

## TOPIC 2: BREACH OF CONFIDENCE

### Introduction

- Equity is protecting the Plaintiff against *unauthorised use* of its confidential information- focus on *confidential information*
- Role in society – Commerce, innovation, privacy, government secrecy and national security

### Elements

P may sue D for breach of confidence (BOC) for (*publication, disclosure, use*) of (*state what the information is*). The court will consider four elements from Coco and O'Brien.

NB: Use Coco v AN Clark as authority for the final 3 elements and O'Brien as authority for the first.

#### 1. SPECIFICITY

**Opening sentence:** The information must be identified with sufficient specificity, not merely expressed in global or general terms – O'Brien

- Identify what the information is (personal, commercial, technical, non-technical) and takes the form of (oral communication, plant cuttings, videotape, trade secret)
- O'Brien: couldn't point out the contents of the unit trust deed and the articles of association that were not common knowledge
- Burden on plaintiff to identify with some degree of concreteness what is the confidential information they want protected – Ocular Sciences
- Can't just point to your whole warehouse and protect everything inside – Ocular Sciences.
- If relevant discuss 'fork of O'Brien' – catch 22 between 1<sup>st</sup> and 2<sup>nd</sup> element: In satisfying the first element, he failed the second because the information was public. In satisfying the second element he found himself describing the scheme generally which didn't satisfy the first element. Reasoning: Allow D to adequately defend themselves to the claim and so courts can identify and provide effective relief (injunction) – Ocular Sciences
- *If the information is "available to anyone in the market", the information probably can't be defined with sufficient specificity – THE INFORMATION CAN TAKE MANY FORMS*

**Concluding sentence:** On the facts, the [what the information is] can be identified with the sufficient specificity as outlined in O'Brien. [note – how many pieces of information?]

### **O'Brien v Komesaroff (1982)**

#### **Facts:**

- Solicitor K developed tax limitation scheme
- Solicitor worked with accountant when providing tax minimizations to client
- The accountant thought the scheme was such a great concept that he copied this scheme and sold it to his personal clients
- Solicitor sued accountant in both copyright and breach of confidence

#### **Issues:**

- Whether BOC was made out (sufficient specificity of information in 'overseas trust' concept?)

#### **Decision:**

- Mason J held: Could not identify with specificity in document of areas that were confidential in the 'overseas trust' documents
- Neither was the use of a withholding tax scheme confidential as they contained information available to the public (provisions of Acts) and had widely been utilized by lawyers and accountants in Australia.
- Thus could not be any successful claim in breach of confidence
- Here, P had difficulty satisfying both 1) and 2) simultaneously (only one or the other)

*Specifying information as 'more or less everything' is insufficient*

### **Ocular Sciences Ltd v Aspect Vision Care**

#### **Facts:**

- Employee G leaves O business
- The employees subsequently set up a competing business using the knowledge they had garnered through previous employment.
- The business partners claimed that the information about contact lenses, equipment, and software, i.e. pretty much everything to do with the optometry business, was confidential.

#### **Issues:**

- Whether 'more or less everything' about the optometry business constituted information capable of protection under BOC

#### **Decision:**

- Need to distinguish between 'know how' and 'confidential information'?
- 'Know how' is information that an employee is entitled to use and put at the disposal of new employers for public policy reasons.
- TEST: Would a reasonable, honest man view information as belonging to part of employee's knowledge or part of employer's property?
- Found that the information about the running of a contact-lense business was know how.
- Laddie J: Primary relief granted for a BOC action is an injunction and thus the Courts must be able to frame a sensible limited injunction which has the effect of preventing the D from only doing things they should not be doing without overreaching and preventing the use of information that is public knowledge/widely used
- The courts are careful to ensure that the plaintiff gives full and proper particulars of all the confidential information on which he intends to rely in the proceedings
- Factors that need to be considered include:
  - The burden on the plaintiff (but not given much weight)

- The link between the pleadings and the remedy
- The ability of the defendant to meet the case
- The potential for harassment and abuse of process

## 2. NECESSARY QUALITY OF CONFIDENCE

**Opening sentence:** *Equity will only protect information with the necessary quality of confidence – **Smith-Kline**.*

*This may be considered in two limbs: secrecy and value.*

### a) Secrecy

Information must be sufficiently secret as opposed to being common or public knowledge (**ABC v Lenah**).

- Mere fact that the information arises on or is created on private property is not enough to establish secrecy. Just because the information was obtained by trespass does not render ordinary information confidential – **Lenah Game Meats**.
- Some information is inherently confidential, such as sex (**Giller**).
- Consider whether there is a circle of confidence
  - Secrecy lost in **Lenah Meats** because there was no attempt to bring people into a circle of confidence. Large numbers could access the information and there was no limit on what they could do with it.
  - In **Jane Doe** statutory limitations on broadcasting identity of witnesses brought everyone in the court room into a circle of confidentiality

### **ABC v Lenah Game Meats (2001)**

#### **Facts:**

- L was a licensed abattoir that killed and processed brushtail possums
- Trespassers broke into L's factory and filmed processing operations, particularly the stunning/killing of the possums.
- ABC obtained a copy of the film and intended to broadcast on TV (4 Corners)
- L sought injunction on a number of bases, including breach of confidence. L framed the confidential information in question as what the slaughtering/processing looks like rather than the information captured on the film itself
- ABC argued in interest of public, should be justified in breaching confidence. Specifically, iniquity as a defence

#### **Issues:**

- Specificity and secrecy of the information

#### **Decision:**

- If specific information was characterized by slaughtering methods used by L, information was not confidential in nature as the abattoirs processes were well known by the public.
- The fact the abattoir was licensed by a public authority points towards the nature of the operations being non-confidential
- Relevant that they did not take steps to keep the information confidential

-Gleeson CJ: the fact the means by which the information was obtained was surreptitious and would import a duty to not disclose the information would not have the effect of transforming ordinary information into confidential information

-Failed on secrecy and value (fact that they don't want the information to be public because it will hurt their business is not enough – no inherent equitable worth)

**The information must not have entered the public domain** (*Spycatcher; Jane Doe*)

- Public domain' means the information is so generally accessible that, in all the circumstances, it cannot be regarded as confidential. In *Spycatcher*, the information had been published around the world, released in TV interviews and by other agents
- *Lenah*: government inspections and heavily regulated, easily accessible
- *AFL*: subscribers to media information notified but limited dissemination to a small group does not remove confidentiality.
- Speculation, gossip or assertion from an anonymous source is not sufficient for information to enter the public domain. Look for anonymous source, intermediary source with questionable reputation (*AFL*)
- Publication to a limited audience (e.g. friends, family and police) does not destroy confidence (*Jane Doe*) → Circle of secrecy
- The fact that court proceedings are public doesn't mean information stated in Court enters the public domain (*Jane Doe*)
- ***Douglas***: pictures had not entered public domain. Each picture was treated as a separate piece of information.

*An insider group sending information to a broadcaster did not vitiate secrecy/cause information to enter public domain*

- *Judge distinguished between true speculation and genuine dissemination of information. Philosophy of knowledge – true belief is different from knowledge with justification – was not connected with an authoritative source so it did not stop the second element from being made out*

### **AFL v The Age (2006)**

#### **Facts:**

- 3 footballers tested positive for use of recreational drugs for a second time.
- Somehow, information about the identity of the 3 footballers was leaked internally
- The Age wished to publish this information in a newspaper
- The AFL sought an injunction via breach of confidence, claiming the drug test information was clearly personal information intended to be confidential.
- The Age argued that information was no longer confidential as it had entered public domain

#### **Issues:**

- Whether the information was placed in the public domain:
    1. Information was known by members of AFL family (club doctor etc)
    2. Sydney Morning Herald had named 3 players in article, which was never published.
- However it was available for 5 hours via government customers

3. Exposure on pay per view TV show. Telephone call was made to the host of the TV show identifying one of the 3 players
4. Figures available for viewers of TV show evinced very low view numbers.
5. Plethora of speculation in football forums. Occasionally the speculators were correct, but many were not

**Decision:**

-No entering of public domain. Not significant enough of a volume of people that it was sufficient to amount to 'public knowledge'

1. No evidence of dissemination of information within AFL family.
2. Distributed electronically to small number of organisations prior to recalling. Not sufficient to enter public domain.
3. Broadcasting of radio call was merely speculative and was towards a very limited audience. Not sufficient by itself to enter public domain.
4. Internet forum discussions were rumour-like and speculative, as evinced by the many different players named. If the information was from some credible source such as a business website/news website, much more likely to be considered to enter the public domain. The fact the information was in a 'discussion forum', where users were anonymous and no standard of accountability existed means that it cannot possibly be treated as entering the public domain.

-Individually, each source disseminated information to a very limited audience; no dissemination to the public at large was evinced.

-Level of disclosure was so out of proportion (front page of Age) with the little public disclosure that had already occurred.

**Jane Doe v ABC (2007 - County Court, so not binding authority)**

**Facts:**

- Secret information concerned the identity of a witness in a criminal trial
- P had been assaulted and raped by estranged husband, who was about to be convicted
- ABC reported information with identifying info about the husband, including his name, address and the fact the victim was his wife. This made it easy to identify who the P was.
- This was directly in contravention of act of parliament to identify victims of sexual abuse, which was a criminal provision

**Issue:**

-Whether the information was public information, as parties had been identified in open court. There is a system of open courts – having appeared as a witness in open court, how can she now maintain that her identity is secret?

**Decision:**

-Kampl J considered the interaction between equity and the statute governing proceedings (statute for criminal proceedings placing limitations broadcasting identity of witnesses)

-The effect of the statute was to bring everyone in the courtroom into circle of confidentiality

-This is what makes the situation from the factor in *Lenah*. Without this, would have been impossible for the plaintiff, since the courtroom would be an easily accessible public place (Everything Gleeson J said about a factor would be even more true of a public court room)

## b) Value

*Equity is not concerned with protecting banal or trivial information; it must have some value.*

### Commercial Information

- People have interest to engage in commerce to make profits, personal autonomy, agency and Equity will deem it worthwhile protecting this interest – **Franklin**
- A combination of commonplace elements put together will be protected if the combination is a product of ingenuity. So whole combination of information, even if separately is merely trivial and not secret, may be sufficiently secret and valuable because of its utility in commerce. – **Talbot**
  - Attempts to secure/protect (**Giller; Franklin**)
  - Application of skill/expertise to create = human ingenuity (**Ocular**)
    - Test for ingenuity isn't high. Doesn't need to be revolutionary – **Talbot**
  - Value of information to P and competitors
  - An exclusive right to publish will give rise to confidence, has commercial value because affects reputation (**Douglas**)

### COMBINATION OF COMMONPLACE INFORMATION

*General idea may be known/generic but “commercial twist” or “particular slant” on a generic/publicly known idea is capable of producing confidential information*

- *Combination has to be a saleable proposition (something worthwhile)*

### **Talbot v General Television Corporation (1980, VSC)**

#### **Facts:**

- Talbot had developed a concept for a TV series called 'To Make a Million'. This would depict the success stories of certain millionaires in order to inspire viewers
- T had prepared a written submission to various TV networks to pitch idea
- Channel 9 requested a pilot script after receiving a submission from T. Received no response from network afterwards
- A short time later, T noticed that Channel 9 had begun spreading promotional material about a special series hosted on "A current affair"
- T brought action in copyright and breach of confidence. T's action in copyright failed

#### **Issue:**

- Whether the information was confidential in nature – GTC argued that the idea of 'how millionaires succeeded and how regular people could learn from them' was not an original one and thus could not be confidential

#### **Decision:**

- Talbot was successful. In making the pitch, he did not sacrifice the secrecy of the idea (*Jane Doe*) – he brought the people into the circle of confidence
- Although the information and concepts were of 'public knowledge' the fact T had added a '**commercial twist**' to the concept, which took it out of public knowledge
- In this situation, T had produced a 'saleable proposition', drafted to bring out desirability of a television channel televising, which gave the information a confidential nature

- Putting these commonplace elements together reflected “a degree of ingenuity”. Threshold for ingenuity is not high. If it is original, it is close to being enough (saleable proposition)
- Distinguishing O’Brien – television can be privatized, unlike the law (both put together info)

*Reiterates the **Talbot** principle + says that only the combination is protected*

### **Link 2 v Ezystay (2016)**

#### **Issue:**

- Whether a manual (dispute between online booking service) is confidential

#### **Decision:**

- Components out of which the manual are built up, but putting them together creates protectable confidential information
- Clear that the remedy only goes to the combination – the plaintiff can still use the individual commonplace elements and reconstruct the information themselves
- Here, the remedy was “delivery after destruction” – returning all physical copies and destruction of electronic files (ensures no information can be used as a “how to” guide)

### **FULL INGENUITY**

*Trade secrets – the information was the breeding code in the nectarine tree*

### **Franklin v Giddins (1978)**

#### **Facts:**

- F operated orchard where they grew a special type of nectarine that were very commercially successful by grafting special branches onto existing trees
- F was the sole supplier of this type of fruit as F had bred the fruit trees for many years
- Due to crossbreeding program that F utilized, impossible to genetically replicate nectarines without actually taking part of F’s budwood and growing a fruit plant (could not use seed)
- G knew that F’s budwood was not for sale so stole a piece of budwood and began growing the nectarines. F argued that G had stolen a trade secret and thus committed BOC

#### **Issue:**

- What was the confidential information?

#### **Decision:**

- Quality of confidence: DNA of nectarines was confidential information (a trade secret)
- In addition, the attempts to prevent the information may also grant the information the necessary quality of confidence

**Circumstance importing a duty:** Fact that F was unwilling to sell the budwood, had fence clearly indicates information was of a confidential nature, taken steps to prevent confidentiality

- Delivery up and destruction of the budwood and the related fruit trees was imposed

### **Personal Information**

- Equity may also protect information of a personal or intimate nature.

- Religious/Cultural information: **Foster v Mountford**
  - Secret Indigenous ceremonies protected because disclosure would disrupt social ceremonies and their religious value – **Foster**
- Personal or Intimate information protected:
  - Sexual activity is a private and confidential affair worthy of equity's protection – **Giller**
  - Footage of persons having sex – **Giller v Procopets**
  - ID of a complainant in a rape trial protected – **Jane Doe**
  - Photos of a celebrity wedding not protected because they were willing to publish the photos (failed on secrecy) and a wedding isn't so intimate and personal that one would expect it to be kept private (failed on value) – **Douglas v Hello (Lord Walker's dissent)**

*BOC is extended to information concerning personal affair and private life of individuals*

- *"Reasonable expectation of privacy" analysis also imports a subjective quality – does not enliven on what the reasonable expectation is grounded*

*Information with religious or cultural value can also be confidential if disclosure would disrupt social ceremonies and their religious value (or similar)*

### **Foster v Mountford (not fully binding authority – an interlocutory application)**

#### **Facts:**

- Dr M was author and R the publisher of book containing revelations about Aboriginal cultural/religious secret ceremonies
- Book was prefaced by disclaimer that the book was to be used only after consultation with male Aboriginal leaders
- M had witnessed the male rites/ceremonies 35 years prior when they took M in confidence and showed him sacred sites/objects/paintings etc. M had recorded using camera/notebooks/aboriginal drawings
- Aborigines claimed breach of confidence and sought injunction, stating that the revelation of some secrets may undermine social/religious stability of aboriginal community

#### **Issue:**

- Whether the information was confidential (heard as an interlocutory matter)

#### **Decision:**

- Context under which information was imparted and also the sensitivity of the information concerned clearly evinced information was intended to be confidential
- The plaintiffs had lead Dr M "into their confidence and showed him and explained to him sacred sites and objects, paintings and rock engravings, and he recorded their myths and totemic geography by Aboriginal drawings, the camera and notebook"
- Revelations of the secrets of their uninitiated men, women and children may undermine social stability of their community
- Value connected to the place of the religious practices was worthy of protection

### **Giller v Procopets (2004 – VSC)**

#### **Facts:**

- G and her husband had an unhappy relationship, with 1 child.
- G subsequently began to live with P in a De Facto relationship. Bore 2 children



- Relationship broke down and G officially moved out in 1993. However, G continued sexual relations with P before the relationship finally broke down in 1996
- P secretly filmed them having sex before obtaining consent and creating another number of sextapes - Total of ~10 sextapes.
- P threatened to show videos/photos, including to G's parents, 3rd parties and employer

**Issue:**

- Whether the information contained the requisite element of secrecy

**Decision:**

- Gillard J extended BOC to information concerning the personal affairs and private life of individuals; not confined to trade secrets.

Breach of confidence clearly made out:

- a. Specifically identifiable information – Video contained in the films was the alleged information in question.
  - b. Confidential information – The mere fact that G and P were engaging in sexual relations was not the confidential information. The actual acts and intimate details depicted in film are the confidential information in question
  - c. Circumstances giving rise to duty of confidence –very nature of consensual sexual acts between two parties in the privacy of their home creates relationship of mutual trust and confidence which is not to be divulged without the consent of both parties
  - d. Actual misuse –misuse to maliciously attempt to show videos to high-impact people
- Remedy: Injunction was pointless, as police had already seized the tapes
  - Entitled to damages in lieu and equitable compensation

**Wilson v Ferguson (2015 – WASC)**

**Facts:**

- P and D were colleagues and were also involved in an unofficial romantic relationship. The relationship subsequently broke down after the P alleged the D was cheating.
- D still had possession of explicit images/videos of the couple after breakup. A number of the images/videos had been obtained via mutual sexting, however on one instance, the D had emailed himself explicit images/videos on the P's phone to himself whilst the P was away from the room. D had promised not to show the videos/images to anyone else when the P discovered he had done this
- After breaking up, the D uploaded 15 explicit images and 2 videos onto Facebook, which was subsequently removed after a number of hours. They were accessible to 300+ of his Facebook friends, a number of which were workmates of the P

**Issue:**

- P claimed injunction restraining D from posting any other similar content by way of BOC

**Decision:**

- Explicit/intimate nature of information inherently carries a confidential nature (Similar justifications to Giller v Procopets) and the nature of the photos would make it obvious to any reasonable person in the D's position that they were not to be shared to any other person.

- The fact a number of the photos/videos were obtained by D sending it to himself would also import an obligation of confidence

**Remedies:** Granted injunction against D preventing any future disclosure of explicit images/videos depicting sexual activities

-Granted equitable compensation for the humiliation/anxiety/distress which had resulted from defendant's publication of images in BOC. In addition, compensation was awarded for the loss of income as she was fired from her position.

- *Granting an exclusive right can give rise to confidence*
- *Confidence can survive publication if each image is treated as separate information*
- *Combination of personal and commercial characteristics*

### **Douglas v Hello! (English case)**

#### **Facts:**

- Concerned marriage of Michael Douglas and Catherine Zeta-Jones.
- Douglases sold exclusive rights of wedding to OK Magazine via a bidding war, for 1 million pounds. Clause 6 of the agreement stated that the couple would use their best efforts to ensure no one else would take any photographs
- As a consequence, the Douglases took extensive steps to prevent any photos being taken by attendees of wedding, making them sign declarations in order to attend
- Freelance photographer infiltrated the wedding posing as waiter and took a number of photos and sold the rights to the photos to Hello! Magazine
- OK! Published the official photos and later in the same day Hello! published their photographs and tabloid newspapers republished Hello!'s photographs.
- Douglas sought injunction to prevent Hello! from publishing photographs and claimed breach of confidence had occurred

#### **Issue:**

- Whether the information was confidential, even after the initial publication by OK

#### **Decision (Walker J delivered most useful judgment):**

- Information that was confidential was not the fact of the wedding but rather the photographs of the wedding (similar reasoning to Giller in that form of information = what is confidential)
- There was clearly confidential information in the freelance photographs even after OK had published the photos as OK had paid 1M pounds for the benefit of the obligation of confidence to be imposed on all attendees with regards to photos of the wedding.
- Photographs were not considered to have entered public domain as although the ones that OK! Published were in the public domain, none of the other pictures had entered into the public domain. Each picture was to be treated as a separate piece of information
- Both the authorised/unauthorised information disclose the same sort of information – the official photos do not contain any prime sensitive information (timing issue not important)
- Certain 'banal' element about photos from a wedding

**Remedies:** The fact that the Douglas' were all too willing to sell their photographs indicated that their **underlying motive was not to protect the confidentiality** of the information

- Hence, were only awarded a small amount of compensation for the breach of confidence

### **3. CIRCUMSTANCES IMPORTING DUTY**

A court of equity will restrain the publication of confidential information improperly or surreptitiously obtained (taking cases) or of information imparted in confidence (giving cases) which ought not to be divulged – **Lord Ashburton v Pape**

Identify whether it is a giving or takings situation.

### Giving Cases - Information Imparted to D

- Circumstances must be such that any reasonable person standing in the shoes of the recipient of the information would have realised that the information was being given to him/her in confidence – **Coco**
- Consider explicit/implicit conditions of the giving of the information – **Smith Kline**
- Consider:
  - Nature of the information – is it obviously confidential? (Smith Kline)
  - Past practice between parties so to give rise to an understanding (Smith Kline)
  - Sensitive information such as intimate images? **Wilson**
  - Has the confider expressed a limited purpose or expressly warned against disclosure? **Smith**

### Taking Cases: Information Improperly taken

- When the information/trade secret is stolen or taken, the court will import a duty of confidence (**Franklin; Pape**). Little analysis is required beyond establishing the taking.

### Blurring/Waiving Cases: Information accidentally obtained

- ASK: Would a reasonable person in D's position have known on reasonable grounds that the information was confidential? (*A-G v Guardian*)
- [WAFTING] Inadvertently finding an obviously confidential information such as a diary or secrets of importance to national security would lead to obligation of confidence **AG v Guardian**.
  - Gleeson J in *Lenah* extended this to someone with a photo lens taking a photo with a distance of a private act
- [BLURTING] However secret and confidential the information, there can be no binding obligation of confidence if that information is blurred out in public – **Coco**
- not taking a lot of care to preserve privacy – in *Lenah* – one key consideration was whether they had made reasonable efforts to protect the information. One could argue that D should not be held liable because P has not made any attempt to preserve privacy. E.g. iPhone example (Little care to preserve privacy)
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### NB1: Third Party Defendants: Information obtained and passed onto third party

Third party is under obligation if they knew or ought to have known about the confidentiality of the original communication (*Hello*)

- e.g. **Franklin v Giddins** the D1 stole the budwood and gave it to D2. D2 was also liable by her knowledge of the theft and subsequent use.

*The arising of the duty depends on the circumstances in which they receive the information*

- *Unlike in the Castrol case where plaintiff won, here the defendant won*

### **AG v Guardian Newspapers (Spycatcher case)**

#### **Facts:**

- Former MI5 agent was author of a book called Spycatcher, which contained info about irregularities and unlawful activities conducted by MI5
- No possibility of book's publication in the UK due to terms of contract with MI5
- Book was published with Australian subsidiary of an English publication company. Steps were taken to publish book in US
- In England, two newspapers (including Guardian) published article which outlined book's allegations. Interlocutory injunction granted against newspapers until trial

#### **Issue:**

- Did Guardian Newspapers have a duty of confidence?

#### **Decision:**

- English government had sat back and allowed this type of conduct to happen for a large duration of time. MI5 'leaked like a sieve'; had not taken any steps to prevent leaks happen. In fact, leaks happened previously, which government had not taken any steps to resolve
- Even though English government clearly had good claim previously, by its actions it had let its own protection lapse.

**Lord Goff:** Commented about the circumstances importing duty of confidence

- Confirmed that there is no need for a pre-existing relationship for the duty to arise
- In addition, stated that the circumstances imposing duty may include:
  - Where an obviously confidential document is wafted by an electric fan outside of a window into a crowded street OR Where an obviously confidential document, such as a private diary, is dropped in a public place and is then picked up by a passer-by.

### **NB2: Third Party Plaintiffs**

It is not possible to have third party plaintiffs per Lord Walker in *Douglas v Hello*. Equity protects a personal right; it cannot be assigned to a third party (see Okay magazine attempting to join action / funding Douglas).

## **4. BREACH OF DUTY: UNAUTHORISED USE**

*Breach occurs where there is unauthorised use of information—Coco*

Taking Cases: use of information = breach. Where information is taken, any use will be unauthorised – *Franklin; Talbot*

Giving Cases: Where information is given – look to scope and purpose of authorisation. Use of the information outside the parameters of the giving of that information is a breach – *Castrol*.

- This includes 'threatened' or anticipated breach (*Moorgate*)
- Where disclosure is made for a limited purpose P needs to show use fell outside the permitted scope (*Castrol*)

- In *Castrol* the report was voluntarily provided for purpose of whether advertising was okay; used to prosecute Castrol for other consumer law → outside scope
- In *Smith* restriction on use did not extend to exercise of statutory functions, internal assessments, but regulator could not pass on to a 3P for instance

#### NB1: If D is a Regulatory Body

- Voluntarily provided information to regulator: Breach by ACCC because information was used for another purpose – *Castrol*.
  - Ensuring truth in advertising does not require regulative vetting of ads for truth per *Castrol*.
- Mandatorily required to disclose information: Regulator seeks out information. Suggests no breach – *Smith Kline Gummow J*.
  - The statutory obligation of the regulator precludes receiving information with an imported duty of confidence as it must prioritise its statutory obligation in using the information (e.g. public health) per Gummow J in *Smith Kline*.

#### NB2: Is Detriment Required?

- There is no need to show detriment per Gummow J in *Smith Kline* (cf. Deane J in *Moorgate*). Could counter-argue that it was only obiter.
  - It is not a tortious action. Equity does not respond to harm, it is concerned with the conscience of the defendant.
- Detriment will be assessed subjectively, if at all, and any 'substantial concern' will be sufficient to make out the requirement.
- Government needs to prove **detriment** to the public interest if information is released (*John Fairfax*)

GIVING - both cases involve the **provision of information by private actor giving information to a regulatory body**, and then alleging misuse the information

*It is possible to ascertain limited purpose in providing information*

#### **Castrol Australia v Em Tech (1950) – Castrol won**

##### **Facts:**

- Castrol wished to develop new oil and Emtech conducted tests on oils submitted by C
- Intended to make claims on how much more efficient their oil is (laboratory test results)
- The outcome of the tests was compiled into a report, which was subsequently submitted to the Trade Practices Commission (TPC) by Castrol in order to determine whether their advertising campaign would comply with consumer protection legislation
- The Trade Practices Commission (TPC) subsequently sought to prosecute Castrol and used the documents Castrol had supplied EA to mount a prosecution case
- Castrol claimed this was an unauthorized use of information and sought injunction for BOC

**Issue:**

-Was the TPC's subsequent use of the report/documents unauthorized?

**Decision:**

-Rath J held that the information was given clearly for the limited purposes of ascertaining whether their advertising campaign was compliant with specific advertising provisions of the TPA; the information was not provided for investigating other breaches of the TPA  
-Accordingly, the use was outside the intended scope/purpose of providing the information

*The arising of the duty depends on the circumstances in which they receive the information*

- *Unlike in the Castrol case where plaintiff won, here the defendant won*

**Smith Kline v Department of Community Services (1990)****Facts:**

-Particular drug developed/sold on market. Was granted permission to market it in Australia  
-Generated many of documents and records at Department of Community Services/Health  
-Generic producer wanted to sell generic brand of same/similar drug in Australian market  
-Health department wished to use SK's documentation to assess competitor's drug  
-First company sought injunction to prevent department from using documentation from assessing second company's drug  
-SK sued for BOC, arguing that it provided it only to approve its own application

**Issue:**

-Whether there was a misuse of information on the part of the Department of Health

**Decision:**

-Gummow J refused injunction; no misuse of information made out  
-Reasoned in line with the statute that shaped the regulatory context to understand why the outcome here was different than Castrol. They **key difference** is that in Castrol, there is no statute that says that if you want to run an ad, you must get it vetted. Anyone who wants to advertise their product can do so, with some limitations. Thus, Castrol was not acting out of duty here, but the statute/broader regulatory context here is very different – cannot sell pharmaceuticals in Australia without a license  
-SK hadn't informed department that info would only to be used for limited purposes  
-Would know that they could not disclose information in certain circumstances; e.g. giving info to competitors etc  
-Purpose was to assess drug for internal purposes; public health of Australia. Reasonable person in department's position would not realise purpose was limited with respect to this  
-Reasonable person may assume that information pertaining to the creation of the drug/competitive qualities would be confidential, however restriction on referring to the documents for comparative purposes cannot be implied  
-Not that they had no obligation of confidence – only the sort plaintiff argued for (statutory regime didn't permit taking information subject to this obligation)

In affirming Gummow J's judgment, **Full Federal Court made useful remarks:**

- To determine the existence of confidentiality and its scope, it may be relevant to consider a range of factors, including:

- Whether the information was supplied gratuitously or for consideration
  - If consideration, stricter DOC

### **Moorgate Tobacco Co v Phillip Morris (1984)**

#### **Facts:**

- An overseas tobacco company, Moorgate, negotiated for Phillip Morris to manufacture and market Loew's new brands of cigarettes "Kent Golden Lights" or "Kent Special Mild", however the negotiations failed to come to fruition
- Two years later in 1977 PM trademarked "Golden Lights" and then sought to manufacture and sell low tar and nicotine cigarettes called "Marlboro Golden Lights"
- Appellant sued for declaratory and injunctive relief

#### **Issue:**

- Was the information contained in the negotiations considered confidential? This was marketing results, advertising and the knowledge that Moorgate wished to introduce the brand 'Golden lights' to Australia.

#### **Decision:**

- HCA held that PM had not undertaken any fiduciary duty of acting for or in the licensor's interest in respect of the brand and mark "Kent Golden Lights"
- However, there is a general equitable jurisdiction to grant relief against abuse of confidential information not involving any tort, any breach of contractual provision, or any wider fiduciary duty or copyright or trade mark right. The rational basis of the jurisdiction lies, not in proprietary right, but in an obligation of conscience arising from the circumstances in which information was obtained. This is the action for breach of confidence
- Rather than saying unauthorised use must detriment the plaintiff Deane J said 'preservation of its confidentiality or secrecy is of substantial concern to the plaintiff'

*In legal reasoning terms, Gummow J killed it off*

### **Moorgate Tobacco Co v Phillip Morris (1984)**

#### **Decision:**

- Gummow J noted that BOC is not a tort, which responds to harm. It would be natural to think in a tort that you would need detriment. On the other hand, equitable actions are concerned with the **conscience of the defendant**. This means that once (3) is established, all you have to show is a breach to trigger equity's remedial response
- Demonstrates the idea of equity being a jurisdiction of conscience

## **5. DEFENCES**

**a) Public Interest (UK law):** Was disclosure/publication in the public interest?

- Only obiter support for this position in Aus (Gleeson CJ in **Lenah Meats**).
- Gummow J in **Smith Kline** stated that public interest only goes to element 2. Incongruent to be both in the public interest and worthy of equity's protection.
- *PI needs to be serious and more than public curiosity and it is high threshold - things like national security and public health*

### **Minister for Immigration v Kumar (2009)**

#### **Facts:**

- Mr K was born in Fiji, married Australian citizen in May 2004. Suspicion that the couple were not in genuine and continuing marriage and that marriage was purely for immigration reasons
- Mr K applied for permanent residency in June 2004. Tribunal rejected application on basis that marriage was contrived for the sole purpose of allowing Mr K to migrate to Australia
- Mr K was provided with 28 days to procure information refuting this claim and comment on his relationship with his "wife". Mr K did not provide any additional information.
- Mr K argued that Tribunal's decision was product of failure to comply with requirements of disclosing "identity of informant and full nature of information".
- Tribunal argued that information was 'non-disclosable information' under the Act and therefore there was no failure to comply

#### **Issue:**

- Was Tribunal's failure to disclose information a breach of the act?
- Would tribunal's actions amount to a breach of confidence if disclosed?
- Was there a public interest in disclosure

#### **Decision:**

- HCA held: Tribunal was not required to disclose the informant's identity and the nature of the information. Information was passed to Tribunal in circumstances importing an obligation of confidence, which rendered the information 'non disclosable information'.
- Public interest?** Something may present a serious risk to the medical health of the public, national security, the administration of justice or a matter of comparable public importance such that it may fairly be regarded as necessary in the public interest that a person possessing such information should be free to disclose it to an appropriate third party, whether or not the matter involves individual wrongdoing (by the claimant or anyone else)
- However, the general law does not protect confidences about matters as the commission of crimes/frauds, such as in this instance. On the contrary, the protection of the confidence of informant's disclosures advanced the operation of spousal visa provisions and therefore enhanced the public interest by helping identify fraudulent immigration applications.
- Therefore no contravention on part of Tribunal, as if they disclosed information, would have been breach of confidence (no public policy defence available)

### **b) Iniquity**

- If the information discloses a wrongdoing (criminal or civil wrong, or serious public misdeed), the D will have a defence to unauthorised use of the information – **AFL v The Age**
- 3 step test per **AFL v The Age**:
  - A genuine iniquity; crime or civil wrong or serious misdeed of public importance
    - High threshold and will only apply in serious cases
      - Isolated drug use was not serious enough to warrant mass publication (AFL)
  - Information is of public importance – what is to be disclosed affects the



- community as a whole or affects the public welfare
  - Disclosure is to a third party with a real and direct interest in redressing the alleged wrong
    - The age disclosed to the public who did not have an interest in redressing wrong
- NB: Cannot plead own iniquity to defeat someone else's duty of confidence – Kumar

#### REMEDIES:

- Can only be personal
- Injunction is key remedy
- Awards have included various personal remedies:
  - Orders for destruction and/or delivery up (*Franklin v Giddins*)
  - Equitable compensation (*Giller*)
  - Equitable damages
  - Account of profits

Litigants will frequently seek remedies such as injunction or delivery up, to restrain (further) use and/or disclosure of the information. Where information has already been used or disclosed, courts may deem injunctions inappropriate and favour the use of a monetary remedy, such as LCA damages, equitable compensation or an account of profits.

Courts, particularly in commercial disputes, have been flexible in applying remedies so as to take account of commercial realities, such as the potential for commercial confidential information to become public knowledge and for procedures and processes to be legitimately developed or reverse engineered.

Recent English and Australian decisions pertaining to the misuse of personal information have also shown that the courts are prepared to award monetary compensation for non-financial harm and distress suffered by plaintiffs.