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A. BREACH OF CONFIDENCE

Introduction: Distinguish the protection equity affords to confidential information in its **exclusive jurisdiction** against the protection it confers to contractual confidences in equity's auxiliary jurisdiction.

→ Contractual terms are enforced in the usual way in equity's auxiliary jurisdiction, notably by **injunction**. If breached, a promisee who suffers loss can obtain **contractual damages**. Statute also imposes obligations in relation to the use of information (e.g. s 183 *Corporations Act* on directors and officers; or where information is provided to government – *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448).

→ But breach of confidence is concerned with situations where **confidential information will be protected *independently* of any contractual or statutory obligation** e.g. where there was no contract; or where the defendant was not a party to any contract.

Principle: Equity affords protection to confidential information in its **exclusive jurisdiction**. Confidential information may be protected **independent** of any contractual or statutory obligation i.e. if there was no contract (e.g. where negotiations failed to conclude in a contract) or because the defendant was not a party to a contract.

Coco v AN Clark (Engineers) Ltd [1969] RPC 41: An inventor came in Chancery before Megarry J. This case concerned 'the pure equitable doctrine of confidence, unaffected by contract'. Most cases of confidence are contractual (and boring). Assume there is no contract – i.e. in **equity's exclusive jurisdiction**. Megarry J said three elements were required if, apart from contract, a case of breach of confidence is received:

1. The information itself must 'have the necessary quality of confidence about it' (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 per Lord Greene MR).
2. The information must have been *imparted* in circumstances importing an obligation of confidence.
3. There must be an unauthorized use of that information to the detriment of the party communicating it.
    - Standard, pithy statement of equitable principle in confidence: but **very, very wrong**.

Optus Networks Pty Ltd v Telstra Corp Ltd (2010) 265 ALR 281: In this case, Optus sought an account of profits for the money that Telstra took from Optus's use of their network. They argued they could take that money because of Telstra's misuse of confidential information derived from the benefit of having that information. At [39] per Finn, Sundberg and Jacobson JJ established **four elements** in assessing whether Optus had established an equitable breach of confidence against Telstra:

1. The information must be **identified with specificity**;
2. It must have the **necessary quality of confidence**;
3. It must have been **received by Telstra in circumstances importing an obligation of confidence**; and
4. There must be an **actual or threatened misuse** of the information **without Optus's consent**.
    - Reasoning here reflected other cases: *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 87.
    - But by contrast: *Coco v AN Clark* – in which Megarry J stated three requirements.

→ The three element test of Megarry J in *Coco* was wrong in a number of ways:
1. He missed an element! The information must be **identified with specificity** (*O'Brien v Komesaroff*). Without identification with particularity, you lose.
2. Megarry J said 'normally' – litigants do not use the previous sentence in Megarry's judgment i.e. it is not an articulation of a prescriptive, exhaustive test.
3. Not 'imparted' but '**received**' – the broader formulation is more accurate.
4. 'unauthorised use' is absurd – why should you have to wait for the detriment to have occurred in order for equity to intervene? *Quia timet*: equity will give an injunction because it is feared that something bad is about to happen. If Megarry J is read literally, it falls through – you can prevent someone from using the confidential information **beforehand**.

1. Identification with Specificity

O'Brien v Komesaroff (1982) 150 CLR 310: A life insurance salesman marketed tax minimisation devices, including by using a unit trust deed (Exhibit B20) which had been drafted for Komesaroff, the respondent and a solicitor. After they fell out, the solicitor subsequently sued for infringement

of copyright (where he succeeded) and breach of confidence. The P failed at the threshold for the latter, because he could not identify any information with specificity. One partner wanted to stop another from competing – but the P could not identify what was confidential i.e. the subject of the injunction.

- → Mason J: The exhibit which the case concerned '**was not a sufficiently precise definition of what was the confidential information which was to be the foundation of an action for breach of confidence**...there is nothing in Ex 'B20' per se which gives any indication that it is information of confidential nature. It is merely a unit trust deed. In effect, there was **no information of sufficient particularity to enable the Court to embody it in an order**.'
- → The essential question: '**What did he communicate?**'
  - 'The contents of the trust deed and articles of association in question were matters of **common knowledge**. Information may be categorized as **public knowledge** though only notorious in a particular industry or profession'. But '**only those improvements evolved by the respondent could give rise to a claim for relief for breach of confidence**': *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47.
- → The 'accepted conception of confidentiality' involved '**the person seeking to protect the information largely keeping it to himself**': *Ansell Rubber Co Pty Ltd v Allied Rubber Industries* [1967] VR 37 at 49.
  - In this case Komesaroff failed because 'it is information which, **by way of advice to others**, he **regularly published to the world at large**, albeit for a limited purpose.'
- → The information here was '**so general that we cannot satisfy ourselves, in the light of the findings of fact made by the primary judge, that the information so described was imparted by the respondent to the appellants, that it was imparted in circumstances which gave rise to an obligation of confidence and that it does not include material which is common knowledge**.'

2. Necessary Quality of Confidence

Saltman per Lord Greene at 215: Equity will only protect information which has the 'necessary quality of confidence'. Three overlapping categories are information that is (1) commercially sensitive, (2) personal and (3) governmental.

→ Absolute secrecy is not required – *Stephens v Avery* [1988] Ch 449 at 454: 'information only ceases to be capable of protection as confidential when it is known to a substantial number of people.' When disclosed to a limited number of people, the question is one of degree
  - *HRH Prince of Wales v Associated Newspapers Ltd* [2007] 2 All ER 139: Journals circulated among 21 close friends of the Prince retained sufficient confidence to support and injunction against their publication by a newspaper.
  - *Douglas v Hello! Ltd* [2001] QB 967: Photographs of a wedding to which 250 guests were invited, but at which photography was closely controlled, were confidential.
    - 'Once information gets into the public domain, it can no longer be the subject of confidence': *Douglas v Hello! (No 3)* [2008] 1 AC 1 (Lord Hoffman).

→ There are lists of the factors which help in determining whether commercial information may be considered confidential (see p. 548 Casebook), but the better position is that of Campbell JA in *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 73 IPR 326, quoting Fullagar J in *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167 at 193 in that they are helpful but 'that it was wrong to suggest...that one should slavishly check off the factors against the information, as if one were counting spots on some strange creature to see if it was indeed the species of leopard illustrated in the picture book. **The question to which each learned judge was directing his ultimate inquiry was: Would a person of ordinary intelligence, in all the circumstances of the case, including, inter alia, the relationship of the parties and the nature of the information and the circumstances of its communication, recognise this information to be.**'

(a) Public Domain

Johns v Australian Securities Commission (1993) 178 CLR 408: J had been examined by the precursor to ASIC about TriCo – a dodgy, collapsed financial company. Vic Royal Commission got hold of the private Q&A J had with ASC. J's incriminating answers were tendered in a Royal Commission (treat as a Court). J, after the transcripts had been made available to the RC, wanted to stop this. HCA was split 2:2:1. (Toohey J: Didn't decide on this point at all.)

- → Brennan and Dawson JJ: Apologetic that the RC got J's transcript, but the information was in the public domain – thus, no equity. Per Brennan J: '...the transcripts were used in the public herings and it is **too late now to recall the decisions** which permitted them to be so used. The most that can be done is to **declare** tht the decisions were invalidly taken fo failure to accord Mr Johns an opportunity to be heard in oppotion...on balance, I would favour the making of a declaration. Yet it will be a **pyrrhic victory** for Mr Johns.'
    - Quoting Browne-Wilkinson VC in *Marcel v Commissioner of Police* [1992] Ch 225: '...there can be no breach o f the duty of confidence once the information or documents are in the **public domain** and the **confidentiality has therefore disappeared**. In the case of the...documents which have been read in open court, they have now **lost their confidentiality by disclosure in open court.**'
- → McHugh and Gaudron JJ: Limited lack of availability of this information – thus, while there was a sense in which this was in the public domain, there was still some relief that could be given. As far as equity was concerned, some equitable relief was still available.
    - **Public domain** has 'two distinct aspects: the first is concerned with the question whether any duty of confidence arises; the second is concerned with whether a duty of confidence has come to an end'.
        - **First**: Is there the necessary quality of confidence? (*Saltman* at 215.) No obligation attaches to 'trivial tittle-tattle' or to information 'which is public property and public knowledge' or 'common knowledge'.
        - **Second**: Has the information ceased to be confidential? For example, 'if the information is published "by or with the consent of...the person to whom the obligation is owed"' which releases a person from their duty of confidence. They have 'the same rights as every other member of the public'. That is largely a question of fact.
            - '**it seems that publication, no matter how extensive and no matter whether by third parties of by the person who owes the primary obligation, does not necessarily extinguish an obligation of confidence'

ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199: The Cth, intervening, sought unsuccessfully to dilute the requirement of confidentiality.

- → Gleeson CJ: 'Certain kinds of information about a person, such as information relating to **health, personal relationships, or finances, may be easy to identify as private**; as may certain kinds of activity, which a **reasonable person**, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be **highly offensive to a reasonable person of ordinary sensibilities** is in many circumstances a **useful practical test of what is private**.'
- → The Cth submitted that (a) a court of equity has jurisdiction to enjoin [i.e. prohibit via injunction] the use of information obtained illegally if use of the information, which need not have the necessary quality of confidence to be protected on that ground, would be 'unconscionable'; and (b) a third party may be enjoined from using the information even if not implicated in the illegal obtaining of it.
  - **But Gummow and Hayne JJ held**: accepting these submissions would reverse the position of Mason J in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 where Mason J held that '**when equity protects government information it will look at the matter through different spectacles**' – but this **was not** such a government information case.
    - 'Decisions of equity courts are not a wilderness of single instances determined by idiosyncratic exercises of discretion.'

(b) Former Clients

Prince Jefri Bolkiah v KPMG [1999] 2 AC 222: The Prince argued that there was a black and white line between current and former clients – if there is a current client, then the lawyer owes a fiduciary obligation to the client and there is an obvious conflict of interest. But for **former clients**, the Prince argues that the answer is breach of confidence: if you can show that a former solicitor has confidential information, then it almost certainly would have been imparted in the circumstances of confidence. If you can show that there is an easily established low leval chance of it being misused, then you can stop the lawyer using it against you.

- → Lord Millett: '**The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer.** Thereafter the solicitor has no obligation to defend and advance the interests of his former client. **The only duty to the**

former client which survives the termination of the client relationship is a <u>continuing duty to preserve the confidentiality of information imparted during its subsistence</u>.'

- 'Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so.'
- 'The Court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.'

Kallinicos v Hunt (2005) 64 NSWLR 561: No 'duty of loyalty' owed in Australia subsequent to the termination of retainer, but former solicitors may be restrained from acting, even without it being shown that he or she possesses any confidential information of the former client, in order to protect the integrity of the judicial process. In this case, a solicitor was ordered to stop acting for one party to a joint venture separation dispute, because the solicitor had earlier acted in (now disputed) property transactions involving both parties. No confidential information was in issue – the case concerned a perceived conflict of interest for the solicitor as both advisor and material witness.

→ Brereton J held that the solicitor should be restrained from acting for his client, owing to this conflict of interests.

(c) Government Secrets

Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39: The Cth sought to restrain the publication of a book on three grounds: (a) infringement of copyright (on which it was ultimately successful); (b) breach of the official secrets provision in the *Crimes Act*; and (c) breach of confidence. The latter was rejected by Mason J:

→ '...when equity protects government information, it will look at the matter through different spectacles...the court will determine the government's claim to confidentiality by reference to the **public interest**. Unless disclosure is likely to injure the public interest, it will not be protected.'

- 'The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects...If, however, it appears that disclosure will be inimical to the public interest because national security,

relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained.'

→ 'However, I am not persuaded that the degree of embarrassment to Australia's foreign relations which will flow from disclosure is enough to justify interim protection of confidential information. In any event, the question whether an injunction should be granted on this ground is resolved against the plaintiff by the publication that has taken, and is likely to take, place.'
  - 'The sales of the book already made..indicate that detriment which the plaintiff apprehends will not be avoided by the grant of an injunction...in this case it is likely that what is in the book will become known to an ever-widening group of people here and overseas, including foreign governments.'

Remedies

Giller v Procopets (2008) 24 VR 1: In Victoria (uniquely within Australia), statutory amendment extends *Lord Cairns' Act* damages to the exclusive jurisdiction. In this case, the Vic CA awarded statutory damages of $40,000 for mental distress, including $10,000 for aggravated damages, against a former de facto partner who had shown videotapes depicting sexual activity between them (some taken covertly, in some of which she had acquiesced) to her family. The reasoning supported the same being available as a matter of equitable compensation.