

Topic 4: Breach of Confidence

- BOC is a doctrine developed by equity that recognises and protects certain rights of confidentiality; it pertains to the unauthorized use of confidential information.

Elements:

To claim BOC (P) must satisfy the 4 elements as set out in *O'Brien* and *Coco* (see also *Smith Kline* per Gummow J).

1. The information must be specific: *O'Brien*
2. It must have a “quality of confidence”
3. The recipient has knowledge of the confidentiality restrictions i.e. acquisition
4. There is a breach of that duty

1. Information must be Specific: (*O'Brien*)

The information must be defined with sufficient specificity (*O'Brien*) not merely global terms (*Smith Kline*) so that it can be particularized in pleadings (*Ocular*).

On the facts _____

- P must be able to precisely specify the information she claims is protected, it is unusual they won't be able to do so
- If complete specification would destroy the quality of confidence, P may be allowed to lack some specificity *O'Brien; Bluescope Steel*
- Courts require specificity to determine if the information is confidential or whether any confidentiality has been destroyed by publication, and if so the scope of the injunction to restrain a misuse by injunction of the information

2. Necessary Quality of Confidence: (*Coco*)

Confidence requires the information must be confidential, not ‘public information, or public/common knowledge (*Saltman*). Confidentiality may be inherent (*Giller*) or implicit in the information itself (*AFL*) or implied by the relationship between the parties (*Argyll; Giller; Ferguson*). It is necessary to consider the information itself and surrounding matters _____

Consider:

1. Is it confidential
2. Has it entered the Public Domain?
3. Is it serious or trivial?

Information Held to Contain or Be Confidential Information:

- Plans (*Saltman*),
- Photographs (*Hello!*)
- Drawings (*Saltman*),
- Customer lists (*Ithaca*),
- Concepts for television shows (*Talbot*)
- Fruit-tree cuttings/genetic information (*Franklin*),
- Sex videos (*Giller*) and
- Recipes for drinks (*FBI Foods*)
- Generic class of photographic information of a private event (*Douglas v Hello!* per majority)

1. Is it confidential?

Factor's indicating/ detracting from information's confidentiality

General Information: The general idea may be well known but the specific idea may be confidential

Talbot

- A “commercial twist” or “slant” on a publicly known idea is capable of producing confidential information *Talbot*

Security: Attempts to secure or protect information may supply the necessary quality of confidence

Douglas v Hello!; Franklin v Giddins

- In *Franklin* the Ps attempted to guard the grafting technique and twigs by “exercising general surveillance” over their EE’s and visitors

Novelty and ingenuity can cause something to be confidential *Talbot; Saltman*

Skill and Expertise: Application of skill and expertise to create it *Saltman; Ocular*

Right to Publish: An exclusive right to publish will give rise to confidence *Douglas*

Commercial/Personal: The information need not be commercial and can be personal *Giller*

Common Knowledge/Private Property: The mere fact information is not common knowledge or is a record of events that occurred on private property does not render it confidential *Lenah*

Private land is not enough to make it confidential *Lenham*

- Possum slaughtering factory on private property, ABC trespassed onto film. Looked at how much effort went into making area secret

How Information Was Obtained: The way in which information is obtained (e.g. trespass) does not transmogrify ordinary information into confidential information *Lenah* although it may bear on the circumstances importing the duty

Reverse Engineered; is not a BOC, however the mere fact alone that it could have been reverse engineered or discovered with sufficient time and labor is not a defense.

Know-How: Equity does not protect know-how (the confidants accumulated knowledge and skill), thus EEs should not be restricted in using know-how gained in employment, BUT should not misuse trade secrets

2. Has it entered the public domain?

Information that has entered the public domain cannot be protected as confidential information, because where it is generally accessible it cannot be secret (*Lenah per Gleeson CJ*). Whether it has entered the public domain is a question of fact, where it maintains relative secrecy it will be confidential (*AFL*).

- Processes carried out on private property do not inherently make them confidential *Lenah*
 - Distribution to a limited audience means the information hasn't necessarily lost its confidentiality *AFL*
 - “Speculative gossip” and “innuendo” (e.g. internet fora) does not mean information enters the public domain *AFL*
 - Information published around the world, released in TV interviews and by other agents will lose its confidential nature *Spycatcher*,
 - Tax minimization schemes which were “well known” to many lawyers and accountants *O'Brien*
 - Public court proceedings don't mean information stated in Court enters the public domain due to Statutes restraining publication *Jane Doe*
 - Relevant issue is whether the information was communicated with the expectation of confidence *Jane Doe* – Jane had communicated the information to friends, family and police with an expectation of confidence
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3. Is it trivial or serious enough for equity to intervene?

- Equity will not intervene if the information is “trivial or useless” (*Douglas* per Baroness Hale)
- Commercially valuable it is not trivial *Douglas* although it need not be of a commercial nature *Giller*
- Must also be of value to warrant equities assistance i.e.
 - Genetic material – stolen fruit cuttings *Franklin*
 - Trade secrets that don’t qualify for copyright or patent protections – TV show idea *Talbot*

Types of Information and Interests

Cultural and religious practices

- Courts are highly sympathetic towards cultural and religious practices (*Foster*).
- The information was sufficiently valuable to be protected. The confidential information that the court was trying to protect information that had religious, spiritual and cultural value, not commercial.

Commercially sensitive information:

- Is the information itself secretive or is it available to everyone.
- For instance *Lenah*, the production process was standard and publically available information
- Look at significance of the information and its effect in creating a competitive advantage, ingenuity that has gone into its creation (see below), extent to which it is known outside the business, measures taken to safeguard it (*Douglas*; *Franklin v Giddins*), amount of money expended developing it and its value to competitors (*Ansell; Wright*)

‘Know How’

- Equity does not protect “know how” in Employment situations
- Balance between protecting trade secrets and not restricting employees from using their skill, knowledge, experience gained via employment

Human Ingenuity cases (could overlap with above)

- Human ingenuity will confer a quality of confidence (*Coco v Clark*); note that this has a low threshold: in *Talbot*, for instance, D stole P’s concept for a TV show. Court considered two factors:
- Had been sufficiently developed to be capable of being the subject of protection as confidential information
- Had a quality which removed it from the realm of public knowledge: even though the concept was similar to existing programs, the particular slant of the show was different to anything else in the market.

Human autonomy and dignity

- *Jane Doe; Giller*: equity will protect interests of people to control how they are seen; need not be commercially valuable, but can concern private life and personal affairs of P (*Breen* per Gummow J).
- In *Jane Doe*, court considered that identifying a person as the victim of a sexual assault is information which the person to whom it relates has a reasonable expectation would remain private (referring back to Gleeson CJ quote above).
- This is so notwithstanding that P has told friends and police about the assault.
- *Giller*: the information, explicit photographs from a relationship, followed by threatened leak. Equity extends to information concerning the personal affairs and private life of P, protecting the confidentiality or secrecy of substantial concern to the plaintiff.
- Fact that P’s sexual relations with the D was known and not confidential immaterial; sexual activities occurred during an intimate relationship, was private and what the parties do in the course of their sexual activities was a matter, not to be disclosed. Therefore, video image is what is protected.

Non-Commercial Information

- Sex tape. Manner and detail in which recorded - confidential even though well-known couple in relationship *Giller v Procopets*
- Explicit images and text messages *Wilson v Ferguson*
- Aboriginal religious ceremonies - social and religious stability *Foster v Mountford and Rigby*

BOC and General Right to Privacy

There is no tort of privacy but *Giller* and *Wilson* show that privacy can in some cases be protected by BOC (See also UK *Hello!*). Some lower court decisions have recognised Tort of Privacy similar to New Zealand, but higher courts have dismissed this.

- 2014 Law Reform Commission recommendations recommended we adopt a Tort of Privacy but it has not been adopted, they suggest that BOC doctrine wouldn't be ideal as all remedies may not be available.

3. Knowledge of the Confidentiality Restrictions i.e. Acquisition: *Coco*

Where D knows or ought to know that the information was imparted in confidence the equitable duty to maintain the confidence will arise (*Coco*)

- Here the focus is on how the information was acquired and the test derived from *Coco v Clark*
- Megarry J in *Coco v Clark* at 46, the question is whether a reasonable man standing in the recipient's shoes would infer that the information was received in confidence

Imparting may arise in differing circumstances:

1. P imparts the information on D:

- Information must be received in circs, such that any reasonable person would realize that the information was given to him or her in confidence (*Coco; Saltman*),
- The circs – may be inferred – e.g. *Giller* so obvious goes without saying
- There can be no binding obligation where information is “blurted out” in public or communicated in other circumstances which negate any duty of confidentiality *Coco*

Consider:

- The communications between the person imparting the information and the recipient *Smith Kline*
- The nature of the information itself *Smith Kline*
- Whether the information was supplied gratuitously or for a consideration *Smith Kline*
- Whether there is any past practice of such a kind as to give rise to an understanding; *Smith Kline*
- How sensitive the information is *Smith Kline*
- If the confider has any interest in the purpose for which the information is to be used *Smith Kline*
- Whether the confider expressly warned the confidee against a particular disclosure or use of the information *Smith Kline*

2. D improperly or surreptitiously obtains/steals the information:

- A thief who steals a trade secret with a view to profiting is under an obligation of confidence *Franklin per Dunn J*
- Thus a person who obtains information by dishonest, unlawful or surreptitious means has not been given information ‘in confidence’ but cannot escape liability for unauthorized use of information on that ground if information is of a confidential nature.
- Cf *Lenah* where although unlawful trespassing did not give rise to a duty of confidence

3. D obtains from a 3rd party:

- Obligation of confidence applies to the original acquirer and any 3rd party to whom the information is conveyed and who knows, or becomes aware, or should reasonably know, of the confidentiality of the original communication *Douglas*
- In *Douglas*, *Hello!* magazine knew of the circumstances importing the duty when they acquired the photographs from Mr Thorpe and they were accordingly bound by obligations of confidence

4. D accidentally obtains it:

- Inadvertently finding an ‘obviously confidential’ documents such as a diary or ‘secrets of importance to national security’ would attract a duty of confidence *Spycatcher Lord Goff*

4. Breach of Duty: Unauthorised Use or Threat to Disclose

There must be unauthorized use of the information' (*Coco*) including use contrary to P's restrictions and apprehended breach (*Corrs Pavey Whiting* per Gummow J)

- Includes threatened abuse
- Accidental or unintentional disclosure can constitute a breach (Talbot)

Where D Can't use at all:

- Where any use is prohibited the P simply needs to show use – this applies best for taking cases (*Franklin*)

Where D Can use Limitedly:

- Where disclosure is made for a limited purpose P needs to show that the use is outside the permitted scope (*Castrol*)
- Look at scope of authority/permission to use the info and argue on the facts

Factors influencing whether use is unauthorized/outside scope:

Smith Kline: to determine the existence of confidentiality and its scope in the context of a giving case, relevant to consider:

- a) Whether information was supplied gratuitously or for consideration;
- b) Past practice of such a kind;
- c) Sensitivity of the information;
- d) Whether the confider has an interest in the purpose for which the information is to be used;
- e) Whether the confider warned the confidee against a particular use of information.

Specific purpose/limited use:

Castrol: provided authority only for a limited purpose

Smith Kline: restriction on use did not extend to exercise of statutory functions but regulator could not pass on to a 3P for instance

No Breach Where:

No confidence, however, will be breached where confidential information is discovered through the defendant's own endeavors, by independent re- discovery, or through a public source. Thus successfully reverse engineering something will not amount to a breach of confidence.

Detriment Requirement:

D will argue that there is no breach because the use did not cause detriment to the P *Coco*

P will counter-argue that detriment is not essential or required as equity is concerned with righting the wrong of BOC and upholding an D's obligation, not Ps loss (*Smith Kline; Moorgate*).

- *Moorgate* the court said all P needs to show is that preservation of confidence is of 'substantial concern' to the P as opposed to showing use would cause detriment
- *Smith Kline Gummow J* 'The obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to P. P comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss.'
- i.e. Equity is concerned with righting a wrong and upholding an obligation; does not ask the further question of whether the P was hurt.
- Commercial or dollar detriment not required (*Proprot; Franklin*)

D__ may try to rebut that the statements about detriment in *Smith Kline* and *Moorgate* were only obiter
