

Topic 2: BREACH OF CONFIDENCE

BOC is an action that protects certain rights of confidentiality – it pertains to the unauthorised use of confidential information (actual or apprehended).

Elements of BOC:

1. Information must be specific (*O'Brien*)
2. Must have the necessary quality of confidence (*Coco*)
3. Circumstances import the duty of confidence (*Coco*)
4. There is a breach of duty (*Coco*)

Confidential info can take virtually **any form**, e.g.:

- Oral confidences
- Drawings
- Written docs
- Photographs
- Works of art
- Electronic docs and recordings
- Relics
- Physical items such as prototype inventions
- A list of customers
- Genetic structure of a tree/tree cuttings
- Concepts for TV shows
- Recipes
- Sexual videos/photos
- Religious secrets

1) Information must be specific (*O'Brien*)

P must be able to precisely identify the info he claims is protected

- Simply identify the information, cite *O'Brien* and move on to next element
 - E.g. "The *chemical formula* that Gary is concerned Talia has stolen from him can be identified with sufficient specificity"
- Can't be something like 'a warehouse full of documents'

2) Information must have necessary quality of confidence (*Coco*)

Quality = character/aspect/feature

Components of 'quality of confidence':

- 1) Secrecy – info must have requisite secrecy
- 2) Value – the continued secrecy/non-disclosure of info serves an interest to which equity is responsive

1. Secrecy

The info must be confidential/retain requisite levels of secrecy – it cannot be public info or common knowledge, and it cannot be in the public domain.

- **EXAM:** Lead with an account of what is going on, rather than general statement of rules/cases:
“The diagram is sufficiently secret because X was the only person who knew about it (as required in *O’Brien*)”

Factors going to secrecy:

- Combining general info with special ‘slant’: A general idea may be well known, but putting a ‘commercial twist’ or ‘slant’ on it may cause it to be confidential (*Talbot*)
- Novelty and ingenuity: Can cause something to be confidential (*Talbot*)
- Right to publish: An exclusive right to publish will give rise to confidence (*Douglas*)
- Attempts to secure/protect info: May provide necessary quality of confidence by e.g. hiring security guards to prevent entry (*Douglas*) or conducting general surveillance (*Franklin*); but **cf** *Lenah* – not decisive
- Distribution to limited audience: Does not necessarily mean info has lost confidentiality (*AFL*)
- ‘Speculative gossip’: Doesn’t mean the info has entered the public domain – distinguish between rumours/speculation and genuine dissemination of information from authoritative source (*AFL*)

Factors not necessarily going to secrecy:

- Telling someone: Doesn’t necessarily destroy secrecy – can be seen as bringing that person into your circle of trust (element 3) (*Jane Doe*)
- Private property: The fact something arises on private property doesn’t render it confidential (*Lenah*)
- Not common knowledge: The mere fact something is not common knowledge doesn’t render it confidential (*Lenah*)
- Info obtained through trespass: Not enough to transmogrify ordinary info into confidential info – although it may bear on circumstances importing the duty (element 3) (*Lenah*)

2. Value

The info must not be something **banal** or **trivial** – it must be of a character that merits equity’s protection

- Can be commercial info (*Douglas*) or non-commercial info (*Giller*)
- The *subjective desire* to keep info secret is irrelevant – this is an *objective* enquiry

EXAM: Lead with something like “*the info is sufficiently valuable, importing the necessary quality of confidence, because it is not banal or trivial. It is commercial information that has been created by X’s own ingenuity (Talbot).*”

Types of info and interests:

Commercial info:

- *Commercially sensitive info*
 - Consider the significance of the info and its effect in creating a competitive advantage;
 - The ingenuity that has gone into its creation;
 - The extent to which it is known outside the business;
 - Measures taken to safeguard it (*Douglas; Franklin*)
- *Human ingenuity – combining commonplace info to get ingenious output*
 - Human ingenuity will confer quality of confidence (*Coco*)
 - Threshold for ‘ingenuity’s is not that high – if you compile commonplace info, but create something novel out of it, that’s enough to be protectable (*Talbot; Franklin*)
 - Ingenuity can consist in the combination of banal info that on its own isn’t ingenious, but when combined is unique (*Link 2*)

Non-commercial info:

Frame the question in terms of a **human interest in protecting certain types of human info** that goes towards someone’s **identity or personality**

- *Cultural and religious secrets*
 - The long-standing religion involved secrets of initiation and what members do once they are initiated which formed part of their entire social structure and human identity; had strong cultural and religious value (*Foster*)
- *Human autonomy and intimacy*
 - Video footage of P having sex (*Giller*), sexually explicit photos of P and text messages (*Wilson*) and the identity of a complainant in a rape case (due to statutory regime) (*Jane Doe*) are all protected by confidence
 - Might be able to extend this to certain types of medical information and educational information (if Q is frame in terms outlined above)

Right to privacy? NO

- There is no general right to privacy
- *Not wanting public to see* – Just bc, e.g., food production is something people don’t want to see/would be put off by it and would cause financial loss, **doesn’t make it protected** (*Lenah*).

3) Circumstances importing the duty: knowledge of restrictions (*Coco*)

D **knows or ought to know** that the info was **imparted with confidence** and can't be used without the authority of the confider.

- TEST: *Would a reasonable person in the position of the recipient have realised the info was confidential?* (*Coco*)

The **circumstances** in which the info was acquired are critical:

1. P deliberately confides/gives info to D
 - a. Circumstances importing the duty may be so obvious it goes without saying – e.g. sex tapes/photos (*Giller; Wilson*)
 - b. There can be **no binding obligation** where info is “**blurted out**” in public or communicated under circumstances which negate any duty of confidentiality (even if the info is *obviously* confidential) (*Coco*)
 - c. A picture taken through a telephoto lens suggests an obligation of confidence (*Lenah; Hellewell*)
 - d. Consider (*Smith Kline*):
 - i. The communications bw the person imparting the info and the recipient;
 - ii. The nature of the info itself;
 - iii. Whether the info was supplied gratuitously or for consideration;
 - iv. Whether there's past practice of such a kind as to give rise to an understanding; (*Foster*)
 - v. How sensitive the info is;
 - vi. If the confider has any interest in the purpose for which the info is to be used;
 - vii. Whether the confider expressly warned the confidee against a particular disclosure or use of the info
2. D improperly or surreptitiously obtains/takes info
 - a. A thief who steals a trade secret with a view to profiting is under an obligation of confidence (*Franklin*)
 - b. A person who obtains info by dishonest/unlawful/surreptitious means cannot use info that is confidential in nature
3. D obtains from 3rd party
 - a. Obligation of confidence applies to any 3P to whom the info is conveyed, and who knows or ought reasonably to know, of the confidentiality of the original communication (*Douglas*)
 - b. NOTE: Element 3 must be made out for each recipient in the chain of Ds