; and that a difference of even one penny in the pound might be important in the competitive trade; that the information was confidential information received by an employee to advance his employer's business which he had no right to reveal to anyone else. The information was not general knowledge of something which the employees learned by means of directions or instructions from their employers: see *Sir W. C. Leng & Co. Ltd. v. Andrews* [1909] 1 Ch. 763, 773; and *Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80, 89; nor was it "general technical knowledge" within the meaning of *Commercial Plastics Ltd. v. Vincent* [1965] 1 Q.B. 623, 640D, 641B, D, F, 642A. Such information, in particular information about prices, is a trade secret and therefore within category 3: see *Robb v. Green* [1895] 2 Q.B. 1, 11, 17; *Sir W. C. Leng & Co. Ltd. v. Andrews* [1909] 1 Ch. 763, 774; *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, 704, 705 and *Thomas Marshall (Exports) Ltd. v. Guinle* [1979] Ch. 227, 248D. A man of ordinary honesty and intelligence would recognise such information to be the property of his former employer and not to do with as he liked and that it was improper to put such information at the disposal of his new employer: see *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1, 5B, 6D. Knowledge of sales information is readily separable by an employee from his general knowledge of his employer's business and acquired skill (*Printers & Finishers Ltd. v. Holloway*, at p. 6C).

E A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to him who imparted it even if all features have been published or are available for inspection: see *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293, 1317-1319 and *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 931-932, 933. An ex-employee should not be exempt from the rule merely because he is prima facie permitted to compete with his former employer and canvass his customers.

G *Peter Crawford Q.C.* and *James Gibbons* for the defendants. The appeal involves the consideration of three relevant legal principles: (1) the employee's duty to serve his master faithfully (the duty of fidelity, or good faith); (2) the freedom of an individual to use his knowledge and talents freely (the freedom to work); and (3) the equitable obligation of confidence. *Mason v. Provident Clothing and Supply Co. Ltd.* [1913] A.C. 724, 739, is the first example of the balancing exercise between an employee's duty of fidelity and an individual's freedom to work.

H The duty of fidelity includes the duty not to disclose the employer's affairs to his detriment and the duty not to misuse his employer's property, for example lists and plans. The duty not to disclose may be

the same as saying that the protected information is confidential. In an ordinary contract of employment the duties cease on termination of the contract: see *Robb v. Green* [1895] 2 Q.B. 1, 14, per Hawkins J. and *Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80, 88–89. It should be borne in mind that in *Thomas Marshall (Exports) Ltd. v. Guinle* [1979] Ch. 227, the contract of employment, and therefore the duty of fidelity, was still in being. During the continuation of a contract of employment the employee is plainly under a duty to observe his master's interests and this imposes upon him the obligation of "confidence" in relation to his master's affairs. A

An employee's contractual obligations may, by agreement, be extended beyond the contract, but such extensions, by way of restrictive covenants against competition and the like are subject to the court's supervision and will only be enforced if they are reasonable: see for example *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, 690. That case makes it clear, however, that if an employer wishes to restrict an employee after the termination of his contract of employment, he must set it down in black and white. Such a provision will only be upheld if there is some interest of the employer which is protected. Such interests would include trade secrets and the interest in not having his customers solicited or enticed away from him: see pp. 701–702. But a covenant against competition per se will not be upheld: see also *Littlewoods Organisation Ltd. v. Harris* [1977] 1 W.L.R. 1472. B

The individual's freedom to work includes the liberty of an employee to use his skills and knowledge freely, including the skills and knowledge honestly acquired in the course of his previous employment: see *United Indigo Chemical Co. Ltd. v. Robinson*, 49 R.P.C. 178, which is very closely analogous to the present case. *Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.*, 49 R.P.C. 461, is to be distinguished from *United Indigo*. In *Reid* it was an express term of the contract of service that the information imparted was secret and should not be disclosed, thus, there was a specific covenant against disclosure and the information sought to be protected was capable of being regarded as a trade secret. In *E. Worsley & Co. Ltd. v. Cooper* [1939] 1 All E.R. 290, where the defendant was in an executive position similar to the first defendant in the present case (see p. 295), there was no express covenant; no warning as to the secrecy of the material; the information was obtained openly and honestly and inevitably acquired; it was not obtained as a result of communication by the employer; and the information was not in the nature of a trade secret or secret process. In these respects the case is analogous with the present. The freedom to work also includes the freedom to compete with a former employer and to canvass a former employer's customers, which necessarily involves the use of knowledge and skills obtained from the former employment including customers' names, addresses, preferences and prejudices. The exercise of this freedom is legitimate only if no documents are used or taken away for the purpose: to do that involves misuse of the employer's property during the employment in breach of the duty of fidelity. C D E F G H

The obligation of confidence may arise either contractually or independently of contract, but only where the information can properly

A be described as "secret": see, for example *Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239; and where the information is communicated in circumstances which impose a burden of confidence, such as communications from inventors to potential exploiters of the invention: see *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41. Such an obligation can arise in the context of an employer/employee relationship and may do so by implication in the case of secret information: see *Vokes Ltd. v. Heather* (1945) 62 R.P.C. 135, 141. But such an obligation arises by implication within such a relationship only exceptionally and in relation to highly secret and unusual information because of the ability of the parties to deal appropriately with trade or business information by contract: see *Littlewoods Organisation Ltd. v. Harris* [1977] 1 W.L.R. 1472; in which case it is subject to the court's jurisdiction based on reasonableness: see *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1, 4, 5B, 6C. The obligation is also exceptional because of the existence of the freedom to work. *Printers & Finishers Ltd. v. Holloway* is strongly in favour of the first defendant. The case involved a highly secret process yet the employee was permitted to take the knowledge away and make use of it for his own benefit, even though he had been instructed to keep the information secret. The information was inseparable from his own skill and knowledge. The information was so secret that it was not disclosed in open court.

D In the present case it was never suggested to the defendants before or during their employment with the plaintiffs that any knowledge which they might acquire in the course of their employment would be secret, nor was it ever suggested that the sales information was communicated to any of the defendants in circumstances imposing a special obligation of confidence upon them. The information acquired was merely incidental to their performance of fairly low level employment.

E No particular importance is to be attached to prices because knowledge of prices became part of the salesman's know-how based on his experience of the customers. It was not a result of a specific pricing structure. In any event, knowledge of the price charged to a particular customer in that trade is no more a trade secret than the knowledge possessed by any retail shopkeeper of the likes and dislikes of his regular customers.

F The plaintiffs' submissions involve an unjustified extension of the obligation of confidence at the expense of the freedom to work because the information by its nature is not a trade secret; there are no circumstances justifying the continuation of the duty of fidelity in this respect after the termination of the employment; there was no suggestion at the inception or during the course of the employment that the salesmen or office staff would be recipients of secret information and the information was not obviously secret in nature. It is the court's duty and function to balance the competing interests as the earlier, though not the later, authorities show.

G H The plaintiffs are seeking to obtain the benefits of covenants not to compete without the consent of the employee inherent in any covenant, and without the protection of the court's jurisdiction with regard to duration and extent.

In the circumstances the judge was correct in holding that the sales information was protected by the duty of fidelity during the course of the employment, but not thereafter. A

*Dehn Q.C.* replied.

*Cur. adv. vult.*

5 December. The following judgment of the court was handed down. B

NEILL L.J. In these two appeals it will be necessary to consider the interaction of three separate legal concepts. (1) The duty of an employee during the period of his employment to act with good faith towards his employer: this duty is sometimes called the duty of fidelity. (2) The duty of an employee not to use or disclose after his employment has ceased any confidential information which he has obtained during his employment about his employer's affairs. (3) The prima facie right of any person to use and to exploit for the purpose of earning his living all the skill, experience and knowledge which he has at his disposal, including skill, experience and knowledge which he has acquired in the course of previous periods of employment. C D

The two appeals are against the orders of Goulding J. dated 8 November 1983, whereby he rejected the claims by Faccenda Chicken Ltd., the plaintiffs, that the defendants, the respondents to the appeals, had improperly used confidential information obtained during their employment by the plaintiffs and had conspired together to injure the plaintiffs. E

The events which gave rise to the claims which are the subject matter of these appeals are set out with admirable clarity in the judgment of Goulding J. reported in [1984] I.C.R. 589. We propose therefore from time to time in the course of this judgment to adopt passages from the judge's recital of the facts. In this case such a course is particularly appropriate because we were not referred to any transcript of the evidence, and both sides accepted before us that, for the purpose of ascertaining any matter of fact, we should not look beyond the judge's judgment. F

The plaintiffs carry on the business of breeding, rearing, slaughtering and selling chickens. Their premises are at Brackley in the county of Northampton. The chickens are sold as fresh chickens which means that, though after being slaughtered they are chilled in refrigerators until sale, they are not actually frozen. At all material times Mr. Robin Michael Faccenda has been the chairman and managing director of the plaintiffs. In about 1973 the plaintiffs engaged Mr. Barry Fowler, the first defendant, as sales manager. G

The judge described the subsequent development of the business of the plaintiffs in these terms, at p. 593:

"At that time [1973], and for some time afterwards, the company sold its chickens to wholesalers, and did not approach retailers directly. Mr. Fowler, who is agreed to be a businessman of considerable ability, proposed to Mr. Faccenda the establishment of H

1 Ch. **Faccenda Chicken Ltd. v. Fowler (C.A.)**

A what he called a van sales operation, whereby itinerant refrigerated  
 vehicles would daily offer fresh chickens to such traders as butchers,  
 supermarkets and catering establishments. Starting at first in a small  
 way, Mr. Fowler built up this branch of the business until it came to  
 represent a substantial part, though always the smaller part, of the  
 company's trade. There were in all 10 refrigerated vehicles, each  
 B driven by a salesman and travelling in a particular sector of the  
 Midlands. The sectors radiated in different directions from Brackley  
 in Northamptonshire, where Faccenda Chicken Ltd. has its factory.  
 Each salesman followed a different round within his sector on each  
 of the five working days of the week, some customers receiving a  
 call once a week and others twice a week, according to their  
 requirements and the possibilities of the van sales organisation.  
 C Thus, the whole operation was based on 50 journeys or rounds, one  
 for each vehicle on each working day of the week. The journeys  
 were, of course, not rigidly fixed, but variable from time to time as  
 particular customers were gained or lost or their requirements  
 changed. It is clear from the evidence that the weekly standing  
 orders of customers were not contractually binding on them. The  
 evidence shows in my judgment that each customer was freely  
 D permitted to take less than his standing order when the salesman  
 called, or to increase, or vary the composition of, his order if the  
 goods he wanted on the particular day were available in the van  
 when it called. Firm orders were placed on special occasions or by  
 large customers by telephoning to the office of Faccenda Chicken  
 Ltd. at Brackley, but the van salesman played no part in their  
 E negotiation."

It seems clear that by 1980 the van sales operation was prospering. The average weekly profit for the period which covered approximately the second half of 1980 was about £2,500.

On 11 December 1980, however, the first defendant was arrested, together with another man, on a charge of stealing some of the plaintiffs' chickens. The first defendant resigned immediately as sales manager, and, though at his trial in September 1981 he was acquitted of the charge of theft, his work with the plaintiffs was at an end.

F During the early part of 1981 the first defendant considered the purchase of an hotel in Cornwall, but the project fell through. Shortly afterwards he decided to set up his own business of selling fresh chickens from refrigerated vehicles. This business was to be carried on in the Brackley area. Though he had no source of supply under his own control, there was no shortage of fresh chickens available for bulk purchase. In about May 1981 the first defendant advertised for employees under a box number in a local newspaper. As a result of this advertisement eight employees of the plaintiffs applied to join his new organisation. This was not surprising, because, although a box number  
 G was used, the eight employees knew of the first defendant's intentions before the advertisement appeared. The applications were successful;  
 H the first defendant was pleased to be able to obtain staff whom he knew to be experienced and competent and who had worked with him before.

In the course of the next few weeks the eight employees, consisting of a supervisor (Mr. Finch), five van salesmen (that is, half the van salesmen then employed by the plaintiffs, and two ladies who had been employed in the plaintiffs' offices, gave notice and joined the first defendant. The new business started its operations on 6 July 1981, although the first defendant's company (Fowler Quality Poultry Products Ltd., the tenth defendant) was not incorporated until August. A

The loss of such a high proportion of their experienced staff had a serious effect on the plaintiffs. Indeed, ever since the first defendant had left at the end of 1980, the operations of the plaintiffs' van sales division had been much less profitable, and after July 1981 the position deteriorated further. Mr. Faccenda, not surprisingly, was dismayed by what had happened, and on 10 September 1981, the date (it seems) of the first defendant's acquittal, an action was started by the plaintiffs in the Chancery Division against him and his company and the eight former employees of the plaintiffs. B C

In these proceedings two alleged causes of action were relied upon. (a) Breaches of implied terms of the contracts of employment that the nine employees would faithfully serve the plaintiffs and

"would not use confidential information and/or trade secrets gained by them and each of them whilst in the plaintiffs' employment to the disadvantage or detriment of the plaintiffs, whether during the currency of such employment or after its cessation." D

(b) An unlawful conspiracy

"together to injure the plaintiffs' goodwill and connection by unlawfully making use of the said confidential information and/or trade secrets of the plaintiffs gained by the individual defendants whilst in the plaintiffs' employment . . . ." E

A year later, on 16 September 1982, the first defendant issued a writ in the Queen's Bench Division claiming nearly £23,000 in respect of commission which he said was due to him. In these proceedings the plaintiffs served a counterclaim which in effect repeated the allegations of breaches of contract and conspiracy and also included a claim for £435 in respect of the chickens which it was said the first defendant had wrongly converted in 1980 and which had been the subject matter of the criminal proceedings in which the first defendant had been acquitted. The Queen's Bench action was transferred to the Chancery Division in March 1983. On 27 June 1983 the two actions came on for hearing together before Goulding J. After a hearing lasting 39 days, the judge, in a reserved judgment delivered on 8 November 1983, dismissed the claims by the plaintiffs for damages for breach of contract and for conspiracy. At the same time he gave judgment for the first defendant for £15,316 in respect of his claim for commission and interest after making a deduction in respect of the amount claimed by the plaintiffs in conversion, where a sum was conceded by way of set-off without any admission of liability. F G H

At the trial the claims for injunctions which had been included in the writ in the Chancery action were not pursued owing to the lapse of time.

1 Ch.

Faccenda Chicken Ltd. v. Fowler (C.A.)

A An injunction had been granted and certain undertakings had been given at an interlocutory stage, but it is not necessary for us to make any further reference to these matters as it is agreed that the interlocutory orders have no relevance to the issues now before the court. Moreover, we need only make passing reference to the fact that at the trial a substantial amount of time was taken to deal with allegations put forward on behalf of the plaintiffs to the effect that documents in the possession of some of the employees during the period of their employment had been wrongfully used or copied. The judge came to the conclusion that none of these allegations had been satisfactorily proved. We can therefore concentrate our attention on the matters round which the argument before us principally revolved.

B  
C The main case put forward on behalf of the plaintiffs before Goulding J., and the only factual basis for the claims relied upon before us, was that the first defendant and the other former employees of the plaintiffs as well as the new Fowler company had wrongfully made use of confidential information which the first defendant and his colleagues had acquired while in the employment of the plaintiffs.

D This information, which was described by the judge compendiously as "the sales information," can be listed under five headings: (1) the names and addresses of customers; (2) the most convenient routes to be taken to reach the individual customers; (3) the usual requirements of individual customers, both as to quantity and quality; (4) the days of the week and the time of day when deliveries were usually made to individual customers; (5) the prices charged to individual customers. It was submitted on behalf of the plaintiffs that this sales information could be regarded as a package which, taken as a whole, constituted "confidential information" which could not be used to the detriment of the plaintiffs. In addition, however, particular attention was directed to the prices charged to individual customers, because, it was submitted, information as to prices was itself "confidential information," quite apart from the fact that such information formed a constituent element of the package of sales information. Thus our attention was drawn to the following passage in the judgment, [1984] I.C.R. 589, 594:

E  
F  
G "Counsel for Faccenda . . . in the course of evidence and argument, paid special attention to the importance of knowing the prices paid by the respective customers . . . There has been much controversy regarding the extent to which one trader's prices are generally known to his rivals in the fresh chicken market. I find that an experienced salesman quickly acquires a good idea of the prices obtained by his employer's competitors, but usually such knowledge is only approximate; and in this field accurate information is valuable, because a difference of even a penny a pound may be important."

H It was further said on behalf of the plaintiffs that by wrongfully making use of this confidential sales information the first defendant and his colleagues had seriously damaged the plaintiffs' business. We understand that at the trial it was suggested that the damages amounted to no less than about £180,000, though it may be noted that the judge

concluded that, even if he had decided the issue of liability in favour of the plaintiffs, he would have assessed the damages at £5,000. A

In his judgment Gouling J. dealt with the allegations made by the plaintiffs in these terms, at pp. 596-597:

“A great deal of documentary and oral evidence was devoted to the description and analysis of the trading activities both of the Fowler business and of Faccenda Chicken Ltd. during the weeks (and especially the first week) that followed the commencement of the former. Faccenda Chicken Ltd. claims that it was the particular target of the operation. It alleges that Mr. Fowler and his confederates deliberately arranged to call on its customers on the same days of the week as its own salesmen, and generally at a somewhat earlier hour. It is also strongly contended that the defendants pursued a deliberate policy of undercutting Faccenda prices. I regard these allegations as greatly exaggerated. It is certainly true that the majority of the customers of the new business had previously been customers of Faccenda Chicken Ltd., and that in many (though not all) cases they ceased to be so. It is difficult to know what significance to attach to this fact without knowing to what extent Faccenda Chicken Ltd. had acquired the whole of the available market in the larger towns within a radius of (say) 50 miles from Brackley. My impression is that a large proportion of the relevant retailers were buying Faccenda chickens, many of them also purchasing chickens (probably of lower quality) from one or more of Faccenda’s competitors. As to the timing of calls on customers, it was inevitable that the Fowler salesmen should use the knowledge of customers’ requirements that they had acquired as Faccenda salesmen, but I do not find that routes and times were deliberately planned and organised in the comprehensive way that Faccenda Chicken Ltd. would have me believe. As to undercutting, I accept the defendants’ explanation of their pricing policy. It was to obtain a minimum gross profit on chickens of 4p per pound. Prices yielding a lower gross profit were quoted as a temporary inducement, or introductory offer, for a period of two or three weeks to potential customers thought to be of value. They were also accepted when it was necessary, at the approach of the weekend, to get rid of perishable stock in danger of deterioration. The result, in cases where a fair comparison can be made, is that Fowler prices generally undercut Faccenda prices, but there are also many examples where they were the same or higher.” B C D E F G

It was argued in this court on behalf of the defendants that, by accepting their explanation of their pricing policy, the judge was in effect making a finding that they had not made use of their knowledge of the prices charged to individual customers of the plaintiffs when fixing the prices they would charge the same individuals after they had become customers of the tenth defendants. We are unable to accept this argument. H

It seems to us to be clear from reading the judgment as a whole that the judge accepted that, to a greater or less extent, all the constituent

A elements of the sales information had been made use of for the purpose of the Fowler business. Furthermore, in the passages in his judgment in which he applied the principles of law to the facts of the case we can find no indication whatever that he intended to exclude the information about prices from the rest of the sales information of which the defendants had made use.

B Accordingly, we propose to consider the matter on the basis that the defendants made use of the sales information for the purpose of the Fowler business and that this information included information about prices charged to individual customers of the plaintiffs.

C The judge came to the conclusion that, though use had been made by the defendants of the sales information, such use did not involve any breaches of contract by them or provide evidence of an actionable conspiracy. In this court counsel for the plaintiffs criticised this conclusion on two broad grounds: (1) that the judge had misdirected himself in law as to the relevant principles to be applied to the use by an employee of information acquired during his employment; and (2) that in any event, in the circumstances of the case and on the findings of the judge, the sales information as a whole, or, alternatively, the information about prices, was confidential information or a trade secret which could not be used by the defendants to the detriment of the plaintiffs.

D We propose to turn first to consider the submission that the judge misdirected himself in law. It will be convenient if we start by setting out some of the passages in his judgment in which Goulding J. dealt with the law. He said, at pp. 598–599:

E “Let me now deal with the alleged abuse of confidential information. I must make it clear that anything I say about the law is intended to apply only to cases of master and servant. In my view information acquired by an employee in the course of his service, and not the subject of any relevant express agreement, may fall as regards confidence into any of three classes. First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master’s competitor. An example might be a published patent specification well known to people in the industry concerned. . . . Secondly, there is information which the servant must treat as confidential (either because he is expressly told it is confidential, or because from its character it obviously is so) but which once learned necessarily remains in the servant’s head and becomes part of his own skill and knowledge applied in the course of his master’s business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master; and . . . there seems to be no established distinction between the use of such information where its possessor trades as a principal, and where he enters the employment of a new master, even though the latter case

involves disclosure and not mere personal use of the information. If an employer wants to protect information of this kind, he can do so by an express stipulation restraining the servant from competing with him (within reasonable limits of time and space) after the termination of his employment.” A

The judge then referred, by way of examples of this type of information, to the information about a manufacturing process which was in issue in *United Indigo Chemical Co. Ltd. v. Robinson* (1931) 49 R.P.C. 178 and to the trade information in *E. Worsley & Co. Ltd. v. Cooper* [1939] 1 All E.R. 290. Goulding J. continued [1984] I.C.R. 589, 600: B

“Thirdly, however, there are, to my mind, specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone’s benefit but the master’s. An example is the secret process which was the subject matter of *Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239.” C

Having explained his three-fold classification of information, the judge then applied the law to the facts. He said, at p. 600: D

“In my judgment the sales information relied on by Faccenda Chicken Ltd. in the Chancery action falls into my second class, and cannot be protected in the absence of an express restrictive stipulation. The defendants being free to compete with Faccenda Chicken Ltd. and to solicit its customers, it is impossible, in my judgment, to say they must not use their own knowledge of the whereabouts and requirements of those customers, the prices they have been paying, and the routes by which they are conveniently visited.” E

Counsel for the plaintiffs made a number of criticisms of the judge’s formulation of the law. We can summarise the most important of these criticisms: (a) that the judge erred in law in holding that there were two classes or categories of confidential information which an employee might acquire in the course of his service; there was only one such class or category. Confidential information remained confidential even after the employee had left the employer’s service; (b) that the law of confidence relating to employees was merely a branch of the general law of confidence, and, though the obligations of an employee were based on an implied term of the contract of service, this was immaterial because the scope of the implied term was co-extensive with the obligations imposed by equity on a person to whom confidential information was entrusted in circumstances where no contract existed between the parties; (c) that the judge erred in law in holding that confidential information in his second class could be protected by a restrictive covenant. It was plain, it was submitted, that a restrictive covenant would not be enforced unless the protection sought was reasonably necessary to protect a trade secret or to prevent some personal influence over customers being abused in order to entice them away: see *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, per Lord F G H

1 Ch.

Faccenda Chicken Ltd. v. Fowler (C.A.)

A Parker of Waddington, at p. 709; (d) that although some of the information, for example, the names and addresses of customers, could not by itself be treated as confidential, the sales information did constitute confidential information when looked at as a whole; (e) that in any event information about the prices charged to individual customers was confidential information; (f) that a clear distinction could be drawn between the skill and general knowledge of a trade or business which an employee might acquire in the course of his employment and which he was entitled to use in subsequent employment, and the special knowledge of a former employer's business which the employee could not use thereafter. In support of this proposition and of the special importance of prices, we were referred to the judgment of Farwell L.J. in *Sir W. C. Leng & Co. Ltd. v. Andrews* [1909] 1 Ch. 763, where in a formulation of principle (which was subsequently approved by Lord Atkinson in *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, 705) he said, at p. 774:

D “To acquire the knowledge of the reasonable mode of general organisation and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence in revealing anything acquired by reason of a person having been in any particular service, although the person may have learnt it in the course of being taught his trade; but it would be a breach of confidence to reveal trade secrets, such as prices, [etc.], or any secret process or things of a nature which the man was not entitled to reveal.”

E Reference was also made to the judgment of Sir Robert Megarry V.-C. in *Thomas Marshall (Exports) Ltd. v. Guinle* [1979] Ch. 227, 248D, where he said: “Costs and prices which are not generally known may well constitute trade secrets or confidential information: . . .”

F In the course of his submissions in support of the appeal Mr. Dehn took us on an instructive and valuable tour of many of the cases dealing with the law of confidence in the context of the relationship between employer and employee and also referred us to some of the cases on restrictive covenants.

It is not necessary, however, for us for the purpose of this judgment to travel this ground again. It is sufficient to set out what we understand to be the relevant principles of law. Having considered the cases to which we were referred, we would venture to state these principles:

G (1) Where the parties are, or have been, linked by a contract of employment, the obligations of the employee are to be determined by the contract between him and his employer: cf. *Vokes Ltd. v. Heather* (1945) 62 R.P.C. 135, 141.

(2) In the absence of any express term, the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.

H (3) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purposes of the present appeal it is not necessary to consider the precise limits of this implied

term, but it may be noted: (a) that the extent of the duty of good faith will vary according to the nature of the contract (see *Vokes Ltd. v. Heather*, 62 R.P.C. 135); (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer: see *Robb v. Green* [1895] 2 Q.B. 315 and *Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80.

(4) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (*Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239), or designs or special methods of construction (*Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.* (1932) 49 R.P.C. 461), and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret. The obligation does not extend, however, to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only "confidential" in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith. This distinction is clearly set out in the judgment of Cross J. in *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1; [1965] R.P.C. 239 where he had to consider whether an ex-employee should be restrained by injunction from making use of his recollection of the contents of certain written printing instructions which had been made available to him when he was working in his former employers' flock printing factory. In his judgment, delivered on 29 April 1964 (not reported on this point in [1965] 1 W.L.R. 1), he said [1965] R.P.C. 239, 253:

"In this connection one must bear in mind that not all information which is given to a servant in confidence and which it would be a breach of his duty for him to disclose to another person during his employment is a trade secret which he can be prevented from using for his own advantage after the employment is over, even though he has entered into no express covenant with regard to the matter in hand. For example, the printing instructions were handed to Holloway to be used by him during his employment exclusively for the plaintiffs' benefit. It would have been a breach of duty on his part to divulge any of the contents to a stranger while he was employed, but many of these instructions are not really 'trade secrets' at all. Holloway was not, indeed, entitled to take a copy of the instructions away with him; but in so far as the instructions cannot be called 'trade secrets' and he carried them in his head, he is entitled to use them for his own benefit or the benefit of any future employer."

A The same distinction is to be found in *E. Worsley & Co. Ltd. v. Cooper* [1939] 1 All E.R. 290 where it was held that the defendant was entitled, after he had ceased to be employed, to make use of his knowledge of the source of the paper supplied to his previous employer. In our view it is quite plain that this knowledge was nevertheless “confidential” in the sense that it would have been a breach of the duty of good faith for the employee, while the employment subsisted, to have used it for his own purposes or to have disclosed it to a competitor of his employer.

B (5) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid:

C (a) The nature of the employment. Thus employment in a capacity where “confidential” material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.

D (b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret *eo nomine*. The restrictive covenant cases demonstrate that a covenant will not be upheld on the basis of the status of the information which might be disclosed by the former employee if he is not restrained, unless it can be regarded as a trade secret or the equivalent of a trade secret: see, for example, *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, 710 *per* Lord Parker of Waddington and *Littlewoods Organisation Ltd. v. Harris* [1977] 1 W.L.R. 1472, 1484 *per* Megaw L.J.

E We must therefore express our respectful disagreement with the passage in Gouilding J.’s judgment at [1984] I.C.R. 589, 599E, where he suggested that an employer can protect the use of information in his second category, even though it does not include either a trade secret or its equivalent, by means of a restrictive covenant. As Lord Parker of Waddington made clear in *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, 709, in a passage to which Mr. Dehn drew our attention, a restrictive covenant will not be enforced unless the protection sought is reasonably necessary to protect a trade secret or to prevent some personal influence over customers being abused in order to entice them away.

G In our view the circumstances in which a restrictive covenant would be appropriate and could be successfully invoked emerge very clearly from the words used by Cross J. in *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1, 6 (in a passage quoted later in his judgment by Gouilding J. [1984] I.C.R. 589, 601):

H “If the managing director is right in thinking that there are features in the plaintiffs’ process which can fairly be regarded as trade secrets and which their employees will inevitably carry away with

them in their heads, then the proper way for the plaintiffs to protect themselves would be by exacting covenants from their employees restricting their field of activity after they have left their employment, not by asking the court to extend the general equitable doctrine to prevent breaking confidence beyond all reasonable bounds.”

A

It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are *capable* of being trade secrets, though the secrecy of some information may be only short-lived. In addition, the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality.

B

(c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure *merely* by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret. It is to be observed that in *E. Worsley & Co. Ltd. v. Cooper* [1939] 1 All E.R. 290, 307D, Morton J. attached significance to the fact that no warning had been given to the defendant that “the source from which the paper came was to be treated as confidential.”

C

D

(d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose. In *Printers & Finishers Ltd. v. Holloway* [1965] R.P.C. 239, Cross J. considered the protection which might be afforded to information which had been memorised by an ex-employee. He put on one side the memorising of a formula or a list of customers or what had been said (obviously in confidence) at a particular meeting, and continued, at p. 256:

E

“The employee might well not realise that the feature or expedient in question was in fact peculiar to his late employer’s process and factory; but even if he did, such knowledge is not readily separable from his general knowledge of the flock printing process and his acquired skill in manipulating a flock printing plant, and I do not think that any man of average intelligence and honesty would think that there was anything improper in his putting his memory of particular features of his late employer’s plant at the disposal of his new employer.”

F

G

For our part we would not regard the separability of the information in question as being conclusive, but the fact that the alleged “confidential” information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret.

These then are the principles of law which we consider to be applicable to a case such as the present one. We would wish to leave open, however, for further examination on some other occasion the question whether additional protection should be afforded to an employer

H

A where the former employee is not seeking to earn his living by making use of the body of skill, knowledge and experience which he has acquired in the course of his career, but is merely selling to a third party information which he acquired in confidence in the course of his former employment.

B We now turn to the facts of the instant case. It will be remembered that the case for the plaintiffs was that the first defendant and his colleagues were in breach of an implied term of their contracts of employment in using or disclosing the sales information that they had acquired while in the employment of the plaintiffs or, alternatively, that they were in breach of this implied term by using or disclosing their knowledge of the prices charged by the plaintiffs to individual customers. It will also be remembered that the sales information contained five  
C elements: the names and addresses of customers; the most convenient routes to be taken to reach the individual customers; the usual requirements of individual customers; the days of the week and times of day when deliveries were made to individual customers; and the prices charged to individual customers.

D Mr. Dehn was prepared to concede that, if these pieces of information were looked at separately, some of them did not constitute confidential information at all. Thus he accepted that the defendants were entitled to make use of any recollection they might have of the names and addresses of the plaintiffs' customers as well as of the most convenient routes by which the premises of such customers could be reached. Moreover, we did not understand him to argue otherwise than rather faintly that the defendants would have been in breach of contract if they had merely  
E made use of their knowledge of the usual requirements of the plaintiffs' customers or of the times when deliveries were made to them.

F The central plank of Mr. Dehn's argument was that any information about the prices charged to individual customers of the plaintiffs was confidential, and that, as this information about prices formed part of the package of sales information, the package taken as a whole was confidential too. It is therefore necessary to consider the information  
G about prices more closely. It seems clear that, apart from the fact that the three main groups of customers—butchers, chains of shops and catering establishments—were charged slightly different prices, there were a number of individual variations inside these groups to take account, no doubt, of such matters as the size of the orders placed and the length of time that the traders concerned had been customers. It was this information, submitted Mr. Dehn, which was confidential. Counsel  
G relied in particular on the following passage in the judgment of Goulding J. [1984] I.C.R. 589, 594:

H "I find that an experienced salesman quickly acquires a good idea of the prices obtained by his employer's competitors, but usually such knowledge is only approximate; and in this field accurate information is valuable, because a difference of even a penny a pound may be important."

He also relied on the references to the confidentiality of prices in the three authorities which we have already mentioned.

We find ourselves unable to accept Mr. Dehn's submissions either as to the information about prices or as to the sales information as a whole. We can well appreciate that in certain circumstances information about prices can be invested with a sufficient degree of confidentiality to render that information a trade secret or its equivalent. The price put forward in a tender document is an obvious example. But there may be many other cases where the circumstances show that a price or prices are matters of great importance and highly confidential. A

Information about the price to be charged for a new model of a car or some other product or about the prices negotiated, for example, for various grades of oil in a highly competitive market in which it is known that prices are to be kept secret from competitors occur to us as providing possible further instances of information which is entitled to protection as having the requisite degree of confidentiality. B

But in the present case the following factors appear to us to lead to the clear conclusion that neither the information about prices nor the sales information as a whole had the degree of confidentiality necessary to support the plaintiffs' case. We would list these factors as follows. C  
 (1) The sales information contained some material which the plaintiffs conceded was not confidential if looked at in isolation. (2) The information about the prices was not clearly severable from the rest of the sales information. (3) Neither the sales information in general, nor the information about the prices in particular, though of some value to a competitor, could reasonably be regarded as plainly secret or sensitive. D  
 (4) The sales information, including the information about prices, was necessarily acquired by the defendants in order that they could do their work. Moreover, as the judge observed in the course of his judgment, each salesman could quickly commit the whole of the sales information relating to his own area to memory. (5) The sales information was generally known among the van drivers who were employees, as were the secretaries, at quite a junior level. This was not a case where the relevant information was restricted to senior management or to confidential staff. E  
 (6) There was no evidence that the plaintiffs had ever given any express instructions that the sales information or the information about prices was to be treated as confidential. We are satisfied that, in the light of all the matters set out by the judge in his judgment, neither the sales information as a whole nor the information about prices looked at by itself fell within the class of confidential information which an employee is bound by an implied term of his contract of employment or otherwise not to use or disclose after his employment has come to an end. F

Accordingly these appeals must be dismissed.

*Appeals dismissed with costs.*

*Legal aid taxation for legally aided defendants.* G

*Leave to appeal refused.*

*Stay of execution extended for one month, and, subject to petition to House of Lords being lodged, until hearing of that petition.*

*Solicitors: Penningtons for Shoosmiths & Harrison, Banbury; Johnson & Gaunt, Banbury.* H

I. C.