THE LEGAL REGIME FOR PROTECTION OF TRADE SECRETS IN NIGERIA: BREACH OF CONFIDENCE CLAIM AS GAP-FILLER

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Abstract

Trade secrets are the less prominent members of the intellectual property family. Copyright and patents, because they are visible in the public domain, and easily identified with advancements in science and art and with innovations and inventions, are more prominent. However, trade secrets are equally crucial, and are especially central to trade and commerce but by their very nature, they are kept confidential and away from the public domain. This work explicates the nature of trade secrets and the legal regime for their protection in Nigeria. The aim is to tease out the salient features of trade secrets, assess the legal regime for their protection in Nigeria, and examine the centrality of breach of confidence claims in that regard. The research method utilised is doctrinal while research design in discursive and analytical. The work finds that Nigeria has no comprehensive statute for protecting trade secrets, and in the absence of contractual undertakings, resort is made to the equitable claim in breach of confidence as a gap-filler. In concluding, the work delineates the imperative for the enactment of trade secret legislation in Nigeria, in view of the centrality of trade secrets to trade and commerce for the development of the country.

Keywords: Breach of Confidence, Trade Secrets, Intellectual Property, Nigeria

1. Introduction

A trade secret is any confidential business information which provides an enterprise with a competitive edge.[1] A trade secret has been defined as information of any type that is actually or potentially valuable to its owner and not generally known or readily ascertainable by the public and which the owner has made a reasonable effort to keep secret.[2] This definition is in line with that in section 1 of the United States' Uniform Trade Secrets Act (USTA) which defines trade secret as:

> Information, including a formula, pattern, compilation, program device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

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[1]World Intellectual Property Organization 'Trade Secrets' Retrieved on February 23, 2020 from http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm

[2] World Intellectual Property Organization Magazine April 2002, 'Trade Secrets Are Gold Nuggets: Protect Them.' Retrieved December 5, 2019 from wipo.int/export/sites/www/sme/en/documents/wipo_magazine/04_2002.pdf

Trade secrets encompass both favorable information, as well as negative information, so far as they are commercially viable, and so far as deliberately keeping them confidential would preserve competitiveness.[3] For example, enterprise A may decide to keep as trade secrets, the information that certain research options which it had tried were unviable, if only so that enterprise B would waste its time on such options instead of some other viable options that may threaten the business of enterprise A.

One of the most famous examples of trade secrets is the formula for Coca-Cola beverage.[4] The formula, code named "Merchandise 7X" is said to be known to only two anonymous senior executives at every point in time, and these executives who have signed non-disclosure agreements are never to travel together. The paper on which the recipe is written was kept in the vault of a bank in Atlanta, Georgia, before it was moved into a highly secured purpose-built vault[5] within the World of Coca-Cola, the company's museum in Atlanta, United States of America. Considering that a trade secret is essentially "secret" information whose value lies in its nondisclosure, a trade secret can be protected for an unlimited period of time; that is, indefinitely as long as it remains undisclosed. For these reasons, the protection of trade secrets may appear to be particularly attractive for businesses. For example, Coca-Cola has never patented its formula; saying to do so would require its disclosure. And once the patent expired, anyone would be able to use that recipe to produce a generic version of the drink. [6]

In section 2, this work looks closely at some of the salient features and importance of trade secret as a type of intellectual property, as a case is made for its protection. Section 3 explicates the differences between trade secrets and copyright and patents, identifying the circumstances where protection of intellectual property through trade secrets may be of more utility. In section 4, the work discusses the legal regime for protecting trade secrets in Nigeria and zeroes in on the utility of the equitable claim in breach of confidence as a gap-filler. The work concludes in section 5 with a call that in view of the centrality of trade secrets to trade and commerce, Nigeria should enact a robust trade secrets statute.

2. The Case for Protection of Trade Secrets

Virtually every business has trade secrets worth protecting, regardless of whether the business is run as a sole proprietorship, a small business or a Fortune 500 company.[7] Nevertheless, most businesses, including large companies, fail to properly protect their trade secrets. In fact, most businesses only become aware that they have valuable information worthy of protection as trade secrets when competitors attempt to take advantage of such information. But since the business

[3] International Fragrance Association (IFRA) Policy Paper 'Trade Secrets: European Union Challenge In A Global Economy' Retrieved January 10, 2020 from https://ifrafragrance.org/docs/default-source/policy-documents/22900_pr_2012_02_09_trade_secrets__eu_challenge_in_a_global_economy.pdf?sfvrsn=dd65b7d1_0

[4] CNN 'Does formula mystery help keep Coke afloat?' Retrieved January 12, 2020 from http://edition.cnn.com/2014/02/18/business/coca-cola-secret-formula/ See also L., 'Coke hides its secret formula in plain sight in world of Coca-Cola' Stafford The Atlanta Journal-Constitution Dec. 8, 2011 Retrieved January 12, 2020 from http://www.ajc.com/news/business/coke-hides-its-secret-formula-in-plain-sight-in-wo/nQPMm/

[5] The vault, like one straight from a film, has a palm scanner, a numerical code pad and massive steel door. Inside its walls, is another safe box with more security features. Inside the safe box is a metal case containing what its owners call "the most guarded trade secret in the world"

[6] CNN 'Does formula mystery help keep Coke afloat?' Op. cit.,

[7] Intellectual Property Watchdog 'Trade Secrets: A Valuable Overlooked Asset' 2011 Retrieved February 10, 2020 from http://www.ipwatchdog.com/2011/01/14/trade-secrets-valuable-overlooked-asset/id=14411/

has not protected such information as trade secret, they find that they have no ground of action. Primarily, therefore, a business should protect its trade secret, because failure to do so mean it has no asset and no remedy if the information is appropriated by others. Besides, the realities of today's globalized, technology driven and acutely competitive business environment is that businesses continually engage in rapid innovation and a cycle of incremental product development. Consequently, trade secrets have become increasingly critical to the viability of a growing range of industries competing in a global high-technology market. If a business is to attain profitability and protect itself from unfair competition, then it is expedient that it safeguards the valuable information which gives it competitive edge.

Another benefit for protecting trade secrets is their value as collateral in cases of merger or acquisitions. For example, although John Pemberton invented the original Coca-Cola recipe in 1886, it was only in 1919, more than 30 years thereafter that it was written down. During the interval, the recipe was passed down orally. The formula was finally committed to paper when a group of investors purchased the company in 1919 and the written record of the recipe was used as collateral.[8] Furthermore, trade secrets can be critical to the survival, growth and profitability of a business. For example, Stantec, the engineering services company, in a statement to accompany a record quarter and fiscal year-end results that marked 48 years of uninterrupted profitability, made a formal statement of the centrality of trade secrets to its success: "The Company relies primarily upon trade secret laws to protect its proprietary rights in its specialized technologies."[9]

But it is not all kinds of information that are protectable as trade secrets.[10] In fact, invention or novelty is not one of the perquisites for confidential information to qualify as trade secret. Hence, the fact that business information is novel or is related to an invention does not *ipso facto* qualify it as trade secret. Conversely, the mere fact that business information is quite simple does not prevent its protection as trade secret. For information to qualify as trade secret, it must satisfy certain conditions.[11] While these conditions may vary from country to country, there are three general standards. The primary condition is that the information must be a secret in the sense that it must not be something that is commonly known. This is apparent from even a dictionary definition of the word 'secret' as referring to information that is hidden and intended to be so kept. Secondly, information to qualify as trade secret must be capable of giving the business a commercial edge over competitors. This commercial advantage is the reason behind the 'trade' in 'trade secrets'. As stated elsewhere, such information may be positive, such as formulae or processes underlying the manufacture of profitable goods, and it may be negative, such as information about unprofitable formulae and methods. Thirdly, the proprietor must take deliberate reasonable measures to maintain secrecy of the information. Maintenance of the secrecy should be deliberate, because once the information becomes of common knowledge, then it ceases to be a secret.

[8] CNN 'Does formula mystery help keep Coke afloat?' Op. cit.,
[9] WIPO Magazine 'Trade Secrets Are Gold Nuggets: Protect Them.' Op.cit.,
[10] U.S. Attorneys' Bulletin, 7 (Nov. 2009) 'Common Issues and Challenges in Prosecuting Trade Secret and Economic Espionage Act Cases' Retrieved January 12, 2020 from http://www.justice.gov/usao/eousa/foia_reading_room/usab5705.pdf
[11] Investors.com 'All About Trade Secrets' Retrieved December 13, 2019 from http://inventors.about.com/od/tradesecrets/a/trade_secret.htm

The above three conditions are also in tandem with Article 39 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provides as general conditions for protection of trade secrets that the information be secret, have commercial value and be subject to reasonable steps by its proprietor to maintain the secrecy. Examples of information that may qualify as trade secrets are:

a. data compilations (e.g. profile or list of customers or of suppliers);[12]
b. schedules;
c. manuals;
d. ingredients or recipe or formulas for producing products;
e. information about research and development activities;
f. financial information;
g. personnel records;
h. business strategies, business plans, methods of doing business, marketing plans/advertising strategies, distribution methods;
i. algorithms and processes that are implemented in computer programs, and the programs themselves;
j. instructional methods;
k. designs, drawings, architectural plans, blueprints and maps.

Once information qualifies, it can, like copyright and unlike patents, be automatically protected without the necessity of registration or any other procedural formalities.[13] Hence, what is crucial is to take deliberate measures to keep the information secret or confidential because once they are disclosed and consequently become of common knowledge, they become valueless as trade secrets. In this connection, one precautionary measure that can be taken to keep trade secrets confidential is to limit the number of people who have knowledge or access to the information and then to ensure that the people who do, are well aware that it is confidential information.[14] Additionally, the proprietor of the trade secret should execute non-disclosure agreements (or confidentiality agreements) with persons to whom the information may be disclosed.

3. Difference Between Trade Secrets, Patents and Copyright

With patents, the proprietor of a novel or useful invention acquires monopoly over that invention for a particular number of years. Trade secrets may offer a similar monopoly provided competitors have not, through reverse engineering or independent innovation, obtained the same know-how. Consequently, trade secrets are related to patents in two ways. While on one hand, some trade secrets such as production process, recipe or list of clients are not patentable, and therefore can only be protected as trade secrets, on the other hand, trade secrets may concern

[12] D. Gossett, "Customer Lists as Trade Secrets" *The National Law Review* Retrieved January 14, 2020 from http://www.natlawreview.com/article/customer-lists-trade-secrets. See also G. Quinn 'Trade Secrets: A Valuable Overlooked Asset' where the author, founder of IP Watchdog said "One of the hardest things for a business to develop is customers who are interested in your product or service. Attracting a customer base is why you advertise. If a competitor could obtain your customer list and just solicit those on that list, the competitor would have lessened or completely eliminated the need for advertising expenses."

[13] World Intellectual Property Organization 'Trade Secrets Protection' Retrieved January 13, 2020 from http://www.wipo.int/sme/en/ip_business/trade_secrets/protection.htm

[14] World Intellectual Property Organization 'Trade Secrets Precaution' Retrieved January 13, 2020 from http://www.wipo.int/sme/en/ip_business/trade_secrets/precaution.htm

inventions that would fulfill the patentability criteria and could therefore be protected by patents.[15] For the second case, the enterprise would have to decide between patent and trade secret.[16]

In making the decision, the principal merit of trade secrets over patents is that whereas patents are limited in time (usually 20 years), trade secrets may last in perpetuity as long as it is kept confidential. But the demerit of that choice is that if the secret is embodied in an innovative product, it is possible for others to discover it by independent innovation or by 'reverse engineering', and to be able to legally use it. For the law is that trade secret protection of an invention does not provide the right to exclude third parties from making commercial use of it. Only patents can provide this type of protection. The secret relates to the production process rather than to the product, as products would be more likely to be reverse engineered. Notwithstanding, trade secrets are advisable when there is a high likelihood that others are not likely to easily discover it by reverse engineering or by independent innovation.[17]

Trade secrets can also be differentiated from copyright. Copyright protects the form in which ideas and information are expressed, but not ideas and information *per se*. On the other hand, trade secret protects the substance of ideas and information no matter the form they are expressed. But it should be appreciated that while the majority of trade secrets are non-copyrightable information, valuable compilations of confidential information such as annotated customer, supplier and competitor lists– could satisfy copyright's originality and fixation standard. It is possible, therefore, to assert both trade secret and copyright in certain commercial information. However, a second difference between the two is that there are statutory eligible subject matters for works protected by copyright, but not works protected by trade secret.[18] Thirdly, while copyright provides an author exclusive rights typically for a specified term of years beyond the author's life, trade secrets offer an unlimited protection. Notwithstanding, a significant similarity between the two is that like trade secrets, there are no formalities required to obtain copyright.

While there is no doubt that trade secrets are intellectual property, they have never enjoyed the legal status nor the prominence conferred upon patents and copyrights. This "step-child" status of trade secrets within the family of intellectual property rights can be traced to the attributes of trade secrets. The idea that trade secrets involve secret commercial information implies that they offer no apparent benefit to the common good. Patents and copyrights, on the other hand

[15] World Intellectual Property Organization 'Patents or Trade Secrets?' Retrieved January 13, 2020 from https://www.wipo.int/sme/en/ip_business/trade_secrets/patent_trade.htm

[16] WIPO Magazine 'Trade Secrets are Gold Nuggets' Op. cit., the work compares Dell and Walmart. Dell, the computer company, has a number of patents and some pending applications on its unique business models. In 1999, Dell used its patent portfolio as collateral in a $16 billion cross-licensing deal with IBM that provided Dell with lower cost computer components. This freed Dell from having to pay IBM several millions of dollars in royalties and further reduced Dell's cost of doing business. Wal-Mart, on the other hand, appears to rely more on the protection afforded by the law of trade secrets for protection of its business model and has remained profitable and competitive.

[17] World Intellectual Property Organization 'Benefits of Trade Secrets' Retrieved January 11, 2020 from http://www.wipo.int/sme/en/ip_business/trade_secrets/benefits.htm

[18] Intellectual Property Department of Hong Kong 'Trade Secrets (Undisclosed Commercial Information)' Retrieved January 14, 2020 from http://www.ipd.gov.hk/eng/intellectual_property/trade_secrets.htm

ultimately enrich the public domain. In reality, however, many goods produced by means of non-disclosed information provide enormous benefits to the general public.

4. The Utility of Breach of Confidence Claim in Trade Secrets Protection in Nigeria

4.1 Trade Secret, Contract and Statute Law

In order to exploit the commercial value of the information which is trade secret, it is often necessary for the proprietor of the information to share it. The challenge, therefore, is how the proprietor of the trade secret can ensure that the information shared with others is not misappropriated, that is, that the information is not further shared with others without his disclosure, and it is not improperly used?[19] Additionally, if misappropriation does occur, what legal remedies are available? With respect to preventing misappropriation, the proprietor would likely covenant with those he shares the information with, through non-disclosure agreements. A non-disclosure agreement is a legally enforceable contract that creates a confidential relationship between the trade secret proprietor and the person to whom the secret will be disclosed.[20]

However, where there is no such contract obligation the form of non-disclosure agreement, resort is had to either statute law or law of torts to enforce trade secret. In many jurisdictions, such as United States of America and Uganda, there are statutory provisions for remedying misappropriation of trade secrets even in the absence of contracts undertakings, as in non-disclosure agreements. In Uganda, the Trade Secret Protection Act (2009) provides that for information to qualify for protection under the Act, it must:

> (a) be a secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
>
> (b) have commercial value because it is secret; and
>
> (c) have been subject to reasonable steps under the circumstances, by a person lawfully in control of the information, to keep it secret.[21]

Section 18 of the Ugandan Act also outlined the principles to be followed by the courts in declaring the rights of parties: (1) the person entitled to the benefit of the trade secret shall be protected under the Act; (2) the person acting in good faith is entitled to disclose, use and transfer the trade secret to the extent which is just and reasonable having regard to the economic and social value of the consideration given by that person for the trade secret.

In the United States of America, trade secrets are generally protected under state laws. In fact, due largely to the substantial number of patents that are invalidated by the United States courts, many businesses now opt to rely on state trade secret laws in protecting commercially valuable information. This is more so that it was decided in *Kewanee Oil Co. v. Bicron Corp*[22] that neither

[19] S.C. Graeme 'Confidential Information & Trade Secrets: When is a Trade Secret in the Public Domain?' Retrieved January 22, 2020 from http://barristers.com.au/wp-content/uploads/2012/03/confidentialinformationandtradesecretspublication_3_.pdf

[20] Rocket Lawyer 'NDA 101: What is Non-Disclosure Agreement' Retrieved February 27, 2020 from https://www.rocektlawyer.com/article/nda-101:-what-is-a-non-disclosure-agreement.rl

[21] Section 4 of the Act

[22] 416 U.S. 470 (1974)

the Patent Clause of the United States Constitution nor the Federal Patent laws preclude states trade secret protection for patentable or unpatentable information. Notwithstanding the reliance on states trade secrets law, and resulting from the need to harmonize standards and remedies across states, the Uniform Trade Secret Act (UTSA) was first enacted in 1979. Basically, the UTSA applies nationwide as a model law while allowing states the flexibility to meet local circumstances by modifying the text as enacted in each state. To succeed in a trade secret claim under the UTSA, the trade secret owner must prove five primary factors, namely: economic value derived; reasonable secrecy measures taken; data not readily ascertainable; access by the accused and; notice to the accused.

Further strengthening the protection for trade secrets in the United States of America is the Economic Espionage Act of 1996 (EEA) which makes theft of trade secrets a federal crime. The EEA provides two distinct but related offences. The first offence, economic espionage, involves the misappropriation of a trade secret with the intent to benefit a foreign government, foreign instrumentality, or foreign agent. The second offence is misappropriation of a trade secret with intent to convert the trade secret to the economic benefit of anyone other than the owner and to injure the owner of the trade secret. The EEA is not intended to criminalize every misappropriation of trade secrets for which civil remedies may exist under state law. Appropriate discretionary factors to be considered in deciding whether to initiate a prosecution under the EEA include: (a) the scope of the criminal activity, including evidence of involvement by a foreign government, foreign agent or foreign instrumentality; (b) the degree of economic injury to the trade secret owner; (c) the type of trade secret misappropriated; (d) the effectiveness of available civil remedies; and (e) the potential deterrent value of the prosecution.[23] Hence, the EEA does not displace other extant civil remedies under the USTA.

4.2 Trade Secret and Breach of Confidence Claim

Nigeria, unlike United States of America or Uganda, lacks statutory provisions for remedying misappropriation of trade secrets. In Nigeria, therefore, the tort of breach of confidence stands as gap-filler to provide effectual remedy for misappropriation of trade secrets in the absence of contractual undertakings. However, before we zero in to discuss breach of confidence claim, it might be useful to say a few words about the breach of confidence provision in the Nigerian Cybercrime Act (2015). By section 29 (1) of the Act, it is a criminal offence for a computer based service provider intending to defraud, to forge or illegally use the security codes of its consumers so as to gain economic advantage. This provision is a special provision for cybercrime and, is only a snippet of the type of provisions robust trade secret legislation should contain.

From the most generally accepted statement of a breach of confidence claim, by Megarry, J in *Coco v A. N Clark (Engineers) Ltd*[24] three matters must be established to sustain a breach of confidence claim:

i. That the plaintiff's information has the necessary quality of confidence.
ii. That the information was imparted to the defendant in circumstances importing an obligation of confidence.

[23] U.S. Attorneys' Manual Retrieved January 11, 2020 from http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/59mcrm.htm
[24] [1969] RPC 412

iii. That the defendant used the information without the authority of the plaintiff and to his detriment.

The first matter raises the question, what is the necessary quality of confidence which the information must have? The requisite quality of confidence can be considered to involve objective and subjective aspects. A subjective issue is whether preservation of the confidentiality of the information is of substantial concern to the plaintiff. The courts expect the plaintiff to have taken adequate measures to preserve the confidentiality of the information if he is to demonstrate that it is a valuable trade secret. Take for instance, the manner in which the Coca-Cola formula is kept secret as highlighted in the beginning of this work. Objectively considered, the information must be of a kind that warrants protection. Hence, information that is of general knowledge, and is not a secret, is not confidential. The second matter raises the question, did the circumstances in which the trade secret was disclosed, import the obligation of confidence? Although breach of confidence is an equitable cause of action, the common law concept of the reasonable man intrudes. The issue is whether a reasonable man in the position of the recipient of the information would appreciate that the information was confidential.

The third question arising from the third matter is whether the defendant used the information without the consent of the plaintiff and to the plaintiff's detriment? As to breach, a confidential information case is somewhat like a breach of copyright case: misuse must be demonstrated. In a typical copyright case, there must be copying by the defendant of the copyright work and reproduction of at least a substantial part of the work. Likewise, in a breach of confidence case, there must be reference to and use of the confidential information by the defendant. However, the requirement of (mis)use in a breach of confidence case is less stringent than that of substantial reproduction in a copyright case. Head-start or springboard use is enough in breach of confidence claims. The springboard doctrine refers to the use of trade secret to achieve a business advantage by reducing the time and cost taken to work out a method for achieving something. Hence, it is not a defence to say that with sufficient time, labor and expense, a similar result could have been produced, as the confidee has still obtained a time and cost advantage through the use of confidential information.

It is now well-established that a breach of confidence claim arises in the original jurisdiction of a Court of Equity.[25] Hence, equitable principles apply generally in relation to a breach of confidence claim. One significant implication is that the cause of action is not merely property based and the courts focus on the relationship between the confider and the confidee arising from the initial circumstances in which the information was imparted, and then upon the circumstances in which the information is alleged to have been misused. Although, in consideration of this equitable implication, confidential information is not viewed strictly from the perspective of property, it nevertheless is assignable and licensable, and the assignee or licensee can sue others for breach of confidence.[26] Generally, therefore, the court fashions remedies against an infringer which are appropriate to the circumstances at hand and, consistent with equitable principles.

[25] See, for instance *Moorgate Tobacco*, n 5 (1984) 156 CLR 414 at 437-438; *Breen v Williams* (1996) 186 CLR 71 at 128; 138 ALR 259.

[26] T*S & B Retail Systems Pty Ltd v 3 Fold Resources Pty* Ltd (No 3) (2007) 72 IPR 492 at 505-511; *Mid-City Skin Care & Laser Centre Pty Ltd v Zahedi-Anarak* (2006) 67 NSWLR 569 at 609-622; See generally G. Wei, 'Licensing of Confidential Private Information: Hello and Goodbye to the Rights of the Licensee & Third Parties' (2003) 23 JCL 55

Similarly, the doctrine of inevitable disclosure applies to lessen the onus of strictly establishing a breach of confidence claim. By this doctrine, the courts have recognized that trade secret misappropriation is inevitable if an employee with knowledge of a company's specialized trade secrets accepts an equivalent position with a competitor. In that situation, the courts find that an employee who wants to do a good work in his new company would inevitably rely on whatever he knows, including the former employer's trade secret. In *B.F. Goodrich Co v Wohlgemuth,*[27] an employee was prohibited from working in a particular field because he had worked as an engineer in the plaintiff's space suit program, and then left to work for a competitor in the same area. The court held that it would be impossible to perform his managerial functions without relying on his knowledge of the plaintiff's trade secrets. A similar decision was reached in the case of *Pepsico, Inc v Williams Redmond.*[28] Generally, however, the court in applying the inevitable disclosure principle would have to balance all interests including that of public policy in preventing restraint of trade and mobility of labor, as well as ensuring fair competition.

In what circumstances is a breach of confidence claim particularly effective to protect trade secrets? There are two broad types of such situations. In one situation, the trade secret owner and the confidee are in some form of business relationship, and the exchange of information occurs within the course of the business. The confidee is obliged to keep the information confidential. The relationship sours or terminates. Use becomes misuse. The relationship is not governed by a legally binding agreement and there is no contractual obligation such as a non-disclosure agreement. Negotiations may not have been concluded, or a prospective agreement may be too uncertain to be enforced. No fiduciary obligations have arisen. In such circumstances, a breach of confidence claim may be the only form of legal redress available to the trade secret owner.

The second situation is where there has been a business relationship between the owner and the confidee concerning the use of the trade secret, but the information is communicated to, and used by, a third party with whom the owner has had no prior dealings at all. Hence, prima facie there will be no contractual or other obligation owed by the third party to the trade secret owner. Nevertheless, provided that the breach of confidence claim can be made good against the confidee, a court of equity will generally restrain unauthorized use by the third party. The third party may have been, or become, aware of the wrongful conduct of the confidee and then the court fastens upon the conscience of the third party to restrain further unauthorized use. Even where the third party is entirely unaware of the confidee having engaged in any breach of confidence, but once the trade secret owner gives the third party, full notice of his claim and of the impugned conduct by the confidee, a court of equity can act upon the conscience of the third party and restrain continued use.

4.3 Public Domain and Breach of Confidence Claim

The concept of public domain is central in breach of confidence claims for misappropriation of trade secrets. In a breach of confidence claim, publication of the information to the extent that it has entered and become part of the public domain destroys the confidentiality of information sought to be protected. The confidentiality is gone and the information becomes valueless as trade secret. A policy consideration which underlies other intellectual property rights is the spur to innovation, development and competition of a non-infringing kind which public access to, and

[27] 192 N.E. 2d 99, 104-105, 137 U.S.P.Q (BNA) 804, 807 (Ohio Ct. App. 1963)
[28] 54 F. 3d 1262, 1270 (7th Cir. 1995)

disclosure of, the intellectual property right enables. Such matters have no application in a breach of confidence claim by a trade secret owner, whose interest is in keeping the light under the bushel. These seemingly conflicting policy considerations are perhaps reconciled by the centrality of the public domain limitation on breach of confidence claims: the trade secret owner can only obtain protection against unauthorized use by the recipient of the information to the extent that the information is not in the public domain. He automatically loses protection when the information reaches the public domain.

The above raises the crucial question, when is business information said to be in the public domain? There are unresolved issues concerning what "public domain" means in breach of confidence claims. Upon an appraisal of relevant judicial authorities, one writer submitted that a trade secret is said to be in public domain in three instances.[29] First is upon publication of a patent specification containing the trade secret. Secondly, upon publication of any other form of document containing the trade secret, whether on the internet or otherwise, if a sufficient number of relevantly skilled persons have, or are likely to have, accessed the document. Thirdly, upon the public sale or display, without any relevant contractual restraint, of a product which incorporates the trade secret, or was made using the trade secret, if that information is apparent to relevantly skilled persons upon mere inspection of the product and without such persons having to perform any work, analysis or calculations.

There are two important implications of these considerations in litigation. One is that the mere fact that a purchaser of a product or device other than the defendant is prima facie entitled to do what it chooses with its own property, including dismantling or reverse engineering it, does not mean that the plaintiff's breach of confidence claim fails. Secondly is that when the trade secret concerning a product which has been sold in the marketplace is not in the public domain in the types of circumstances referred to above, the defendant will not succeed on an argument that the confidentiality of the information, and hence the plaintiff's cause of action, has been destroyed by the sale.

4.4 Remedies for Breach of Confidence

An obligation of confidence will arise whenever the information is communicated to or acquired by a person who knows or ought as a reasonable person to know that the other person wishes to keep that information confidential. [30] An industry or trade custom or practice may also impose an obligation of confidence. The release of trade secrets could be detrimental to the owner or advantageous to his or her competitors or others. The remedies available for breach of confidence of a trade secret include injunctions, damages, account of profits and delivery up of materials containing confidential information. Damages can include both the actual loss and the unjust enrichment caused by misappropriation. Where however the misappropriation is a willful and malicious one, the court may award exemplary damages. With respect to injunctive relief, actual or threatened misappropriation may apply. The injunction shall only be terminated when the trade secret has ceased to exist. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

[29] S.C, Graeme 'Confidential Information & Trade Secrets: When is a Trade Secret in the Public Domain?' Op. cit.,
[30] Intellectual Property Office of Singapore 'What is trade secret' Retrieved February 10, 2020 from http://www.ipos.gov.sg/AboutIP/TypesofIPWhatisIntellectualProperty/What-is-a-trade-secret-confidential-information.aspx

5. Conclusion

The equitable cause of action for breach of confidence in relation to trade secrets is not a first-line means of protecting such confidential information. The cause of action can be considered to be a gap-filler where other means of controlling the use by others of valuable information are not available. It is a question of fact in each case whether a trade secret concerning a product has been published, or otherwise been made publicly known, in a manner or to the extent that it has entered the public domain. Recent trends disclose that countries the world over have identified trade and commerce as key to industrialization, and that protection of trade secrets is essential for effectual trade and commerce. Nigeria is rated the largest economy in Africa, one of the fastest growing economies in the world, and it is projected to rank among the world's top 20 economies by 2050.[31] Consequently, the country cannot afford to be lethargic in protecting the trade secrets of its investors. Both in the goods and services sector, the level of competition among businesses in Nigeria have continued to grow. In such competitive business environment, the risk of an enterprise losing its trade secrets to unauthorised employees, business partners and competitors, increases greatly. Nigeria's current approach leans towards industrialization which is important to economic growth, but in an environment where adequate protection for creativity is missing, industrialisation would remain a mirage. Taking the path of industrialized nations like United States of America, would be a commendable initiative. It is high time Nigeria enacts a legislation to statutorily protect trade secrets.

[31] Price Waterhouse Coopers 'World in 2050 Report' Retrieved January 15, 2020 from http://m.allafrica.com/stories/201301180537.html/?maneref=http%3A%2F%2Fallafrica.com%2Fview%2Fgroup%2Fmain%2Fmain%2Fid%2F00022392.html