

I Confidential Information

Confidential information is protected in either equity, or by an express/implied term in contract (or in both contract and/or equity): *Optus Networks* (2010). The person to whom the obligation is owed has standing to sue: *Fraser v Evans*.

To establish a breach of confidence in equity, the plaintiff must establish:

- (1) That the information has the necessary quality of confidence;
- (2) That the information was imparted in circumstances importing an obligation of confidence; and
- (3) That there has been an unauthorised use of that information: *Saltman* (1948); *Coco* [1969].

Does the information have the necessary quality of confidence?

- The information must be identified with specificity, and not in global terms: *Smith Kline*.
- If the information is a matter of public knowledge, equity will not enforce an obligation of confidence (unless in limited exceptions): *O'Brien v Komesaroff*; *Terrapin Ltd v Builders Supply Co*.

Exception: 'springboard doctrine':

If information that was confidential has subsequently lost its quality of confidence, a defendant may still be restrained from disclosure if using that confidential information would give that party an unfair competitive advantage: *Terrapin*.

The springboard doctrine will only apply for a limited time, and the determination of the duration is a question of fact: *Titan*.

Exception: 'compilations of public information'

If the constituent parts of the confidential information are in the public domain, this does not deprive the information of its confidential character: *Vasco*.

- Personal information (eg confided in a marital relationship, or celebrity cases) may be protected in equity: *Duke of Argyll* [1967]; *Douglas v Hello (No 3)*.
 - Although the UK courts have shown a greater willingness to use the equitable doctrine as a vehicle for protecting individual privacy rights, Gleeson CJ in *ABC v Lenah Game Meats* indicated that the equitable doctrine could protect personal information in Australia as well.
- Government secrets: ordinary principles are not directly applicable in this context: *A-G v Heinemann*. But government secrets can be protected in equity so long as the public interest in disclosure does not outweigh the public interest in maintaining secrecy (eg for reasons of national security, prejudice to Australia's international affairs): *Cth v John Fairfax* per Mason J.

- Trade secrets will be protected if the subject-matter has some commercial value, such that disclosure to a competitor would cause detriment to the owner of the confidential information: *Ansell Rubber*.

Was the information imparted in circumstances importing an obligation of confidence?

- If the circumstances are such that any reasonable person standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to them in confidence, then equity will impose an obligation: *Coco* per Megarry J.
 - Business relationship: If information is given in a business relationship, especially a joint venture or common endeavour, the defendant bears a higher onus to establish there was no obligation of confidence: *Coco*.
 - Contractual relationship: Express, or implied, contractual terms will give rise to an obligation: *Coco*.
- Employment relationship: There is uncertainty as to how a contractual stipulation of confidence can be enforced post-employment, as it may constitute an unlawful restraint of trade;
 - An implied term of good faith will operate to prevent the disclosure of trade secrets gained during the course of employment: *Faccenda Chicken*.
 - Generally this issue is best dealt with in equity: *Del Casale* per Hodgson JA.
- In the circumstances of employment, an employee may encounter three kinds of information—only (2) and (3) impart an equitable obligation of confidence;
 - (1) information that, because of its triviality or public availability, cannot be regarded as confidential;
 - (2) information that the employee must treat as confidential until the termination of their employment, but which once learned, is part of the employee's skill and knowledge (and to impose an obligation would be an unlawful restraint on trade); and
 - (3) specific trade secrets which cannot be used for other than the employer's benefit, even after the employment relationship is terminated: *Wright v Gasweld* per Kirby P.
- An obligation of confidence will be imparted where the defendant ought to have known that the information was confidential: *A-G v Guardian Newspapers* per Lord Goff; *ABC v Lenah Game Meats* per Callinan J.
- Innocent receipt of information by third parties: an innocent third party can be bound by an equitable obligation of confidence even when they come into possession of confidential information without notice that that information is confidential: *Dart Industries*.

Did the defendant make an unauthorised use of the confidential information?

- Intention: There is no requirement of intention: *Talbot v General Television Corp* [1980].
- Knowing assistance: A third party who knowingly assists in the misuse of that information can also be liable for breach of confidence: *Vestergaard* [2013].
- The purpose and scope of the disclosure is determinative: *Smith Kline*.