

EQUITY SCAFFOLDS

BREACH OF CONFIDENCE

- To **enforce an obligation not to disclose information**, you can sue on the basis of:
 - Breach of contract – advantage: allows for a more subjective view of what confidential information is
 - Equitable duty of confidence – advantage: you can easily access equitable remedies, don't have to prove damages are inadequate
- A promise to keep something confidential in contract does not necessarily oust the equitable duty of confidence. However, if the contract covers the topic exhaustively, there will be no room for equity to intervene: *Optus v Telstra*

Test: *Optus v Telstra*

1) Information identified with specificity

- Court in *O'Brien* was unable to look at the relevant deed and point to which information constituted the confidential information, so there was no breach of confidence

2) Necessary quality of confidence

i. Categories of confidential information

- Personal: *ABC v Lenah Game Meats* – where disclosure of the information would be highly offensive to a reasonable person of ordinary sensibilities (Gleeson CJ)
- Commercially-sensitive: *Wright v Gasweld* (Kirby P factors)
 - How much skill and effort was expended to acquire the information?
 - Has the employer jealously guarded the information?
 - Was the employee made aware of the confidential nature of the information?
 - Has access to the information been controlled?
- Distinguish commercially-sensitive from employee know-how: *Del Casale* (Hodgson JA)
 - Where information is ascertainable by enquiry or experiment (albeit potentially substantial enquiry or experiment) it becomes artificial to treat the confidential information as severable and distinguishable from that know-how
- There is a duty that survives the termination of the client relationship to preserve the confidentiality of information imparted during its subsistence: *Bolkiah v KPMG* (Lord Miller)
 - NB: it is a duty to keep it confidential, not to take reasonable steps to keep it confidential. The court will intervene unless there is a real (cf. fanciful) risk of disclosure
- The Government (public body) cannot declare information is confidential. The court will consider the public interest to determine if information can be deemed confidential: *Commonwealth v John Fairfax & Sons* (Mason J)
 - It is not a defence to a breach – it goes to the very question of whether the information is confidential

ii. Must not be publicly available

- If something was confidential, and is now no longer confidential because the whole world knows about it then there can no longer be a duty to keep it confidential: *BBC v Harper Collins* ('Whit Stig'); *Lucasfilm* (design of Storm Trooper helmets)
- Short-term transient publications will not destroy the quality of confidence: *AFL v Age Company Limited* [names published on a website for 4 hours]

3) Received in circumstances importing an obligation of confidence

- Relevant question: whether the recipient knew, or ought to have known, the information was confidential: *Moorgate Tobacco v Phillip Morris* (Deane J)
- A duty of confidence was imposed on two companies who were negotiating to enter a joint manufacturing venture where designs were shared (agreement never finalised but the nature of the negotiations was such to impose an equitable duty of confidence): *Coco v Clark*

4) Actual or threatened misuse of the information without consent

- An actual breach is not required for the court to intervene (best remedy would be an injunction to prevent the misuse of the information)
- If there has been a breach, equitable compensation/account of profits
- Past conduct in respect of the information is relevant to whether something will be considered a breach

Defences

- Public interest defence only in very narrow circumstances (public health or safety): *NRMA v Yates*
 - There is no public interest in the truth being told
- Forced disclosure (e.g. in *Royal Women's Hospital* doctors were forced to disclose patient information)
- General equitable defences of delay and unclean hands

Remedies

NB: all remedies are discretionary

- i. Injunction: most obvious remedy (always mention in an exam, even if to quickly dismiss it) – requires an awareness of a threatened breach
- ii. Damages for contractual breach of confidence (legal wrong)
- iii. Equitable compensation: similar to contract law damages (compensatory remedy). Can be awarded for distress or embarrassment suffered as a result of breach of the equitable duty of confidence (*Giller v Procopets*)
- iv. Account of profits: a method of calculating an amount of valuing a gain. It does not result in an equal right of the plaintiff to that money, but rather, is a tool for calculating the judgment debt
- v. Constructive trust: may be able to establish a constructive trust over the property in the hands of the person who has breached the duty of confidence. However, this is a very invasive remedy and thus will rarely be awarded