CHARACTERISATION OF BREACH OF CONFIDENCE AS A PRIVACY TORT IN PRIVATE INTERNATIONAL LAW

MICHAEL DOUGLAS*

Certain kinds of breach of confidence may be characterised as torts, at least for the purposes of Australian private international law, in respect of rules of jurisdiction and choice of law. When a breach of confidence involves a misuse of private information, a tortious characterisation is appropriate. This view is consistent with appellate authority recognising the unique character of equitable jurisdiction. The article begins by considering debates concerning the juridical basis of breach of confidence, and its metamorphosis into the tort of misuse of private information. The very existence of that debate indicates that breach of confidence may intelligibly have more than one character. The substantive principles of breach of confidence inform the way that cross-border problems ought to be resolved in private international law. The remainder of the article considers characterisation in respect of long-arm jurisdictional rules, and then in respect of choice-of-law rules.

I INTRODUCTION

It is a trite observation that serious invasions of privacy may occur with increasing ease in the digital era.[1] Mobile technology facilitates intrusion upon seclusion; the internet facilitates sharing of improperly obtained information. Lawmakers have responded to this environment by criminalising 'revenge pornography',[2] while social media platforms like Facebook have taken steps to

* Senior Lecturer, Law School, University of Western Australia. This article grew out of research conducted for the purposes of a PhD at the University of Sydney Law School. I am grateful to my supervisors and former colleagues there, and also to Melbourne Law School, which allowed me to participate in a workshop where I refined ideas presented in this article. Any errors (and fallacies) in the pages that follow are my own.

1 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era: Final Report*, ALRC Report No 123 (2014) 17.

2 These laws are not uniform around Australia: see recently *Crimes Amendment (Intimate Images) Act 2017* (NSW), amending *Crimes Act 1900* (NSW) div 15C; see also Nicolas Suzor, Bryony Seignior and Jennifer Singleton, 'Non-consensual Porn and the Responsibilities of Online Intermediaries' (2017) 40 *Melbourne University Law Review* 1057.

improve their self-regulation mechanisms to protect potential victims.[3] But despite these developments, Australian law does not offer the civil remedies for invasions of privacy which are available in other Commonwealth legal systems.[4] The High Court declined to recognise a common law privacy tort in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[5] The Australian Law Reform Commission's 2014 recommendations for a statutory tort were largely ignored,[6] as were more recent state-based recommendations.[7]

In at least two Australian cases, superior courts[8] have adapted the general law to vindicate violations of privacy. In *Giller v Procopets*, the Court of Appeal of the Supreme Court of Victoria held that equitable compensation would be available in relation to distress arising from a breach of personal privacy that was framed as a breach of confidence claim.[9] Apart from its equitable jurisdiction, the Court also relied on Victoria's incarnation of the *Lord Cairns Act*.[10] More recently, in *Wilson v Ferguson*, the Supreme Court of Western Australia followed *Giller v Procopets* and awarded equitable compensation for distress arising from an instance of revenge pornography in the context of a breach of confidence claim.[11] Although there is no tort of invasion of privacy in Australia, these decisions may lend support to the view that, at least in some cases, breach of confidence might be characterised as an 'equitable tort'.[12] Some have advanced these kinds of arguments for years.[13] They do so bravely, treading ground which is susceptible to derision with the 'fusion fallacy' label.[14] This

3 For example, in November 2017, Facebook and the Commonwealth Office of the eSafety Commissioner announced a partnership to pilot a program which will 'help prevent intimate images of Australians being posted and shared across Facebook, Messenger, Facebook Groups and Instagram': Office of the eSafety Commissioner, 'Facebook and eSafety Office Partner to Protect Australians Online' (Media Release, 2 November 2017) <https://esafety.gov.au/about-the-office/newsroom/media-releases/facebook-and-esafety-office-partner-to-protect-australians-online>.

4 See Part III below.

5 (2001) 208 CLR 199 ('*ABC v Lenah Game Meats*').

6 Or rather, those recommendations were actively refused: 'The government has made it clear on numerous occasions that it does not support a tort of privacy': Chris Merritt, 'Brandis Rejects Privacy Tort Call', *The Australian* (online), 4 April 2014 <http://www.theaustralian.com.au/business/legal-affairs/brandis-rejects-privacy-tort-call/news-story/6b331e6c4a4e30f6a778a28c4d8b636a>.

7 Standing Committee on Law and Justice, Parliament of New South Wales, *Remedies for the Serious Invasion of Privacy in New South Wales* (2016); see also Gabrielle Upton, 'NSW Government Response to the Legislative Council Standing Committee on Law and Justice's Report into Remedies for the Serious Invasion of Privacy in New South Wales' (NSW Government, 5 September 2016) <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/GovernmentResponse/6043/160905%20Government%20response.pdf>.

8 See also *Grosse v Purvis* [2003] Aust Torts Reports ¶81-706; *Doe v Australian Broadcasting Corporation* [2007] VCC 28.

9 (2008) 24 VR 1, 29 [133] (Ashley JA).

10 Ibid 29–31 [34]–[143] (Ashley JA); *Chancery Amendment Act 1858*, 21 & 22 Vict, c 27 ('*Lord Cairns Act*').

11 [2015] WASC 15, [2] (Mitchell J).

12 James Edelman, 'Equitable Torts' (2002) 10 *Torts Law Journal* 64, 71, 85–6.

13 See, eg, *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301–2; see also Des Butler, 'Protecting Personal Privacy in Australia: Quo Vadis?' (2016) 42 *Australian Bar Review* 107, 110.

14 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015) 48 [2-140].

article avoids that debate[15] by limiting its analysis to the characterisation of breach of confidence in private international law problems.

In a broad sense, 'characterisation' is of the essence of legal reasoning.[16] In order to apply the doctrine of *stare decisis*, a court must determine whether one case is like another. Characterisation thus involves comparison and taxonomy.[17] It involves an understanding of the facts, the sources of law on which the issues arise, and the exercise of characterisation itself. Characterisation is important because it is how courts fashion the premises for legal argument.[18] In hard cases,[19] courts may legitimately adopt any one of multiple competing characterisations. As Edelman J recognised in a related context in *Australian Competition and Consumer Commission v Valve Corporation [No 3]*, 'different factors will often point in different directions'.[20] The ambiguity is resolved through the application of value judgments, which might be disguised, hidden or suppressed.[21] The same observations may be directed to the characterisation exercise in private international law, where the claim (in the case of certain jurisdictional rules) or the issue (in the case of choice-of-law rules) must be characterised to determine the proper approach to a cross-border problem.

The thesis of this article is that certain kinds of breach of confidence may be characterised as torts, at least for the purposes of Australian private international law. This follows the suggestion by the authors of *Dicey, Morris & Collins on the Conflict of Laws*.[22] It is argued that, when a putative breach of confidence involves a misuse of private information in cross-border circumstances, it may be

15 Views on fusion have little bearing on the topic of this article. In any event, the debate is probably dead, at least for the moment: 'there seems to be a widely held view that it is no longer persuasive to apply … [fusionist] reasoning': ibid 49 [2-150]; cf the academic work by (now Justice of the High Court) James Edelman, see, eg, James Edelman, 'A "Fusion Fallacy" Fallacy?' (2003) 119 *Law Quarterly Review* 375.

16 See William Gummow, 'The Selection of the Major Premise' (2013) 2 *Cambridge Journal of International and Comparative Law* 47; Symeon C Symeonides, *Choice of Law* (Oxford University Press, 2016) 65.

17 See Frank Bates, *Conflict of Laws as Taxonomy: A New Approach* (LexisNexis Butterworths, 2015).

18 The importance of the premises should not be overlooked: William Gummow, 'The 2017 Winterton Lecture: Sir Owen Dixon Today' (2018) 43(1) *University of Western Australia Law Review* 30, 30, citing Sir Owen Dixon, 'Two Constitutions Compared' in S H Z Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Lawbook, 1965) 100, 103; Sir Owen Dixon, 'Address by the Hon Sir Owen Dixon KCMG at the Annual Dinner of the American Bar Association' (1942) 16 *Australian Law Journal* 192, 194.

19 See, eg, the discussion in Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057.

20 (2016) 337 ALR 647, 662 [69].

21 Chief Justice James Allsop, 'Characterisation: Its Place in Contractual Analysis and Relation Inquiries' (2017) 91 *Australian Law Journal* 471, 471; Chief Justice James Allsop, 'Characterisation: Its Place in Contractual Analysis and Relation Inquiries' in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook, 2016) 105, 106.

22 They submit that 'the argument for looking beyond the historical, domestic divide between law and equity and treating all non-contractual claims to protect privacy as involving "issues in tort" … is one which merits serious consideration should an appropriate case arise for decision': Lord Collins et al, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 2, 2193–4 [34-092] ('*Dicey*'); see also James J Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press, 2nd ed, 2011); Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) ch 23 ('*Gurry*').

characterised as tortious for the purposes of rules of jurisdiction and choice of law. A tortious characterisation would serve the ends of certainty and comity which are fundamental to common law choice-of-law techniques. It would also serve the policy considerations which have underpinned the development of the substantive principles concerning misuse of private information. It is argued that this approach is consistent with appellate authority recognising the unique character of equitable jurisdiction.[23]

The article begins by identifying characterisation in private international law. It then considers debates concerning the juridical basis of breach of confidence and its metamorphosis in some common law jurisdictions into the tort of misuse of private information. The very existence of that debate indicates that breach of confidence may intelligibly have more than one character. The substantive principles of breach of confidence inform the way that cross-border problems ought to be resolved in private international law. The remainder of the article considers characterisation in respect of long-arm jurisdictional rules, and then in respect of choice-of-law rules.

II THE SIGNIFICANCE OF CHARACTERISATION IN PRIVATE INTERNATIONAL LAW

To understand why breach of confidence deserves a tortious characterisation in private international law, and why this matters, it is necessary to understand what 'characterisation' means in this context. Generally, 'characterisation' denotes the exercise which a court must undertake to select an appropriate choice-of-law rule which, in turn, determines the applicable law (*lex causae*) in a case with a foreign element. Consider the choice-of-law rule that 'substantive issues of tort are governed by the law of the place of the wrong (*lex loci delicti*)'.[24] In order for the *lex loci delicti* rule to apply, the court must characterise the key issue as one of tort. This task may be more difficult than it sounds, particularly when the case depends on the application of overlapping legal concepts and juridical categories.

A vast literature surrounds 'characterisation' in the context of choice-of-law problems.[25] As it relates to the present project, the literature may be distilled as follows. First, there is a difficult debate concerning the subject matter of characterisation.[26] Although there are competing views, the best view is that the *issue* in dispute, which would be resolved differently by relevant legal systems

23 See Part V below.

24 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ('*Pfeiffer*'); *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ('*Zhang*').

25 See, eg, *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]* [1996] 1 WLR 387, 392 (Staughton LJ) ('*Macmillan v Bishopsgate*'). There is wisdom in the observation that '[a]ny theory which sets around itself an aura of intellectual isolation and which widens the gap between academic study and practice of law is per se suspect': Anthony J Bland, 'Classification Re-classified' (1957) 6 *International and Comparative Law Quarterly* 10, 10.

26 See, eg, Christopher Forsyth, 'Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws' (1998) 114 *Law Quarterly Review* 141.

with some connection to the subject matter, is the appropriate focus of characterisation.[27] Second, there is a debate as to whether characterisation should occur 'in light of' the *lex fori*, or in light of the foreign law. If foreign law treats an issue as tortious, but local law would address the issue in terms of equity, which approach should prevail?[28] Third, there is a debate concerning the proper purpose and method of characterisation. Some courts will seek the choice-of-law rule that the issue logically and naturally fits into, without consideration of the ultimate outcome that this 'analytical' approach to characterisation would produce for the parties.[29] Other courts will see the task in a teleological fashion, in terms of the principles of substantive law that the competing choice-of-law rules would select.[30] Fourth, characterisation is tricky. It is 'the most fundamental and difficult problem of the conflict of laws'.[31]

Apart from choice of law, 'characterisation' may also refer to the exercise whereby a court considers whether the facts come within the scope of a rule authorising service outside of the jurisdiction. Although the context is different, jurisdictional characterisation gives rise to similar problems to those arising in choice of law. The task is essentially the same: it requires the court to consider the *character* of a set of facts for the purposes of selecting an appropriate rule. In each case, it may be difficult to place the facts into a single juridical category.

Characterisation is important for litigants in cross-border disputes. It may determine whether a court will even hear a claim, or whether a cause of action will succeed. Characterisation may determine whether a victim of an invasion of privacy can obtain a judicial remedy. The characterisation of breach of confidence in private international law may depend on the identity of breach of confidence more broadly.

III THE IDENTITY OF BREACH OF CONFIDENCE

The language of 'breach of confidence' denotes the action that was conveniently identified by Megarry J in *Coco v A N Clark (Engineers) Ltd*.[32] The action has three elements. First, the information must have the necessary quality of confidence. Second, the information must have been imparted in circumstances importing an obligation of confidence. Third, there must be an unauthorised use of the information to the detriment of the party communicating

27 See *Macmillan v Bishopsgate* [1996] 1 WLR 387; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 426–7 [116] (Callinan J) ('*Sweedman*').

28 See Ernest G Lorenzen, 'Qualification, Classification, or Characterization Problem in the Conflict of Laws' (1941) 50 *Yale Law Journal* 743, 743–4.

29 See, eg, *Apt v Apt* [1947] P 127, as discussed in M Davies, A S Bell and P L G Brereton, *Ngyh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed, 2014) 344–5 [14.16]–[14.18].

30 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825, 840 [27] (Mance LJ) ('*Raiffeisen*').

31 Forsyth, 'Characterisation Revisited', above n 26, 141.

32 (1968) 1A IPR 587, 590 ('*Coco*'), citing *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203.

it.[33] Although once identified in terms of those 'elements', this is an area where the law – or equity – is somewhat unsettled. It is because the identity of breach of confidence is somewhat unclear that it provides fertile ground for discussion of characterisation. There is a debate as to the jurisdictional basis of breach of confidence,[34] which translates to uncertainty surrounding the doctrine.[35] There is also a difference of approach between some Commonwealth legal systems. These matters could inform the task of characterisation in the context of private international law problems.

A The Jurisdictional Debate

Two contrary views dominate the debate over the jurisdictional basis of breach of confidence. One camp characterises the action as sui generis; the other, as equitable.[36]

The authors of *Gurry* characterise breach of confidence as sui generis – as a species of its own.[37] In support of that proposition, the authors cite Ungoed-Thomas J in *Duchess of Argyll v Duke of Argyll*, where his Honour identified the 'policy of the law' as the basis of the court's jurisdiction to protect a confidential communication between husband and wife.[38] This sui generis approach has had some support in Canada. In *Lac Minerals Ltd v International Corona Resources Ltd*, Sopinka J cited the first edition of *Gurry*[39] and held, while dissenting, that the jurisdictional basis is not solely contract, equity, or property; rather, '[t]he action is sui generis relying on all three to enforce the policy of the law that confidences [ought to] be respected'.[40] A decade later, in *Cadbury Schweppes Inc v FBI Foods Ltd*, Binnie J explained that: 'The sui generis concept was adopted to recognize the flexibility that has been shown by courts in the past to uphold confidentiality and in crafting remedies for its protection'.[41] This view has also been supported in New Zealand.[42]

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33 See more recently *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281 ('*Optus v Telstra*'), where Finn, Sundberg and Jacobson JJ provide an alternative formulation of Megarry J's third element, namely, that there must be an actual or threatened misuse of the information without consent of the plaintiff: at 290 [39].

34 *Hunt v A* [2008] 1 NZLR 368; Aplin et al, *Gurry*, above n 22, 4 [1.05], 97 [4.01].

35 P G Turner, 'Rudiments of the Equitable Remedy of Compensation for Breach of Confidence' in Simone Degeling and Jason Ne Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 239, 244–5; cf Heydon, Leeming and Turner, above n 14, 1158–9 [42-015].

36 While talk of 'camps' can be problematic, the term is deployed here to roughly group the two dominant views on the jurisdictional basis of breach of confidence. It is not suggested that members of these 'camps' have particular views on the proper characterisation of breach of confidence in private international law.

37 Aplin et al, *Gurry*, above n 22, 97–8 [4.02].

38 Ibid 97–8 [4.01]–[4.02], citing *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, 330, 332 (Ungoed-Thomas J) ('*Argyll*').

39 Francis Gurry, *Breach of Confidence* (Clarendon Press, 1984) 25–6.

40 [1989] 2 SCR 574, 615 [73] ('*Lac Minerals*').

41 *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, 162 [28] ('*Cadbury Schweppes*'), cited in *Merck & Co Inc v Apotex Inc* [2013] FC 751, [55] (Snider J).

42 *Hunt v A* [2008] 1 NZLR 368, 379 [64] (Glazebrook, Hammond and Wilson JJ); *Skids Programme Management Ltd v McNeill* (2012) 98 IPR 324, 341 [78] (Asher J).

The sui generis camp might be characterised by its tendency for pragmatic reasoning.[43] For example, in *Argyll*, Ungoed-Thomas J appealed to policy because the jurisdiction to remedy a breach of confidence was less than clear.[44] Similarly, in *Lac Minerals*, Sopinka J held that the 'multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy'.[45] Flexibility and pragmatism are also familiar to choice-of-law techniques in private international law.[46]

Turner criticises *Gurry*'s sui generis characterisation, asserting that '[t]he action's nature is equitable alone'.[47] This characterisation finds support in the words of Sir Thomas More LC,[48] which were picked up by Megarry J in *Coco*: 'Three things are to be helpt in Conscience; Fraud, Accident and things of Confidence'.[49] It also finds support in various cases in the United Kingdom and Australia.[50] In *Seager v Copydex Ltd*, Lord Denning MR referred to 'the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it'.[51] In *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]*, Deane J grounded breach of confidence in terms of conscience, and identified the authority to decide as the court's exclusive equitable jurisdiction.[52] In *ABC v Lenah Game Meats*, Kirby J held that the reason underpinning relief for breach of confidence 'is to uphold the obligation of conscience and to prevent publication in circumstances where such publication would be unconscionable'.[53]

The equitable characterisation matters when it comes to questions of remedies. Turner advocates a strict approach to equitable compensation in response to a purely equitable obligation.[54] While the sui generis camp can be characterised by its pragmatism, the equitable camp can be characterised by its strict adherence to equitable principle over policy. The same camp[55] advocates a strict approach to characterisation of equitable issues in private international law problems.[56]

It is uncontroversial that, whatever the jurisdictional basis of the so-called cause of action for breach of confidence, a contract may also provide the

43 Which Turner denounces in the context of his exploration of the equitable basis of breach of confidence: Turner, above n 35, 248–9.

44 [1967] Ch 302, 330.

45 [1989] 2 SCR 574, 615 [74].

46 'Of all the departments of English law, Private International Law offers the freest scope to the mere jurist': Geoffrey Cheshire, *Private International Law* (Clarendon Press, 1935), quoted in Christopher Forsyth, 'The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era' (2005) 1 *Journal of Private International Law* 93, 93.

47 Turner, above n 35, 247.

48 Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009) 347 [5.780].

49 *Coco* (1968) 1A IPR 587, 590.

50 See *A-G v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109; see also *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* (1985) IPR 353, 385 (Prichard J).

51 [1967] 1 WLR 923, 931.

52 (1984) 156 CLR 414, 438.

53 (2001) 208 CLR 199, 272 [170]; see also *Vestergaard Frandsen A/S v Besnet Europe Ltd* [2013] 1 WLR 1556.

54 Turner, above n 35, 251; see also Heydon, Leeming and Turner, above n 14, 1184–5 [42-190].

55 Or at least its ideological allies.

56 See Part IV(A) below.

foundation of an obligation of confidence.[57] An injunction to restrain breach of that kind of obligation might be explained in terms of equity's auxiliary jurisdiction to provide aid to legal rights existing under a contract. In *Optus v Telstra*, the Full Federal Court, which notably included Finn J, held that a contractual obligation of confidence may co-exist with an obligation arising in equity's exclusive jurisdiction.[58] When this kind of concurrence arises in the context of a choice-of-law problem, it may be difficult to select a single juridical category for the purpose of identifying the applicable law.[59]

Jurisdictional characterisations will not necessarily determine the outcome of characterisation in private international law problems because choice-of-law categories do not neatly marry up with the juridical categories of purely domestic jurisprudence. For example, the realty–personalty distinction does not align to the distinction between immovables and movables within the conflict of laws.[60] The jurisdictional debate is salient to the present article for two core reasons. First, if obligations of confidence arise purely in the equitable jurisdiction, then arguably they deserve an equitable characterisation in private international law. Second, the very existence of the jurisdictional debate highlights the difficulty of attributing a breach of confidence a single character. That difficulty is compounded by conflicts of laws between legal systems of a common tradition.

B Emerging Conflicts of Laws of Confidence

Breach of confidence has occasionally been labelled as a 'tort'; for example, by Sedley LJ in another instalment in the Douglas litigation.[61] This was recalled by Dr Edelman, as his Honour then was, as part of an argument in favour of the expansion of 'torts' to include equitable 'wrongs' like breach of confidence and breach of fiduciary duty.[62] In Australia, those kinds of arguments tend to be described as 'fallacious'.[63] Similar views on the special role of equity have influenced the case law on choice of law for equitable issues. In respect of breach of confidence, the matter is complicated by an emerging conflict of laws.

Breach of confidence jurisprudence is not uniform among Australia, the United Kingdom, New Zealand and Canada. This is a developing area of law,[64] which complicates the task of characterisation. Apart from the jurisdictional debate, differences in approaches to breach of confidence between legal systems might be attributable to two matters. First, the United Kingdom has enacted European human rights legislation which is not shared in Australia.[65] Second,

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57 See *Coco* (1968) 1A IPR 587, 590 (Megarry J); Aplin et al, *Gurry*, above n 22, 100 [4.14].

58 (2010) 265 ALR 281, 290 [30]–[41] (Finn, Sundberg and Jacobson JJ).

59 For example, difficulties arise if a cross-border claim is framed in both contract and in tort: *Pfeiffer* (2000) 203 CLR 503, 560 [150] (Kirby J).

60 *Haque v Haque [No 2]* (1965) 114 CLR 98, 115 (Barwick CJ).

61 *Douglas v Hello! Ltd* [2001] QB 967, 998–9 [117].

62 Edelman, 'Equitable Torts', above n 12, 64.

63 Heydon, Leeming and Turner, above n 14, 61–6 [2-325]–[2-400].

64 *Vidal-Hall v Google Inc* [2016] QB 1003, 1021 [21] (Lord Dyson MR and Sharpe LJ) ('*Vidal-Hall v Google*').

65 *Human Rights Act 1998* (UK) c 42, implementing the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3

courts have taken differing views on whether breach of confidence is the appropriate vehicle for protection of privacy.

If breach of confidence is a purely equitable cause of action, can it provide a response to an invasion of personal privacy? In the United Kingdom, the answer to this question has developed against the backdrop of human rights legislation which recognises the value of privacy.[66] In *Campbell v MGN Ltd*, the House of Lords had regard to competing statutory human rights in allowing Naomi Campbell's appeal in respect of the finding that disclosure of 'confidential' information by a newspaper was justified in the public interest.[67] Lord Nicholls had regard to the three elements adumbrated by Megarry J in *Coco*,[68] and held that:

> [The] cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. … Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.[69]

The amputation of the need for a 'confidential relationship' is potentially significant, both for its practical consequences[70] and for the jurisdictional debate.[71] The new formulation does not sit well with the view that breach of confidence is a purely equitable cause of action. It could make an appeal to the jurisdictional underpinning of 'conscience' more difficult.

In *Hosking v Runting*, Tipping J referred to the United Kingdom's approach as the incremental development of the equitable remedy of breach of confidence.[72] In *Douglas v Hello! Ltd [No 3]*, the Court of Appeal used the term 'shoehorning' to describe the use of breach of confidence to vindicate a misuse of private information.[73] In that case, the Court followed *Campbell* and held that breach of confidence was the proper vehicle for protection of the rights of privacy enshrined in article 8 of the *European Convention on Human Rights*.[74]

September 1953) ('*European Convention on Human Rights*'). Cf *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT). See, eg, Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the *Human Rights Act*' (2003) 66 *Modern Law Review* 726; Aplin et al, *Gurry*, above n 22, 74 [2.157].

66 *Human Rights Act 1998* (UK) c 42; see also Phillipson, above n 65.

67 [2004] 2 AC 457, 494–5 [132] (Baroness Hale) ('*Campbell*').

68 (1968) 1A IPR 587, 590.

69 *Campbell* [2004] 2 AC 457, 464–5 [14]; see also *A-G v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 281 (Lord Goff).

70 The action can be more readily deployed to address invasions of privacy, rather than breaches of confidence.

71 Australian authority is consistent with this development: *ABC v Lenah Game Meats* (2001) 208 CLR 199, 224–5 [34]–[36] (Gleeson CJ); *Australian Football League v The Age Co Ltd* (2006) 15 VR 419; *Victoria v Nine Network* (2007) 19 VR 476.

72 [2005] 1 NZLR 1, 59 [245].

73 [2006] QB 125, 160 [96] (Lord Phillips for the Court) ('*Douglas v Hello!*').

74 Ibid 150 [53].

The quoted dictum of Lord Nicholls might suggest the creation of a new tort of misuse of private information. The House of Lords explicitly rejected an invitation to recognise a tort of invasion of privacy in *Wainwright v Home Office*.[75] Then, in *McKennitt v Ash*, Buxton LJ described Lord Nicholls' dictum as a 'rechristening' of breach of confidence.[76] Yet in *Vidal-Hall v Google*, the Court of Appeal treated the action as distinct from breach of confidence.[77] Recently, in *PJS v News Group Newspapers Ltd*, the Supreme Court referred to a 'tort of invasion of privacy'.[78] Although uncertainty remains, arguably misuse of private information should no longer be characterised as equitable 'breach of confidence' in the United Kingdom.[79]

Some New Zealand judges have been sceptical of the 'shoehorning' reasoning of the British authorities.[80] In *Hosking v Runting*, Tipping J considered the essential character of breach of confidence, and went on to agree with the majority view[81] that it would be preferable to recognise a distinct tort of invasion of privacy:

> The underpinning element of the breach of confidence cause of action has conventionally been that either by dint of a general or a transactional relationship between the parties, one party can reasonably expect that the other will treat the relevant information or material as confidential and will not publicly disclose it. It is of course of the essence of breach of confidence that for whatever reason the information or material be confidential and intended to remain so.[82]

In Canada, the Ontario Court of Appeal referred to the New Zealand development, and the 'reformulation' of breach of confidence in the United Kingdom, in recognising a common law tort of 'intrusion upon seclusion' in *Jones v Tsige*.[83] Sharpe JA held that the '[r]ecognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society'.[84]

In Australia, the High Court declined to recognise a tort of invasion of privacy in *ABC v Lenah Game Meats*,[85] although a majority of Gaudron, Gummow, Hayne and Callinan JJ held that *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[86] would not preclude the future development of a

75 *Wainwright v Home Office* [2004] 2 AC 406, 424 [35] (Lord Hoffmann); see also *Kitechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765 ('*Kitechnology*').

76 [2008] QB 73, 80 [8].

77 [2016] QB 1003, 1021 [21] (Lord Dyson MR and Sharpe LJ).

78 [2016] AC 1081, 1100 [32] (Lord Mance JSC).

79 See also Tanya Aplin, 'The Relationship between Breach of Confidence and the Tort of Misuse of Private Information' (2007) 18 *King's Law Journal* 329; Paula Giliker, 'A Common Law Tort of Privacy? The Challenges of Developing a Human Rights Tort' (2015) 27 *Singapore Academy of Law Journal* 761.

80 *Hosking v Runting* [2005] 1 NZLR 1, 15–16 [45]–[49] (Gault P and Blanchard J), 59 [245] (Tipping J).

81 Ibid, cited in *Hamed v The Queen* [2012] 2 NZLR 305, 323 [22] (Elias CJ), and applied in *C v Holland* [2012] 3 NZLR 672.

82 *Hosking v Runting* [2005] 1 NZLR 1, 59 [245].

83 (2012) 108 OR (3d) 241, 259–60 [62], [64] (Sharpe JA), cited in *Ludmer v Ludmer* [2014] ONCA 827, [47] (Blair JA).

84 *Jones v Tsige* (2012) 108 OR (3d) 241, 260 [65].

85 (2001) 208 CLR 199.

86 (1937) 58 CLR 479.

common law privacy tort for the benefit of natural persons.[87] Gleeson CJ recognised that breach of confidence might protect personal privacy in some circumstances.[88] As flagged above, that potential has been realised in two cases. The first case is *Giller v Procopets*,[89] where the Victorian Court of Appeal held that the trial judge erred in not awarding 'damages' for breach of confidence under section 38 of the *Supreme Court Act 1986* (Vic). The damages were awarded to compensate the claimant for mental distress flowing from the misuse of videotapes of sexual activity between the parties.[90] The second case is *Wilson v Ferguson*,[91] where the Supreme Court of Western Australia followed *Giller v Procopets* and invoked breach of confidence in awarding an injunction and providing equitable compensation to a victim of 'revenge pornography'. While recommendations for a statutory tort have not been realised, it remains to be seen whether cases like *Giller v Procopets* will produce a tortious metamorphosis of breach of confidence in Australia, like that which has occurred overseas.

These developments are significant when it comes to remedies. For present purposes, the putative emergence of misuse of private information begs the question: should breach of confidence be characterised as a tort, at least in some cases? At this stage, it may be concluded that, in light of developments in the United Kingdom, a tortious characterisation of breach of confidence is at least arguable in respect of a misuse of private information.

IV JURISDICTIONAL ISSUES FOR CROSS-BORDER BREACH OF CONFIDENCE

This Part considers how a breach of confidence claim might be characterised for the purposes of key long-arm provisions. To understand this issue, consider a case of unauthorised publication of a Sydney-based firm's confidential information. The information is published via Twitter by an anonymous person adopting a false alias. The firm could approach Twitter and ask it to remove the content, but that request may be refused; Twitter's policies generally favour freedom of expression.[92] The firm might request that Twitter provide identifying information in respect of the leaker, such as an IP address – but that request would likely be rejected on the basis of Twitter's privacy policy.[93]

In desperation, the firm might seek an injunction against Twitter, to enjoin removal of the information from the internet. But 'Twitter' is merely a platform provided by foreign corporations. Twitter Inc is a Delaware corporation, with its head office and principal place of business in California. Twitter International

87 Callinan J disagreed on the proposition that the tort would be confined to natural persons: *ABC v Lenah Game Meats* (2001) 208 CLR 199, 231–3 [58]–[62] (Gaudron J), 248–9 [107] (Gummow and Hayne JJ), 326–7 [328] (Callinan J).

88 Ibid 230 [54] (Gleeson CJ).

89 (2008) 24 VR 1.

90 Ibid.

91 [2015] WASC 15.

92 See, eg, Twitter, 'Twitter Transparency Report' (2017) <https://transparency.twitter.com>.

93 Twitter, 'Twitter Privacy Policy' (18 June 2017) <https://twitter.com/en/privacy>.

Company is an Irish corporation whose principal place of business is in Dublin. If the firm seeks relief close to home in the Supreme Court of New South Wales, then a threshold issue is whether the Court would possess jurisdiction over those defendants.

In *Gosper v Sawyer*, Mason and Deane JJ recognised that at common law, in the absence of a defendant's submission, jurisdiction is territorial.[94] The rationale for this principle was identified over half a century ago, in *Laurie v Carroll*, as physical power;[95] historically, a sovereign could not exert such power outside its physical territory. A company may be 'present' within the jurisdiction by incorporation, or by registration in Australia.[96] In the absence of incorporation or registration, a corporation may be nonetheless within the jurisdiction by 'carrying on business' in the forum.[97] Recently, in the context of a dispute over confidential information, it was accepted that the Supreme Court of British Columbia had jurisdiction over Google in an analogous fashion by virtue of the nature of Google's business.[98] Google collects data in British Columbia; its business depends on revenue relating to advertising, which is also directed to persons in British Columbia. Similarly, it may be argued that the American Twitter Inc carries on business in New South Wales by providing services here, and by earning money on the basis of advertising directed here.

If that argument fails, the Court could still possess jurisdiction under 'long-arm' provisions which authorise service outside of the jurisdiction.[99] Recently, those provisions received fleeting consideration in *X v Twitter Inc*,[100] and its interlocutory counterpart, *X v Y & Z*[101] – the cases on which the preceding scenario was based. As Pembroke J identified, there may be more than one basis on which the Court may possess in personam jurisdiction over persons outside of the territorial jurisdiction under the rules authorising service outside of the jurisdiction.[102] Under the *UCPR*, service without leave is authorised if the claim falls within one of the heads of schedule 6.[103] In the context of determination of a jurisdictional issue – whether by way of leave to proceed, or an application by a

94 (1985) 160 CLR 548, 564.

95 (1957) 98 CLR 310, 323 (Dixon CJ, Williams and Webb JJ).

96 See generally *Corporations Act 2001* (Cth) ss 119A, 601CD, 601CX(1); *Service and Execution of Process Act 1992* (Cth) s 9(1); *Uniform Civil Procedure Rules 2005* (NSW) r 10.22 ('*UCPR*').

97 *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156.

98 *Equustek Solutions Inc v Jack* (2014) 374 DLR (4th) 537; *Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224; see also *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824.

99 As explained below, although Chancery might have permitted a claim to proceed even in the absence of notice to the defendant, modern procedure of courts of equity generally mandates service; cf Ben Chen, 'Historical Foundations of Choice of Law in Fiduciary Obligations' (2014) 10 *Journal of Private International Law* 171, 178 n 56.

100 [2017] NSWSC 1300 ('*X v Twitter*').

101 [2017] NSWSC 1214.

102 *X v Twitter* [2017] NSWSC 1300, [20].

103 For the purposes of this part, for the sake of convenience, primary reference is to the *UCPR* (NSW), although rules in other Australian states and territories would, for the most part, provide for equivalent provisions; see also Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the *Uniform Civil Procedure Rules*' (2017) 44 *Australian Bar Review* 160.

defendant to set aside service – a key question is whether the claim is of 'the requisite kind'.[104] The court's task is one of characterisation.

Before turning to characterisation under the long-arm provisions, it is necessary to pre-empt a potential objection. It might be argued that, assuming the equitable pedigree of breach of confidence, the following analysis overlooks the universality of equitable jurisdiction.[105] Courts of equity act upon the conscience of the defendant, 'and will not suffer anyone within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction'.[106] The objection finds support in historical practice. In one of the few pieces[107] on the relationship between equity and private international law, White explained that the Court of Chancery exercised jurisdiction in a manner distinguishable from common law courts.[108] At common law, the defendant's amenability to service is the foundation of personal jurisdiction; in Chancery, '[j]urisdiction depended upon the residence or domicile of the defendant within England, or on the cause of action arising, or the subject matter of the suit being situated, in England'.[109] In certain cases, Chancery might exercise jurisdiction against absent defendants in the absence of personal service.[110] But to fetishise this Chancery practice is to pay insufficient regard to the *Judicature Act* of 1873,[111] and the evolution of practice in Australian courts in the decades since. Those who reject the *substantive* fusion of law and equity do so by stating that the Judicature system resulted in the fusion of the *administration* of law and equity.[112] Section 24 of the *Judicature Act 1873*[113] provided a new joint procedure for the joint administration; indeed, the new system was intended to avoid the procedural problems of split administration.[114] The conflict of laws of procedure at law and in equity was resolved in favour of the common law approach to jurisdiction.[115] The modern procedure is that equitable jurisdiction may be claimed over a person overseas, but until the person is served, the originating process is but 'an inchoate command'.[116] Service perfects the exercise of jurisdiction.[117] The rules of the court must be complied

104 *Agar v Hyde* (2000) 201 CLR 552, 573–4 [50]–[52] (Gaudron, McHugh, Gummow and Hayne JJ).
105 Cf *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132.
106 *Carron Iron Co v Maclaren* (1855) 5 HLC 416, 436–7; 10 ER 961, 969–70 (Lord Chancellor).
107 See also T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004); Tiong Min Yeo, 'Choice of Law for Equity' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 147; Laurette Barnard, 'Choice of Law in Equitable Wrongs: A Comparative Analysis' (1992) 51 *Cambridge Law Journal* 474; Chen, above n 99.
108 R W White, 'Equitable Obligations in Private International Law: The Choice of Law' (1986) 11 *Sydney Law Review* 92, 96 ff.
109 Ibid 96; see *Cookney v Anderson* (1862) 31 Beav 452, 462; 54 ER 1214, 1217–18 (Romilly MR).
110 See, eg, *Dowling v Hudson* (1851) 14 Beav 423; 51 ER 349.
111 See generally Heydon, Leeming and Turner, above n 14, 38–41 [2-020]–[2-065].
112 See *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 306 [18] (Spigelman CJ), 402–3 [390]–[391] (Heydon JA) ('*Harris v Digital Pulse*').
113 *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 ('*Judicature Act 1873*').
114 David A Hughes, 'A Classification of Fusion after *Harris v Digital Pulse*' (2006) 29 *University of New South Wales Law Journal* 38, 44.
115 White, above n 108, 104.
116 *Laurie v Carroll* (1957) 98 CLR 310, 324 (Dixon CJ, Williams and Webb JJ).
117 Ibid.

with, no matter which jurisdiction the action is founded upon.[118] And the rules demand characterisation of the claim to permit service outside of the jurisdiction.[119]

A Breach of Confidence 'Arising in Australia'

Under *UCPR* schedule 6(n), service without leave is permitted in respect of a 'cause of action occurring within Australia'.[120] Following the dictum of Lord Pearson in *Distillers Co (Biochemicals) Ltd v Thompson*, courts will consider where 'in substance' the action occurred,[121] but in practice, the aphorism may be of little help. The task is complicated for a cross-border breach of confidence, where the action may depend on a chain of events occurring in several places, and the information underpinning the claim is intangible. Should the action be located at the place where the information is initially communicated or obtained? The place of the events giving rise to an obligation of confidence (for example, the place of the formation of a relationship of confidence)? The place where information is used without authorisation? Or somewhere else?

One of the few cases to consider the matter directly was *Traxon Industries Pty Ltd v Emerson Electric Co*.[122] Traxon was an Australian company which produced certain industrial devices. It entered into a distribution agreement with Emerson, a company located in Missouri. When the relationship broke down, Traxon brought proceedings in the Federal Court, alleging misleading and deceptive under the *Trade Practices Act 1974* (Cth), breach of contract, breach of confidence, and breach of fiduciary duty. French J, as his Honour was, considered Traxon's application to serve the originating process on Emerson outside of the jurisdiction – the Federal Court procedure requiring leave to serve as a matter of course.[123] Relevantly, his Honour considered whether, in respect of the claim for breach of confidence, there was a cause of action 'arising in the Commonwealth'.[124] The pleadings did not identify where the cause of action occurred. Although Traxon submitted that the matters giving rise to the duty occurred in Western Australia, given Emerson's location in Missouri, it seemed 'inescapable that the allegation relates to conduct by Emerson outside Australia'.[125] French J explained that, for the purposes of the long-arm provision, a 'cause of action' need not be located by all the elements of the cause of action. Rather, it may be identified at the place of the *act* of the defendant which gave the plaintiff cause for complaint.[126] On the facts, the action was located where

118 '[I]n the modern context, the merger of the administration of common law and equity has put their respective jurisdictional rules on an equal footing': Yeo, 'Choice of Law for Equity', above n 107, 155.

119 See, eg, *UCPR* r 11.4(1).

120 Previously, before late-2016 changes, sch 6(a) provided for jurisdiction in respect of a cause of action *arising in New South Wales*. The change expands courts' extended jurisdiction, but overlooks the nature of a 'law area' within the federation. See also Douglas and Bath, above n 103.

121 [1971] AC 458, 468.

122 (2006) 230 ALR 297 ('*Traxon*').

123 *Federal Court Rules 1979* (Cth) O 8 r 2; cf *Federal Court Rules 2011* (Cth) r 10.42.

124 *Traxon* (2006) 230 ALR 297, 307 [47] (French J), quoting *Federal Court Rules 1979* (Cth) O 8 r 1(1).

125 *Traxon* (2006) 230 ALR 297, 310 [60] (French J).

126 Ibid 310 [62] (French J).

Emerson made unauthorised use of the confidential information. This was in the United States, and so service was not permitted in respect of breach of confidence.[127]

French J's approach to localisation of breach of confidence is the same as that applicable to extraterritorial service of torts claims, where the issue is where the tort occurred. In *Dow Jones & Co Inc v Gutnick*, a majority of the High Court held that, in cases like trespass and negligence, where some quality of the defendant's conduct is critical, the place of the wrong should be located with reference to the wrongdoing itself rather than where the wrongdoing is felt.[128] A misstatement should be located at the place where the representation was directed.[129] Assuming the equitable pedigree of breach of confidence, the action depends on the defendant's conscience; the equity corresponds to the defendant's wrongdoing. By parity of reasoning to cross-border torts, breach of confidence may also be located with reference to the place of the defendant's conduct.

If the defendant leaks confidential information onto the wider internet, as the anonymous troll did in *X v Twitter*, then the 'wrong' may be better located at the place where the confidential information is received by third parties, rather than the place where the defendant acted, which may be a distinct location.[130] In *Douglas v Hello!*, which is considered further below in respect of choice of law, photographs were improperly obtained in New York and were then published by a gossip magazine in the United Kingdom. New York law could not apply because, apart from other reasons, the action did not occur there: 'The cause of action is based on the publication in this jurisdiction and the complaint is that private information was conveyed to readers in this jurisdiction'.[131] To invoke the language in *Jackson v Spittall*, it may be appropriate to locate breach of confidence at the place of the act which provides the real 'cause for complaint'.[132] In cases like *Douglas v Hello!*, it is the unauthorised *receipt* of confidential or private information by third parties which may be the real cause for complaint.[133]

This approach to localisation would align breach of confidence with defamation: defamation is located at the place of publication, which is the place

127 Traxon was awarded leave to re-plead. Similarly, under *UCPR* sch 6(w), in the event of multiple causes of action founding claims on a single originating process, each claim must be captured by at least one head of sch 6.

128 (2002) 210 CLR 575, 606 [43] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Gutnick*').

129 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

130 McLachlan writes, in the context of a discussion of choice of law for privacy issues, 'where the action for breach of confidence applies to restrain publications in the media of private facts, a comparison with other causes of action discussed in this article [copyright, defamation, etc] does point to the place of publication as the decisive factor': Campbell McLachlan, 'From Savigny to Cyberspace: Does the Internet Sound the Death-Knell for the Conflict of Laws?' (2006) 11 *Media & Arts Law Review* 418, 433.

131 *Douglas v Hello!* [2006] QB 125, 161 [100] (Lord Phillips for the Court).

132 (1870) LR 5 CP 542, 552 (Brett J for the Court), quoted in *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635, 640 [14] (Spigelman CJ).

133 The authors of *Dicey* write that 'it seems uncontroversial to assert that the real focus of the breach of confidence action in cases such as *Douglas v Hello!* is on the defendant's conduct in misusing private information, rather than any consequential enrichment': Collins et al, *Dicey*, above n 22, vol 2, 2193 [34-092].

of download.[134] But, unlike in the case of international defamation,[135] where there is a separate tort for each download in each law area, in the case of confidential information, unauthorised use is treated as a single event. If the action is purely equitable, then equity acts singularly upon the conscience of the defendant. In such cases, a plaintiff may be better off relying on a distinct 'head' of schedule 6. The problem of locating a single action may be avoided if, for the purposes of jurisdiction, breach of confidence is treated as a tort.

B Damage Caused by a Tortious Breach of Confidence Arising in Australia

Extraterritorial service of process is permitted for a claim founded on a tortious act or omission causing damage which was suffered wholly or partly within Australia.[136] Characterisation of the claim in terms of this pigeonhole avoids the problem of locating the cause of action. But it presents a more difficult problem: whether an act or omission founding a breach of confidence should be characterised as 'tortious'.[137]

The jurisdictional debate may inform the resolution of this problem. For those in the equity camp, to frame an equitable claim in terms of a common law label may imply a fusion fallacy. Perhaps it is for this reason that in *Traxon* it was not even considered whether breach of confidence or breach of fiduciary duty could be captured by long-arm provisions in respect of torts. On the other hand, it is often said that the characterisations deployed in the conflict of laws do not align, and need not align, to the traditional divisions of substantive principles of private law.[138]

In *Vidal-Hall v Google*,[139] the Court of Appeal considered whether misuse of private information was a tort for the purposes of analogous service rules. The claimants argued that Google collected private information about their web usage via the Apple Safari browser, which it then used to sell targeted advertising. They pleaded causes of action in misuse of private information, breach of confidence, and breach of the *Data Protection Act 1998* (UK) c 29. As Google was based outside of the jurisdiction, a threshold issue was whether service was permitted. At first instance, Tugendhat J held that service outside the jurisdiction was permitted in respect of the misuse of private information claim, which could be

134 *Gutnick* (2002) 202 CLR 575.

135 Cf interstate defamation in Australia under the Uniform Defamation Acts: see, eg, *Defamation Act 2005* (NSW) s 11(2).

136 *UCPR* sch 6(a)(ii). Note that, although other Australian jurisdictions provide an equivalent basis for service, Western Australia lacks an analogous pigeonhole: see *Rules of the Supreme Court 1971* (WA) O 10 r 1(1)(k).

137 Another problem, not considered here, is where to locate the damage flowing from breach of confidence. In *Dicey* it is said that, in the context of EU choice-of-law rules, 'the "damage" for the purposes of [*Rome II Regulation*] Art 4(1) will presumably occur in the place where the confidence is breached, even if the defendant subsequently benefits from that enrichment elsewhere': Collins et al, *Dicey*, above n 22, vol 2, 2310 [36-059], citing *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II)* [2007] OJ L 199/40, art 4(1) ('*Rome II Regulation*').

138 See Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 2nd ed, 2008) 208 ('*Conflict of Laws 2nd ed*'); Collins et al, *Dicey*, above n 22, vol 1, 43 [2-014].

139 [2016] QB 1003.

characterised as a tort.[140] However, his Honour declared that the court had no jurisdiction in respect of the breach of confidence claim; following *Kitechnology*, breach of confidence was not a tort.[141]

On appeal, Lord Dyson MR and Sharp LJ, with whom McFarlane LJ agreed, stressed that 'misuse of private information' was now a distinct species from the traditional equitable action for breach of confidence. The use of the label 'tort' in cases like *Campbell* was not merely loose language, but revealing of the nature of the cause of action.[142] And so their Lordships stated that '[m]isuse of private information is a civil wrong without any equitable characteristics'.[143] Their Lordships permitted service outside of the jurisdiction in respect of misuse of private information, but, in keeping with *Kitechnology*, their Lordships would not have permitted extraterritorial service in respect of the breach of confidence claim.[144]

Whether *Vidal-Hall v Google* may be used by Australian courts for the purposes of characterisation under local jurisdictional rules is questionable. The English metamorphosis of breach of confidence into misuse of private information has not yet been followed in Australia. As the High Court declined to recognise a common law privacy tort in *ABC v Lenah Game Meats*, it was understandable that *Wilson v Ferguson* relied on the equitable jurisdiction and the language of 'confidence' and 'conscience'.[145] Until the High Court revisits the issue, it is unlikely that Australian Supreme Courts would dare to characterise breach of confidence as a 'tort' for the purposes of jurisdictional rules. But, if they had the will to do so, they could. They might argue that *ABC v Lenah Game Meats* did not preclude the future development of a tort, and the emergence of misuse of private information is thus consistent with Australian authority.[146] Alternatively, they could appeal to the proposition that characterisation in the field of conflict of laws is not the same as the characterisation undertaken in respect of 'substantive' principles of private law.[147] The label 'tortious' in schedule 6 to the *UCPR* could have distinct meaning from that used in respect of the dispositive rules[148] of the law of torts; in the words of Tugendhat J in *Vidal-Hall v Google*, '[a] term may have different meanings in different contexts'.[149]

One might also recall the role and status of the long-arm rules that provide the model for characterisation. State Supreme Courts possess the inherent jurisdiction to make their own rules.[150] The rules merely give form to and impose

140 *Vidal-Hall v Google Inc* [2014] 1 WLR 4155.
141 Ibid 4174 [70]–[71].
142 *Vidal-Hall v Google* [2016] QB 1003, 1023–4 [26].
143 Ibid 1028 [43].
144 Ibid 1031 [50]–[51].
145 [2015] WASC 15, [57] (Mitchell J).
146 See especially *ABC v Lenah Game Meats* (2001) 208 CLR 199, 230–1 [54]–[55] (Gleeson CJ).
147 See Collins et al, *Dicey*, above n 22, vol 1, 43 [2-014]; Davies, Bell and Brereton, above n 29, 515 [21.3].
148 'Indicative rules', or choice-of-law rules, are distinguishable from 'dispositive' rules, or the substantive principles of law which dispose of the action: W R Lederman, 'Classification in Private International Law' (1951) 29 *Canadian Bar Review* 3, 15 ff.
149 *Vidal-Hall v Google Inc* [2014] 1 WLR 4155, 4169 [54].
150 *Connelly v DPP* [1964] AC 1254, 1347 (Lord Devlin); *Harris v Caladine* (1991) 172 CLR 84, 95 (Mason CJ and Deane J).

order upon the exercise of inherent jurisdiction which those courts would possess even in the absence of those rules.[151] If a court has authority to decide a claim for breach of confidence, then it should possess the powers reasonably necessary for the exercise of that authority.[152] Given the propensity for confidential information to traverse borders, it is arguably necessary for State Supreme Courts to possess extended jurisdiction over persons overseas in respect of actions for breach of confidence, provided that the matter has some connection to the forum sufficient to warrant the invocation of the Supreme Court's (very broad) subject matter jurisdiction.[153] The rules should be given a liberal and purposive interpretation in light of the demands of cross-border disputes in the digital era.[154]

A tortious characterisation may be more defensible for the purposes of jurisdictional rules where the breach of confidence in question concerns what judges of the United Kingdom have branded a misuse of private information. In any event, there would still be other bases by which extended jurisdiction could be permitted.

C Jurisdiction in the Context of Injunction Claims

Service outside the jurisdiction is permitted without leave in respect of an injunction to compel or restrain the performance of any act in Australia.[155] If an injunction is sought to restrain the publication of confidential information or, as in *X v Twitter*, if an injunction is sought to enjoin removal of confidential information, a court may have regard to this injunction pigeonhole in justifying extraterritorial jurisdiction.[156]

Where the content in question is available on the internet, it may be questioned whether the act of removal occurs within Australia.[157] The act might be located at the place of the person to be enjoined, who may be overseas; the place of the relevant server, which may also be overseas; or perhaps at the place where the content was accessed, or accessible, which may be several places. In *X v Twitter*, Pembroke J assumed that, because the impugned content was accessible worldwide, the injunction would operate everywhere in the world: 'The injunction sought to compel or restrain the performance of certain conduct by the defendants everywhere in the world. That necessarily includes Australia'.[158] This was held out as sufficient to establish the Court's jurisdiction over the American and Irish Twitter companies, who had not participated in the proceedings.

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151 *TK v Australian Red Cross Society* (1989) 1 WAR 335, 340 (Malcolm CJ).

152 *Grassby v The Queen* (1989) 168 CLR 1, 16 (Dawson J); *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, 451–2 [50]–[51] (Gaudron, Gummow and Callinan JJ).

153 See Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012) 34.

154 Principles of statutory interpretation would also favour this approach: see, eg, *Interpretation Act 1987* (NSW) s 33.

155 *UCPR* sch 6(d)(i).

156 See especially *UCPR* sch 6(d)(i).

157 Cf *Lewis v King* [2004] EWCA Civ 1329, [2] (Lord Woolf CJ, Mummery and Laws LJJ).

158 *X v Twitter* [2017] NSWSC 1300, [20].

This aspect of *X v Twitter* may be lamented as involving an 'exorbitant' jurisdiction.[159] It might be complained that a domestic court should not claim authority over content which is available not merely in Australia, but everywhere.[160] Another view is that the rules are premised on a paradigm of private international law which depends on territoriality, and that this paradigm is ill-equipped for the challenges of digital globalisation.[161] When Savigny was considering the 'seat' of legal relationships,[162] the internet was not yet even a subject of science fiction.[163] The modern view is that the approach to jurisdiction in *X v Twitter* was not necessarily 'exorbitant'. Rather, as Lord Sumption said in another context, the decision was 'a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum'.[164] Accordingly, the injunction pigeonhole[165] should provide valuable refuge for litigants pursuing an injunction in respect of an online breach of confidence.[166]

D Conclusions on Jurisdiction over Breach of Confidence

The preceding analysis indicates that the characterisation of the subject matter underlying a breach of confidence claim may be necessary for the purposes of satisfying long-arm jurisdictional rules. How should the characterisation exercise proceed? There is a rich and longstanding theoretical literature on this question, at least in respect of choice-of-law problems.[167] Although the context here is different, that choice-of-law work may inform the task of localisation described above[168] and the question of whether breach of confidence should be characterised as tortious. The latter issue is considered again below in respect of choice of law. Putting the theoretical considerations to one side, it has long been observed that the English approach to these problems is predominately positivist – or, put another way, doctrinal.[169] Australian courts are the same, and will consider precedent when characterising issues of breach of

159 See *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 65 (Lord Diplock) ('*Amin Rasheed*').

160 See *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2014] FSR 22, 495–6 [61]–[62] (Roth J).

161 Ralf Michaels, 'Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization' (Research Paper No 74, Duke Law School Legal Studies, 28 September 2005) 28.

162 See Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* (William Guthrie trans, T & T Clark, Law Publishers, 2nd ed, 1869) 59 [trans of: *Systems des Heutigen Römischen Rechts* (first published 1840)].

163 Mark Twain's *From the 'London Times' of 1904* (Century, 1898) was published more than 30 years after Savigny's death.

164 *Abela v Baadarani* [2013] 1 WLR 2043, 2062–3 [53].

165 *UCPR* sch 6(d)(i).

166 Whether that is desirable is an issue for consideration elsewhere.

167 The theory has had little impact on English law: *Macmillan v Bishopsgate* [1996] 1 WLR 387, 392 (Staughton LJ).

168 For example, the exercise for determining the place of the wrong in the context of jurisdictional rules is very similar to that necessary to apply the *lex loci delicti* rule: see, eg, *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458.

169 Ernest G Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1924) 33 *Yale Law Journal* 736, 736.

confidence for the purposes of jurisdictional rules. Cases like *Traxon* and *X v Twitter* may be readily followed,[170] while *Vidal-Hall v Google* may be persuasive.[171]

If courts possess jurisdiction in personam under the rules, it does not mean that they will, or should, exercise that jurisdiction. The principle of *forum non conveniens*,[172] and equitable principles concerning the discretion to award relief,[173] provide important limitations on the exercise of extraterritorial jurisdiction. If the applicable law is not the *lex fori*, this will favour an argument that the court should decline to exercise its jurisdiction.[174]

V THE LAW APPLICABLE TO BREACH OF CONFIDENCE

In a breach of confidence case connected to multiple law areas, which system of law ought to determine the key issue, or issues, in dispute? What is the applicable choice-of-law rule? The position is complicated.[175] The answer to that question may depend on the jurisdictional debate. This Part proceeds on the assumption that the equity scholars are right: that breach of confidence is purely equitable in nature. Even on this assumption, tortious characterisations may be appropriate for the purposes of private international law rules. This claim turns on the broader question of the proper approach to choice of law for equitable issues.

A Is Equity Mandatory?

The conventional view is that equitable issues are a matter for the law of the forum, the *lex fori*, even where the otherwise applicable law is foreign law. In *National Commercial Bank v Wimborne*, Holland J explained that, because equity acts in personam, '[t]he Equity Court determines according to its own law whether an equity exists, its nature and the remedy applicable'.[176] In *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*, McHugh JA described

170 Or *should* be followed unless a court is convinced they were plainly wrongly decided: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

171 See also *Shenzhen Futaihong Precision Industry Co Ltd v BYD Co Ltd* [2008] HKEC 1093, [51]–[61] (Deputy Judge Thomas Au).

172 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *UCPR* r 11.6(2)(b).

173 See, eg, Normann Witzleb, '"Equity Does Not Act in Vain": An Analysis of Futility Arguments in Claims for Injunctions' (2010) 32 *Sydney Law Review* 503; I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Lawbook, 9th ed, 2014) 333.

174 See *Zhang* (2002) 210 CLR 491.

175 See, eg, *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2014] FSR 22, 511 [125] (Roth J). The applicable choice-of-law rule to the Canadians' action for intrusion upon seclusion was recently described as a 'novel issue': *Tucci v Peoples Trust Co* [2017] BCSC 1525, [158] (Masuhara J). 'Identifying the relevant common law principles is not straightforward': *Innovia Films Ltd v Frito-Lay North America Inc* [2012] RPC 24, 598 [103] (Arnold J) ('*Innovia*').

176 (1978) 5 BPR [97 423], 24 ('*Wimborne*').

this as 'the generally accepted view'.[177] Taking the dictum of Holland J at its strongest, choice-of-law methods should not be invoked when the issue is one of equity; the application of equity is a necessary corollary of the exercise of the court's jurisdiction. Thus, in the Foreword to Yeo's monograph, *Choice of Law for Equitable Doctrines*, Justice William Gummow opined that:

> the precepts and principles which inform the 'conscience' of the defendant and give the plaintiff the necessary 'equity' are framed, not with a view to the responses of the man on the Clapham omnibus, but in overriding and universal terms. This consideration tends to support the notion (which Professor Yeo does not favour) that the question of whether such an equity exists is not to be determined by a consideration of foreign law despite connecting factors with other legal systems.[178]

What is it about 'conscience' that distinguishes equity from other principles of private law – like tort – which are subject to choice-of-law analyses? One answer is that matters of conscience are intractably attached to the exercise of equitable jurisdiction; 'conscience' has been described as an element of equitable jurisdiction,[179] and questions of jurisdiction are a matter for the law of the forum.[180] English authorities support this view. For example, in *Ewing v Orr Ewing (No 1)*, the Earl of Selborne LC held:

> The Courts of Equity in England are, and have always been, Courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction.[181]

Similarly, in *British South Africa Co v De Beers Consolidated Mines Ltd*, Cozens-Hardy MR observed:

> For centuries the Court of Chancery has, by virtue of its jurisdiction in personam, applied against parties to a contract or trust relating to foreign land the principles of English law, although the *lex situs* did not recognize such principles. … If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities.[182]

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177 *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 192 ('*Heinemann*').

178 Justice William Gummow, 'Foreword' in T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) vi.

179 *National City Bank of New York v Gelfert*, 29 NE 2d 449, 452 (Loughran J) (NY Ct App, 1940), quoted in Young, Croft and Smith, above n 48, 109.

180 Garnett writes that subject matter jurisdiction is a matter for the *lex fori* because litigants 'must take the court as they find it', as the majority said in *Pfeiffer* (2000) 203 CLR 503, 543 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ): Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) 96.

181 (1883) 9 App Cas 34, 40.

182 [1910] 2 Ch 502, 513–14.

Recently, in *Akers v Samba Financial Group*, Lord Mance quoted these passages and went on to hold that a trust may be created in respect of assets located in a jurisdiction which does not recognise the institution of the trust.[183] Although the case turned on application of the *Hague Convention on the Recognition of Trusts*,[184] it provides a contemporary illustration of the way that courts of equity will deploy equitable doctrines at the expense of traditional choice-of-law techniques.

Apart from that line of reasoning, which focuses on equitable jurisdiction, it might be argued that principles of equity ought to be characterised as procedural. It is accepted that the *lex fori* governs issues of procedure.[185] That argument is untenable. Since *Pfeiffer*, it has been accepted that principles which merely regulate the mode or conduct of proceedings are procedural, and all other principles are substantive. Further, 'matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure'.[186] Equity is valuable precisely because it is substantive in the sense endorsed in *Pfeiffer*.

In any event, Australian private international law no longer provides that equitable issues be subject exclusively to the *lex fori*. In *Paramasivam v Flynn*, Miles, Lehane and Weinberg JJ considered *Wimborne* and *Heinemann* and held:

> Particular considerations may arise where the source of a fiduciary relationship is a contract the governing law of which is not that of the forum. … In other cases of fiduciary relationship, both principle and the balance of Anglo-Australian authority favour, in our view, the general application of the *lex fori*, subject, perhaps, to this: that where the circumstances giving rise to the asserted duty or the impugned conduct (or some of it) occurred outside the jurisdiction, the attitude of the law of the place where the circumstances arose or the conduct was undertaken is likely to be an important aspect of the factual circumstances in which the Court determines whether a fiduciary relationship existed and, if so, the scope and content of the duties to which it gave rise.[187]

Although those comments were limited to fiduciary relationships, it is hard to see why 'the attitude of the law of the place where the circumstances arose' should not be taken into account where some other principle of equity is invoked by events occurring outside of the jurisdiction.

Paramasivam was applied in *Murakami v Wiryadi*.[188] The appeal was from a decision to stay proceedings on *forum non conveniens* grounds. As the High Court emphasised in *Zhang*, choice of law is material to the question of whether a court should decline to exercise its jurisdiction on the basis that it is a clearly inappropriate forum.[189] Although the Court of Appeal did not finally determine

183 [2017] 2 WLR 713, 723–7 [24]–[34].

184 *Convention on the Law Applicable to Trusts and on Their Recognition*, opened for signature 1 July 1985, 1664 UNTS 311 (entered into force 1 January 1992) ('*Hague Convention on the Recognition of Trusts*'); see *Recognition of Trusts Act 1987* (UK) c 14.

185 *Stevens v Head* (1993) 176 CLR 433.

186 *Pfeiffer* (2000) 203 CLR 503, 543 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

187 (1998) 90 FCR 489, 503 ('*Paramasivam*').

188 *Murakami v Wiryadi* (2010) 268 ALR 377, 404 [139] (Spigelman CJ) ('*Murakami*').

189 (2002) 210 CLR 491, 504 [26] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

the choice-of-law issue, Spigelman CJ (with whom McColl and Young JJA agreed) nonetheless considered whether the *lex fori* would govern equitable claims for a constructive or resulting trust. In applying *Paramasviam*, his Honour held that there are a number of circumstances in which the governing law of a fiduciary relationship is not the *lex fori*.[190] For example, where an equitable claim depends on a contractual relationship, the court will apply the proper law of the contract, which may not be the law of the forum. On the facts, it was held that equity, acting on the conscience of the parties, would enforce expectations created under Indonesian law with respect to property situated in New South Wales. It was expected that the property rights of parties to an Indonesian marriage would be determined by Indonesian law. Nonetheless, the appeal against the stay was allowed.

Murakami is the leading Australian authority on choice of law for equitable issues.[191] The case affirms that, generally, a fiduciary relationship will be governed by the *lex fori*, subject to various exceptions. The categories of exceptions are not closed.[192] Consistently with *Murakami*, a fiduciary relationship may not be subject to the *lex fori* where the relationship is underpinned by a factual background that would engage a competing choice-of-law rule. This approach can be extended to other kinds of equitable issues.

B Equity Follows the Choice of Law

In his monograph on *The Conflict of Laws*, Briggs presented the aphorism that 'equity follows the choice of law'.[193] Taken at its highest, the point is that equitable issues should not engage a distinct choice-of-law rule, but rather, should be fit into (or characterised in light of) the closest appropriate choice-of-law rule. In Briggs's view, equitable obligations are 'doubtful tools with which to make sense of private international law'.[194]

Yeo is the leading proponent of this internationalist view. He challenges the idea that the *lex fori* should be the general starting point for choice of law for equitable issues.[195] Instead, the relevant choice-of-law rule will depend on the character of the equitable issue under examination. This is similar to the point made in *Paramasivam* and *Murakami*, but places greater emphasis on the closest analogous choice-of-law rules, and downplays the extent to which courts of equity should revert to the *lex fori* as a matter of course.

In *Rickshaw Investments Ltd v Nicolai Baron von Uexkull*,[196] the Singapore Court of Appeal considered Yeo's work in the context of an appeal from a

190 *Murakami* (2010) 268 ALR 377, 403–4 [132]–[139].

191 *Hiralal v Hiralal* (2013) 10 ASTLR 300, 334–5 [190]–[192] (Slattery J), citing *Murakami* (2010) 268 ALR 377; see also *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177, 240–2 [339]–[346] (Lindgren AJA); *Piatek v Piatek* (2010) 245 FLR 137, 160–3 [117]–[126] (Douglas J).

192 *Murakami* (2010) 268 ALR 377, 404 [139] (Spigelman CJ).

193 Briggs, *Conflict of Laws 2nd ed*, above n 138, 216; cf the fleeting consideration in: Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 236 n 1.

194 Briggs, *Conflict of Laws 2nd ed*, above n 138, 204.

195 Yeo, *Choice of Law for Equitable Doctrines*, above n 107, 8–10.

196 [2007] 1 SLR 377 ('*Rickshaw*').

decision to stay proceedings on *forum non conveniens* grounds. The appellants' underlying claim was multifarious, and involved allegations of conversion, equitable breach of confidence, breach of fiduciary duty, and deceit. The factual background was a dispute under a contract of employment, which included a choice of German law and a jurisdiction agreement in favour of German courts. The law applicable to the equitable claims was key to the question of whether a stay was appropriate. The Court held as follows:

> we would *not* go so far as to endorse the proposition that equitable concepts and doctrines are *always* dependent on other established categories (because, as the modern law of restitution illustrates, the law itself never ceases to develop). We would, however, accept the more *limited* proposition to the effect that where equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned. We would also leave open the possibility that future legal developments might result in equitable obligations constituting a separate established category in so far as choice of law is concerned.[197]

Yeo's view, substantially adopted in *Rickshaw*, ought to be adopted for the purposes of characterisation of breach of confidence. As Tipping J considered in *Attorney-General for England and Wales v The Queen*, in the context of a choice-of-law issue, '[i]t would be anomalous to apply one system of law to an issue which would have arisen at law, and another to an issue which would have been for the Courts of Equity to deal with'.[198] That approach would also undermine coherence in the law, the importance of which has been expressed by the High Court on several occasions.[199]

However, in *Murakami*, Spigelman CJ cited Tipping J in *Attorney-General for England and Wales v The Queen* and held that it is not appropriate to adopt that reasoning in Australia because it involves a fusion fallacy.[200] With respect, it is submitted that one can maintain an anti-fusion (or pro-'fusion fallacy') position while accepting that equitable issues might be subject to a *lex causae* other than the *lex fori*.[201] Two propositions support this claim. First, as the Chief Justice recognised, the categories of exception to the application of the *lex fori* to equitable issues are not closed.[202] Equity may act on the conscience of the parties to give effect to the parties' expectations in respect of the application of foreign law. So if the parties had a relationship in a jurisdiction which recognises a 'privacy tort', an Australian court of equity may have regard to that law of that foreign jurisdiction – the putative *lex loci delicti* – in finding a breach of confidence by effectively applying foreign law.

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197 Ibid 407 [81] (Andrew Phang Boon Leong JA) (emphasis in original).

198 [2002] 2 NZLR 91, 103 [30].

199 *Sullivan v Moody* (2001) 207 CLR 562; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390; *Miller v Miller* (2011) 242 CLR 446; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498.

200 *Murakami* (2010) 268 ALR 377, 404 [136] (Spigelman CJ).

201 See Yeo, *Choice of Law for Equitable Doctrines*, above n 107, 67 [2.32].

202 *Murakami* (2010) 268 ALR 377, 404 [139] (Spigelman CJ).

Second, as explained above, characterisation in choice of law is not necessarily determined by jurisdictional categories. Further, characterisation in private international law is not necessarily determined by the juridical categories expressed in titles of textbooks and subjects at law schools.[203] The authors of *Dicey* express it as follows: 'the characterisation of a rule of law for any purpose other than that of the conflict of laws cannot be relied upon for conflicts purposes'.[204] This is not to say that the jurisdictional basis of breach of confidence is irrelevant. Rather, it will not be determinative. Breach of confidence might be subject to competing characterisations, depending on the nature of the issue in question.

C Choice-of-Law Rules for Breach of Confidence

This section provides an overview of how common law courts have resolved choice-of-laws problems in respect of breach of confidence, while the following section argues that a cross-border misuse of private information case ought generally to be subject to the choice-of-law rule for torts. The cases show that at least four other choice-of-law rules are also relevant. As characterisation involves determining the applicable choice-of-law rule, the following analyses present five competing characterisations of breach of confidence:

1. The general choice-of-law rule for equity: 'Equitable issues are governed by the *lex fori*';[205]
2. The choice-of-law rule for contract: 'Contractual issues are governed by the proper law of the contract';[206]
3. The choice-of-law rule for torts: 'Issues of tort are governed by the *lex loci delicti*';[207]
4. The choice-of-law rule for restitution: 'Issues of restitution are governed by the proper law of the obligation';[208] and
5. The choice-of-law rule for procedure: 'Issues of procedure are governed by the *lex fori*'.[209]

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203 'If the cause of action in English domestic law is not precisely the same as its foreign law counterparts, that is not significant, for our task is to define a characterization category, not to elevate domestic law, entire and intact, onto the celestial plane of private international law': Briggs, *Conflict of Laws 2nd ed*, above n 138, 208.

204 Collins et al, *Dicey*, above n 22, vol 1, 43 [2-014].

205 *Wimborne* (1978) 5 BPR [97 423], 24 (Holland J).

206 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 ('*Akai*'). Note that this is also probably a general rule; issues of formation and validity of contract are probably subject to the *lex fori*, which may not be the proper law of the contract, at least at common law: see *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1.

207 *Pfeiffer* (2000) 203 CLR 503; *Zhang* (2002) 210 CLR 491.

208 *Sweedman* (2006) 226 CLR 362, 402 [31]–[32] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

209 *Pfeiffer* (2000) 203 CLR 503.

1 Equitable Characterisation

The most in-depth consideration of characterisation of breach of confidence was by the Court of Appeal in *Douglas v Hello!*, where it was held that the English law of confidence, the *lex fori*, was the applicable law. Michael Douglas and Catherine Zeta-Jones married in New York. They had entered into a commercial relationship with a British tabloid, OK! Magazine, which provided exclusive coverage of their wedding and rights to publish photographs. A paparazzo infiltrated the wedding and took unauthorised photographs. He sold the photographs to a rival tabloid, Hello! Magazine, which sought to publish them as a 'spoiler'. Although OK! Magazine initially obtained an injunction restraining that publication, it was lifted a few days later. OK! Magazine went to press early to minimise the impact of Hello! Magazine's rival activity. The Douglases claimed for beach of confidence in England. The Court of Appeal upheld the first instance decision on liability and on damages in favour of the Douglases. On appeal, Hello! Magazine argued that the breach of confidence claim should have been characterised as a restitutionary claim for unjust enrichment.[210] Under the English choice-of-law rule, the proper law would have been the law of the country where the enrichment occurred,[211] which would have been New York. It was argued that the claim would fail under New York law.

The Court held that New York law had no application. It applied the English law of confidence to give effect to the United Kingdom's obligations[212] to protect individual privacy.[213] The Court also considered whether the action should be characterised as a tort;[214] if so, section 9(1) of the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42 would have applied, which would have required the application of the law of the place of the wrong.

The Court acknowledged that it was 'shoehorning' the claim into the cause of action for breach of confidence.[215] The claim was essentially about a wrong, and not about the protection of a confidence. The wrong constituted the misuse of the improperly obtained photos, by way of publishing them in England. Although the attitude of the place of intrusion – which was New York – was taken into account, it was the *policy* of the English law of confidence that provided the remedy. It was held that New York law had no 'direct application on the facts of this case'.[216]

An appeal to forum policy is the best justification for the invocation of the equitable characterisation escape device. Chen has argued for the application of the *lex fori* as a matter of public policy in respect of fiduciary relationships. He appeals to fiduciary doctrine's deep moral foundation and protective nature.[217]

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210 *Douglas v Hello!* [2006] QB 125, 160–1 [96]–[102] (Lord Phillips for the Court).

211 *Rome II Regulation* art 10; *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105; see also Collins et al, *Dicey*, above n 22, vol 2, 2289–93 [36-002]–[36-010].

212 As per the *Human Rights Act 1998* (UK) c 42.

213 *European Convention on Human Rights* art 8.

214 *Douglas v Hello!* [2006] QB 125, 160 [96] (Lord Phillips for the Court).

215 Ibid.

216 Ibid 161 [100] (Lord Phillips for the Court).

217 Chen, above n 99, 187.

There is force to the simplicity and certainty of this position; it finds support in the long tradition of courts excluding the operation of foreign law to give effect to fundamental values of the forum,[218] and in the Chancery approach to jurisdiction described above.[219] In a similar vein, it could be argued that the *lex fori* should govern breach of confidence even in respect of misuse of private information, to give effect to the policy of the law that places value on one's private life. *Douglas v Hello!* would support that approach,[220] but it is not without its difficulties.

What do *Paramasivam* and *Murakami* mean for the *lex fori* approach to breach of confidence? As White says, '[e]quity cannot properly enforce matters of conscience if it ignores a foreign law to which the parties were subject'.[221] But to what extent should a court have regard to foreign law, as part of an analysis of cross-border facts, in ascertaining what equity requires?[222] Those who favour the application of the *lex fori* to equitable issues 'in light of foreign law' should also be asked to explain what they mean and what follows from it.[223] The kind of enlightened equity contemplated by those cases could involve what is in substance, if not in form, a tortious characterisation leading to the application of the putative *lex loci delicti*.

2 Contractual Characterisation

As Lord Diplock observed in *Amin Rasheed*, a contract depends on a system of law for its existence.[224] That system is the proper law of the contract: the system of law which the parties intended to govern their contract, or, in the absence of that intention, the system with the closest and most real connection to the transaction.[225] Where an obligation of confidence is founded on a cross-border contract, it is appropriate for the proper law of that contract to govern any issues in respect of breach of confidence. This is probably uncontroversial – the point is observed in both *Paramasivam* and *Murakami* that contractual characterisations are to be preferred where a fiduciary relationship question arises in the context of a contractual relationship.[226] The same point is made in *Jacobs' Law of Trusts in Australia*: in the context of a contractual relationship, the existence of a constructive trust is determined by the proper law of the contract.[227] Thus, in the recent case of *Marshall v Fleming*, it was common ground that, if New York

218 See, eg, *Oppenheimer v Cattermole* [1976] AC 249; see Collins et al, *Dicey*, above n 22, vol 1, 99 [5R-001].

219 See, eg, *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132; see also *Heinemann* (1987) 10 NSWLR 86, 139 (Kirby P).

220 See also *Heinemann* (1987) 10 NSWLR 86.

221 White, above n 108, 112.

222 Cf *Paramasivam* (1998) 90 FCR 489, 503 (Miles, Lehane and Weingberg JJ).

223 J R F Lehane, 'Review of *Specific Performance* (Gareth Jones and William Goodhart, Butterworth, 1986)' (1987) 46 *Cambridge Law Journal* 163, 165, quoted in Justice William Gummow, 'Equity: Too Successful?' (2003) 77 *Australian Law Journal* 30, 33.

224 [1984] AC 50, 65.

225 *Akai* (1996) 188 CLR 418, 434 (Toohey, Gaudron and Gummow JJ).

226 See also *Nicholls v Wilson and Partners Ltd* (2010) 243 FLR 177, 242 [346] (Lindgren AJA).

227 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 626 [28-22].

law would apply as the proper law of a contract of retainer, the whole of the plaintiffs' case – including a claim of breach of confidence – would fail by reason of the expiry of New York limitation periods.[228] A contractual characterisation for breach of confidence gives effect to the primacy of autonomy in private international law, and the proposition that courts will do their best to give effect to the parties' intention in respect of applicable law.[229] This may be the least controversial aspect of this article.

3 Tortious Characterisation

It is also uncontroversial that, at least for *substantive* issues[230] arising in the context of a tort occurring overseas, Australian courts will apply the law of the place of the wrong, subject to matters of pleading and proof.[231] The application of that *lex loci delicti* rule to breach of confidence depends on the characterisation of the key issue in dispute as a matter of tort. Once again, in the context of breach of confidence, the case consideration of this characterisation is sparse.[232]

As flagged above, the prospect of a tortious consideration was considered in obiter in *Douglas v Hello!*.[233] Unusually, the Court considered the English choice-of-law rule for torts despite the fact that the parties did not seek to rely on it. The facts of the case favoured an equitable characterisation leading to the *lex fori*: although there was an intrusion in New York, the *real* wrong – or the cause for complaint[234] – was the publication of photographs in the forum, and the forum was willing to provide relief for breach of confidence by application of the *lex fori*. The Court concluded, 'albeit not without hesitation, that the effect of shoehorning this type of claim into the cause of action of breach of confidence means that it does not fall to be treated as a tort under English law'.[235]

Beyond *Douglas v Hello!* and *Vidal-Hall v Google*, which were concerned with jurisdictional characterisation, there are few other common law authorities on point. The Singaporean Court of Appeal considered the issue in *Rickshaw*, where it substantially adopted the Yeo approach to choice of law for equity and contemplated that breach of confidence might be characterised as a tort.[236] Previously, in the Malaysian case of *Attorney-General of Hong Kong v Zauyah Wan Chik*,[237] Sri Ram JCA applied the rule in *Phillips v Eyre*[238] (once Australia's

228 [2017] NSWSC 1107, [96], [97] (Payne JA). See also *Fleming v Marshall* [2011] NSWCA 86; *Piatek v Piatek* (2010) 245 FLR 137, 162 [120], [122] (Douglas J); *Rickshaw* [2007] 1 SLR 377, 407 [83] (Andrew Phang Boon Leong JA).

229 See Peter Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999) 2; *Huddart Parker Ltd v Ship Mill Hill* (1950) 81 CLR 502, 509 (Dixon J).

230 The carve-out for matters of procedure may be significant for breach of confidence, and is thus considered below under 'Procedural Characterisation', Part V(C)(5).

231 *Zhang* (2002) 210 CLR 491.

232 In the United States, breach of fiduciary duty has been characterised as tortious: see *Aaron Ferer & Sons Ltd v Chase Manhattan Bank*, 731 F 2d 112, 120–1 (Pratt J) (2nd Cir, 1984), considered in Barnard, above n 107, 498–9.

233 *Douglas v Hello!* [2006] QB 125, 160 [96] (Lord Phillips for the Court).

234 See *Jackson v Spittall* (1870) LR 5 CP 542.

235 *Douglas v Hello!* [2006] QB 125, 160 [96] (Lord Phillips for the Court).

236 *Rickshaw* [2007] 1 SLR 377, 407 [81] (Andrew Phang Boon Leong JA).

237 [1995] 2 MLJ 620.

choice-of-law rule for torts[239]) to a claim for breach of confidence. His Honour's approach depended on the sui generis view of the jurisdictional debate:

> The point that emerges from *Prince Albert*[240] and all the learning that has followed upon it leaves me with the impression that although breach of confidence is a wrong sui generis, it is by its very nature akin to tortious wrongdoing. In my judgment, in the field of private international law, for the purpose of characterization, the principles that are to govern this wrong are the same as those which govern the commission of a foreign tort.[241]

If an Australian court had to consider the law applicable to a cross-border breach of confidence, the Singaporean and Malaysian authorities would not, of course, be binding. But it would not be inconsistent with Australian authority, such as *Murakami* and *ABC v Lenah Game Meats*, for the court to apply the *lex loci delicti* to a cross-border breach of confidence.

4 Restitutionary Characterisation

In an older edition of *Dicey*, the authors suggested that breach of confidence might be characterised as a restitutionary claim founded upon unjust enrichment.[242] This was picked up by the Court of Appeal in *Douglas v Hello!*, where it was described as 'persuasive'.[243] It may, however, be misleading to speak of a 'restitutionary' characterisation in the singular. Restitution is a remedy.[244] As discussed below, the appropriate focus of characterisation is the real issue in dispute,[245] and so the applicable choice-of-law rule in a cross-border claim for restitution may turn on the nature of the claim and the conflict of laws in issue.[246] Before the *Rome II Regulation*, *Dicey* thus proposed a multi-faceted choice-of-law rule: although 'the proper law of the obligation' – the law with the closest and most real connection to the obligation[247] – is applicable following a restitutionary characterisation, that 'proper law' should be determined by (a) the proper law of the contract, or (b) in the absence of a contract, the *lex situs*, or (c) in the absence of a contract or relevant property, the law of the place of the enrichment.[248]

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238 (1870) LR 6 QB 1.

239 *Koop v Bebb* (1951) 84 CLR 629, 649 (McTiernan J).

240 *Prince Albert v Strange* (1849) 1 Mac & G 24, 46–7; 41 ER 1171, 1179 (Lord Cottenham).

241 *A-G (HK) v Zauyah Wan Chik* [1995] 2 MLJ 620, 633 (Gopal Sri Ram JCA) (citation added).

242 See Collins et al, *Dicey*, above n 22, vol 2, 2192 [34-091], citing Lawrence Collins et al, *Dicey & Morris on the Conflict of Laws* (Sweet & Maxwell, 13th ed, 2000) vol 2, 1498 [34-029].

243 [2006] QB 125, 160 [97] (Lord Phillips for the Court). The Court favoured the equitable characterisation over a restitutionary characterisation.

244 James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 32–3.

245 *Macmillan v Bishopsgate* [1996] 1 WLR 387; *Sweedman* (2006) 226 CLR 362, 426–7 [116] (Callinan J).

246 See also Andreas Karl Edward Sherborne, 'Restitution in the Conflict of Laws: Characterization and Choice-of-Law in Australia' (2017) 13 *Journal of Private International Law* 1; George Panagopoulos, *Restitution in Private International Law* (Hart Publishing, 2000); see also Stephen Lee, 'Restitution, Public Policy and the Conflict of Laws' (1998) 20 *University of Queensland Law Journal* 1; John Stevens, 'Restitution or Property? Priority and Title to Shares in Conflict of Laws' (1996) 59 *Modern Law Review* 741, 745.

247 Lawrence Collins et al, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 14th ed, 2006) vol 2, 1869 [34-014] ('*Dicey 14th ed*').

248 Ibid vol 2, 1863 [34R-001].

Arguably, the famous *Spycatcher* [249] case involved a restitutionary characterisation. Wright sought to publish a book in Australia based on his time working with the British Secret Service. The British Government brought proceedings in New South Wales to restrain publication of Wright's memoirs, and sought an account of profits, alleging breach of confidence among other things. The focus of the High Court's judgment was the exclusionary rule that an Australian court will not give effect to a foreign governmental interest by way of the application of foreign law.[250] But the cause for consideration of that rule was the Court's acceptance that the claim for breach of confidence was subject to foreign law: the majority was 'prepared to assume … that, *as a matter of English law* and subject to the defences on which the respondents rel[ied], Mr Wright came under an obligation of confidence to the United Kingdom Government'.[251] Brennan J was more explicit: 'An obligation of confidence of the kind in issue in this case is likely to arise under the law of the plaintiff foreign State. In this case it was said that the obligation of confidence arose under the law of the United Kingdom, and that may well be so'.[252] His Honour framed the real issue as 'whether the effect of applying the law which gives rise to the obligation of confidence would be inconsistent with the exigencies of public policy under the law of New South Wales'.[253] The authors of *Dicey* construed the case as involving evident acceptance of a restitutionary characterisation: although the enrichment occurred in Australia,[254] the facts suggested that the system with the closest and most real connection to the obligation (of confidence) was that of England.[255]

The restitutionary characterisation for breach of confidence was considered in *Innovia*, where most of the key events occurred prior to the *Rome II Regulation* being in force, thus prompting consideration of the proper approach to choice of law at general law.[256] Arnold J noted that applying the law of the place of enrichment would be difficult: the subject matter of the claim was patent infringement in several countries, and so 'the enrichment occurred virtually worldwide'.[257] Instead, the Court followed *Spycatcher* and applied the law of the place with which the obligations of confidence were most closely associated, which was English law.[258]

The case for the restitutionary approach is strongest where obligations of confidence are conceived of in terms of unjust enrichment.[259] In the Canadian

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249 *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 ('*Spycatcher*').

250 Ibid.

251 Ibid 40 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ) (emphasis added).

252 Ibid 49 (Brennan J).

253 Ibid 50 (Brennan J).

254 'Emphasis was placed in the case on the fact that the place of publication of Wright's memoirs was Australia. It is unclear whether this factor was a necessary prerequisite to the application of forum law': Lee, above n 246, 15.

255 Collins et al, *Dicey 14th ed*, above n 247, vol 2, 1880 [34-034].

256 *Innovia* [2012] RPC 24, 597–8 [100] (Arnold J).

257 Ibid 601 [107].

258 Ibid 601 [108] (Arnold J).

259 Apart from the doctrinal barriers facing 'unjust enrichment' in Australia, there may be some theoretical problems with the conception of breach of confidence purely in terms of unjust enrichment: see

case, *Minera Aquiline Argentina SA v IMA Exploration Inc*, it was agreed that, following *Cadbury Schweppes*,[260] 'breach of confidence is a restitutionary claim for unjust enrichment resulting from a breach of duty', and that, following *Dicey*, unjust enrichment claims are subject to the 'proper law of the obligation'.[261] That line of reasoning would probably be untenable in Australia.[262]

5 Procedural Characterisation

Claims in equity are often framed in terms of the relief sought rather than through the nomenclature of a 'cause of action'.[263] It may thus be tempting to say that remedial issues are procedural in nature, and subject to the *lex fori*;[264] it is well-accepted that matters of procedure are governed by the law of the forum.[265] The High Court rejected the right–remedy approach to procedural characterisation in *Pfeiffer* in favour of a focus on whether the rule in issue merely regulates the mode or conduct of proceedings.[266] On that approach, the availability of remedies for breach of confidence is likely to be treated as a matter of substance.[267]

The *lex fori* rule for procedure has continuing relevance to cross-border claims for breach of confidence through the maxim that a plaintiff must take the forum as he or she (or it) finds it.[268] This proposition has relevance to claims for injunctions; the injunction is the usual remedy sought and granted for breach of confidence.[269] In *Baschet v London Illustrated Standard Co*, the English court held that it could award an injunction in the context of a cross-border intellectual property dispute subject to French *lex causae*, even though the remedy was 'unknown in France'.[270] The same idea may be applied to other remedies claimed in response to a breach of confidence, such as an account of profits. Whatever system of law determines whether there has been a breach of confidence, Australian courts will defer to their own law in determining the *kind* of relief which could be available.

Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd (2014) 253 CLR 560, 579 [20] (French CJ); Megan Richardson, Michael Bryan and Martin Vranken, *Breach of Confidence: Social Origins and Modern Developments* (Edward Elgar, 2012) 139–40.

260 [1999] 1 SCR 142.

261 *Minera Aquiline Argentina SA v IMA Exploration Inc* [2006] BCSC 1102, [181]–[185] (Koenigsberg J) ('*Minera*'), cited in *Re Walter Energy Canada Holdings Inc* [2017] BCSC 709, [102]–[103] (Fitzpatrick J).

262 See Warren Swain, 'Unjust Enrichment and the Role of Legal History in England and Australia' (2013) 36 *University of New South Wales Law Journal* 1030.

263 Cf Turner, above n 35, 241–4.

264 *General Steam Navigation Co v Guillou* (1843) 11 M & W 877, 895; 152 ER 1061, 1069 (Parke B for the Court); *Stevens v Head* (1993) 176 CLR 433; cf Barnard, above n 107, 475–8.

265 See generally Garnett, *Substance and Procedure*, above n 180.

266 *Pfeiffer* (2000) 203 CLR 503, 543–4 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

267 Although the High Court has not addressed the question of whether assessment of damages is a matter for the *lex loci delicti* in the context of foreign torts: *Zhang* (2002) 210 CLR 491, 520 [76] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

268 See recently *Naiad Dynamics US Inc v Vidakovic* (2017) 266 IR 103.

269 Megan Richardson, 'Of Shrink-Wraps, "Click-Wraps" and Reverse Engineering: Rethinking Trade Secret Protection' (2002) 25 *University of New South Wales Law Journal* 748, 751.

270 [1900] 1 Ch 73, 78 (Kekewich J).

D The Case for the Tortious Characterisation of Misuse of Private Information

The case law shows that there is a principled basis for adopting at least five different characterisations for breach of confidence, and that in different contexts different choice-of-law approaches may be warranted. It should be beyond argument that the proper law of the contract should govern contractual confidences, and that the *lex fori* should determine what remedies are available for any kind of action subject to foreign law, including a claim for breach of confidence. But where the confidence in question would be classified as a misuse of private information in the United Kingdom, and where the issue is whether the defendant ought to be 'liable', in the sense of whether the plaintiff has established the elements of a cause of action, the issue ought to be characterised as tortious.

1 The Equitable Characterisation is Avoidable

Assuming the equitable pedigree of breach of confidence, in a case with strong connections to foreign legal systems, there are at least four alternative bases by which an Australian court may avoid the application of the *lex fori* to the substantive issues in dispute.

First, the court may have regard to the judgment of Spigelman CJ in *Murakami*, where it was held that the categories of exceptions to the application of the *lex fori* to equitable obligations are not closed.[271] For the policy reasons considered below – as well as the doctrinal uncertainty considered above – a court ought to recognise an exception for equitable obligations of confidence.

Second, the court may have regard to the opaque proposition in *Paramasivam* and consider that, where a breach of confidence depends on circumstances or conduct occurring in a foreign place, the law of that place 'is … an important aspect of the factual circumstances' that will determine the scope and content of equitable obligations.[272] So for example, if the claim is premised on a disclosure of information in a jurisdiction recognising a tort of invasion of privacy, the court may 'have regard' to the foreign law of torts in determining the claim in Australia. Strictly speaking, this would be an application of *lex fori*, and consistent with equitable doctrine. But for practical purposes, the court could apply the *lex loci delicti* to the issue of liability. This path may be undesirable, at least from a plaintiff's perspective, when it comes to questions of remedies. Legal remedies, such as exemplary damages, would not be available for a purely equitable breach of confidence,[273] whereas they might if the claim is framed as a tort under foreign law.[274] The extent to which it is appropriate for Australian courts to 'have regard' to foreign law in applying equitable principles is unclear.

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271 (2010) 268 ALR 377, 404 [139].

272 (1998) 90 FCR 489, 503 (Miles, Lehane and Weinberg JJ).

273 See, eg, *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299; cf *Harris v Digital Pulse* (2003) 56 NSWLR 298; *A-G v Blake* [2001] 1 AC 268.

274 Cf *Mosley v News Group Newspapers Ltd* [2008] EMLR 20; *PJS v News Group Newspapers Ltd* [2016] AC 1081, 1104 [42] (Lord Mance JSC).

Third, the court may characterise the issue in light of foreign law. By this it is meant that the court could select the applicable choice-of-law rule by considering how the relevant foreign legal system would treat such an issue. If a foreign legal system would treat misuse of private information as a tort (United Kingdom) or as a matter of unjust enrichment (Canada), then the Australian court could apply the choice-of-law rule for tort, or for restitution, respectively. There are barriers to this approach: in *Oceanic Sun Line Special Shipping Co Inc v Fay*, Brennan J held that '[c]lassification is, of course, a matter for the law of the forum',[275] and in *Sam Hawk*, Allsop CJ and Edelman J held that 'characterising the issue is therefore a matter governed by the law of the forum'.[276] But if these dicta are taken too literally, then a court may never apply a foreign law that is materially different from the *lex fori*; the process of characterisation would be self-defeating.[277] Thus, Forsyth explained that 'what happens when a judge says that he will be characterising according to the *lex fori* is that he characterises the disputed foreign rule according to its closest analogue in the *lex fori*'.[278] The parochialism is necessary because, as the majority recognised in *Pfeiffer*, it is 'axiomatic' that the forum fashions its own choice-of-law rules, and it is the selection of one of those rules which is the *telos* of characterisation.[279] When there are competing characterisations open to the court – as is the case in respect of a cross-border breach of confidence – the court will have what Stone called a 'leeway of choice' in making its selection.[280] The policy considerations set out below should shape the exercise of that choice so that substantive issues of misuse of private information are treated as tortious.

Fourth, the court may simply treat liability for misuse of private information as a tort for the purposes of choice of law, irrespective of how the foreign legal system would characterise the issue. This approach would be defensible even if breach of confidence is an equitable doctrine, because characterisation in the conflict of laws does not necessarily depend on characterisation for jurisdictional, historical, or remedial purposes.[281] As Mance LJ stated, 'the conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations'.[282] And so a 'tort' could have a different meaning in the choice-of-law context than it has in the purely domestic context.[283] The Court of Appeal's treatment of misuse of private information in *Vidal-Hall v Google* would support this approach. The tortious characterisation would also serve the policy goals of choice-of-law techniques.

275 (1988) 165 CLR 197, 225.
276 *Ship 'Sam Hawk' v Reiter Petroleum Inc* (2016) 335 ALR 578, 621 [182] ('*Sam Hawk*').
277 Michael Douglas, 'Characterisation of a Foreign Maritime Lien by the *Lex Fori*' (2017) 17 *Oxford University Commonwealth Law Journal* 152, 160.
278 Forsyth, 'Characterisation Revisited', above n 26, 151.
279 *Pfeiffer* (2000) 203 CLR 503, 527 [42] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
280 Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985) 31–43.
281 Collins et al, *Dicey*, above n 22, vol 1, 43 [2-014].
282 *Raiffeisen* [2001] QB 825, 841 [29].
283 *Vidal-Hall v Google Inc* [2014] 1 WLR 4155, 4169 [54] (Tugendhat J).

2 Policy Favours a Tortious Characterisation

The preceding section is premised on the view that the equitable characterisation ought to be avoided. The case for that premise has been made elsewhere. The application of the *lex fori* as a matter of course encourages forum shopping, the 'cardinal sin' of private international law.[284] Further, it involves a parochial substitution of forum values for those of the system with the strongest connection to the dispute.[285]

The equitable characterisation is also old fashioned, and ill-suited to the challenges of globalisation. In the field of private international law, the societal trend towards globalism[286] finds a counterpart in the claim that courts should take a 'broad internationalist view of legal concepts'.[287] In *OZ-US Film Productions Pty Ltd (in liq) v Heath*, Young J considered the traditional approach to equity in cross-border cases and held that: 'The shrinking globe and the fact that international fraud and fraudsters flourish has meant that some of these concepts may be showing that their use by date has passed'.[288] Davies, Bell and Brereton describe the adherence to the equitable characterisation as a 'dogmatic view' which 'fails to analyse the matter through the internationalist lens required by private international law and is premised on a thoroughly domestic or municipal view of the world'.[289]

Assuming, then, that the equitable characterisation is inappropriate, a case may be made for a restitutionary characterisation which would favour the law with the closest and most real connection to the obligation.[290] *Murakami* supports the view that the focus should be on the parties' underlying relationship, rather than on whether an equity exists.[291] Barnard argues that, where the wrong is committed in the context of a pre-existing relationship, the legal system with the closest connection to that relationship has the stronger claim to determine whether certain conduct was wrongful.[292]

But although a misuse of private information may be founded on a pre-existing relationship between the parties,[293] that is not necessarily the case. In *Douglas v Hello!*, the relevant tabloid had no pre-existing relationship with the Douglases, nor did the paparazzo who infiltrated their wedding. The gist of the wrong was the *misuse* of private information; it was the misuse which was the

284 Richard Garnett, 'The Dominance of Uniformity of Outcome in Australian Choice of Law: Is It Time to Relax the Grip?' (2013) 37 *Australian Bar Review* 192, 193.

285 Cf *Sam Hawk* (2016) 335 ALR 578, 598 [85] (Allsop CJ and Edelman J).

286 Brexit and the rise of Trump being stark counterexamples.

287 *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm), [65] (Aikens J), cited in Collins et al, *Dicey*, above n 22, vol 2, 2308 [36-057] n 164; see also *Minera* [2006] BCSC 1102, [197] (Koenigsberg J).

288 [2000] NSWSC 967, [18].

289 Davies, Bell and Brereton, above n 29, 523 [21.17].

290 Cf Collins et al, *Dicey*, above n 22, vol 2, 2310 [36-059].

291 *Piatek v Piatek* (2010) 245 FLR 137, 161 [118] (Douglas J), citing *Murakami* (2010) 268 ALR 377, 402–3 [130]–[133] (Spigelman CJ).

292 Barnard, above n 107, 501.

293 See, eg, *Wilson v Ferguson* [2015] WASC 15.

real cause for complaint.[294] An analytical characterisation that looks at the inherent nature of misuse of private information should follow the lead of the United Kingdom courts and apply the choice-of-law rule for torts.

The leading High Court judgments on private international law express values which would favour a tortious characterisation for this kind of breach of confidence. In *Pfeiffer*, in rejecting the old parochialism of *Phillips v Eyre* for choice of law for intra-Australian torts, the majority held that 'choice of law rules should provide certainty and uniformity of outcome'.[295] When the Court extended the *lex loci delicti* rule to international torts in *Zhang*, the majority recognised that the rule 'meets one of the objectives of any choice of law rule, the promotion of certainty in the law'.[296] Kirby J held that the rule also gives effect to the reasonable expectations of the parties.[297] Then in *Neilson v Overseas Projects Corporation of Victoria Ltd*, when the majority recognised the doctrine of *renvoi* for international torts, Gummow and Hayne JJ reaffirmed the importance of uniformity of outcome and the need to discourage forum shopping.[298] The application of the law of the place of the wrong also serves the ideal of comity, the importance of which was stressed by the Court in *CSR Ltd v Cigna Insurance Australia Ltd*,[299] as it gives effect to the idea that States have a legitimate interest in having their own laws apply to matters occurring within their territory.[300]

To adopt a tortious characterisation for misuse of private information in Australia is tantamount to saying that such issues should be governed by the law of the place of the wrong.[301] The policy objectives advanced in the preceding cases apply equally here: the characterisation would discourage forum shopping, encourage certainty, and give effect to the parties' expectations, while respecting the territoriality of foreign States' laws. Further, a tortious characterisation would treat like cases alike.[302] While litigation over other 'personality rights' may be subject to the law of the place of the wrong,[303] it challenges the principle of coherence[304] to subject the equitable wrong of breach of confidence to a different connecting factor.

The principle of coherence favours a tortious characterisation at a second level. Whincop and Keyes have argued that the policies underlying substantive

294 *Jackson v Spittall* (1870) LR 5 CP 542, 552 (Brett J for the Court), quoted in *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635, 640 [14] (Spigelman CJ).

295 *Pfeiffer* (2000) 203 CLR 503, 528 [44] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

296 (2002) 210 CLR 491, 517 [66] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

297 Ibid 538 [130].

298 (2005) 223 CLR 331, 363 [89]–[90].

299 (1997) 189 CLR 345, 396 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoting *Hilton v Guyot*, 149 US 113, 163–4 (Gray J) (1895).

300 See Catherine Walsh, 'Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims' (1997) 76 *Canadian Bar Review* 91, 109–10, quoted in *Zhang* (2002) 210 CLR 491, 517 [65] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

301 Applying *Zhang* (2002) 210 CLR 491.

302 *A-G for England and Wales v The Queen* [2002] 2 NZLR 91, 103 [30] (Tipping J).

303 Such as the integrity of one's reputation: *Gutnick* (2002) 202 CLR 575.

304 See generally Michael Gillooly, 'Legal Coherence in the High Court: String Theory for Lawyers' (2013) 87 *Australian Law Journal* 33; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38 *University of New South Wales Law Journal* 367, 367.

areas of private law ought to inform the private international law rules applicable in those areas.[305] Following their lead, in the choice-of-law context, misuse of private information ought to be characterised in a way that serves the underlying policy goals that justified the evolution of misuse of private information out of breach of confidence. In *Campbell*, Lord Nicholls identified that policy as follows: 'In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action'.[306] Cases like *Giller v Procopets*,[307] and even the judgment of Gleeson CJ in *ABC v Lenah Game Meats*,[308] have recognised that breach of confidence may serve this value. The recognition of a *right* to privacy is served by the proposition that an infringement of this right is a *wrong*.[309] To treat misuse of private information as a tort for choice-of-law purposes is thus to treat it as it should be treated for all purposes.

VI CONCLUSION

This article has considered the intersection of common law principles of private international law and the action for breach of confidence. Each of these areas of law is difficult in its own right, and the intersection of these areas is more difficult still. In the face of this difficulty, it may be tempting to retreat to the inertia of equity's universality; to ignore the demands of the long-arm provisions, and to simply apply the *lex fori*. But Occam's razor is a questionable legal tool, particularly where substantive justice favours a more difficult path.[310] In the case of a cross-border misuse of private information, courts ought to characterise the claim as a tort – at least for the purposes of private international law – despite the jurisdictional debate, despite the doctrinal uncertainty, and despite the difficulties of locating the place of the wrong.[311] The principles make this path available, while policy provides that it should be taken. For present purposes, it is not necessary to express a definitive view as to whether misuse of private information should be treated as a tort in all other contexts. Arguably, it should. But the characterisation of breach of confidence in the field of private international law does not depend on that.

305 Michael J Whincop and Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate, 2001) 3.
306 *Campbell* [2004] 2 AC 457, 465 [15].
307 (2008) 24 VR 1.
308 (2001) 208 CLR 199, 230–1 [54]–[55].
309 The plaintiff's right to a remedy for a misuse of private information follows the violation of his or her 'primary right' to privacy: John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (Campbell and Murray, 5th ed, 1885) vol 2, 760.
310 *Brown v Tasmania* (2017) 91 ALJR 1089, 1180 [490] (Edelman J).
311 *Gutnick* (2002) 202 CLR 575, 606 [43] (Gleeson CJ, McHugh, Gummow and Hayne JJ).