

LAW3111 Summary Exam Notes

Breach of confidence (BOC)

1. Specificity (*O'Brien; Cular*)
2. Necessary quality of confidence (*Coco*)
3. Circumstances importing the duty (*Coco*)
4. Breach of duty/unauthorised use (*Coco*)
5. Detriment?
6. Defences
7. Remedies

Fiduciary relationships and breach of fiduciary duty (BOFD)

1. Is there a fiduciary relationship (FR)?
2. What is the scope of the relationship?
3. Breach of fiduciary duty (BOFD)
4. Defences

Third party liability

- *Baden* scale
- Knowing receipt (KR)
- Knowing assistance (KA)
- Remedies

Personal remedies

- Account of profits (AOP) (*Warman*)
- Equitable compensation (EC)
- Common law principles and equitable remedies
- Specific performance (SP)
- Injunctions
- Damages in lieu of SP/Injunction
- Rescission
- Declaration

Defences

1. Laches
2. Unclean hands
3. Hardship

Proprietary remedies

- Constructive trust (CT)
- Equitable lien (EL)
- Which remedy?
- Tracing

Assignment of property rights

1. Voluntary assignments of legal property at law
2. Assignment of property rights recognised only in equity
3. Assignments of future property

TOPIC 2: BREACH OF CONFIDENCE

P may sue D for BoC for [publication/disclosure/use] of [information]. The court will consider four elements to establish this claim: Coco; O'Brien. D may argue a defence.

Note: Use *Coco v AN Clark (Saltman Engineering)* as authority for the final 3 elements and *O'Brien (Ocular Sciences)* as authority for the first.

1. Specificity (O'Brien; Ocular):

The onus is on P to establish what information is confidential and define it with 'sufficient precision'; O'Brien, Ocular Sciences. Therefore, D can defend themselves against the claim and the Court can decide on effective relief; Ocular Sciences.

Here, the information is [X] in the form of [Y]. There is no restriction on the means of which the information is conveyed.

The information claimed to be confidential must be identified with specificity and not merely expressed in global or general terms – *O'Brien*

- Burden on plaintiff to identify with some degree of concreteness what is the confidential information they want protected – *Ocular Sciences*
- Cannot just point to your whole warehouse and protect everything inside – *Ocular Sciences*.
- If relevant discuss 'fork of *O'Brien*' – catch 22 between 1st and 2nd element:
 - o In satisfying the first element, he failed the second because the information was public
 - o 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*

- Examples:
 - o Tax evasion 'scheme' (P pointed to trust deeds, tax legislation, research) too general and publicly accessible – Mason J in *O'Brien*
 - When he pleases in general terms, no specific
 - When he pleaded individually, each item was not confidential)
 - o Everything: 'know-how' too general – *Ocular Sciences*
 - o Identifying someone's name – *AFL*; *Jane Doe*
 - o Fruit DNA – *Franklin*
 - o Format/script put together by P – *Talbot*
 - o Butchering meat – *Lenah*
 - o Information in an operational manual – *Link 2*
 - o Contents of an image – *Douglas*

- Sexual content – **Giller; Wilson**
- Religious practices – **Foster**
- Recipe/contents of a particular drug – **Smith-Kline**
- Report about its advertising methods – **Castrol**

Policy reasons against finding specificity:

- Brennan and Murphy JJ: should not protect avoidance
- While factually untrue that all statements of law are publicly known; everyone is entitled to

O'Brien v Komesaroff (1982) (HC)

- **Facts:** O obtained documents about K's tax minimisation schemes and prepared unit trust deeds for his clients based on them. K alleged BoC
- **Held:** K's BoC claim failed because he was unable to specify the information that was confidential
- **Mason J:** "One needs to know not only what was the information conveyed but also what part of that information was not common knowledge". Here there was a problem with the "generality of the description" of the information

Ocular Sciences Ltd v Aspect Vision Care Ltd (1997) (UK patents court)

- **Facts:** definition of confidential information "encompassed more or less everything" to do with contact lens manufacture
- **Laddie J:** factors to consider include – burden on P (not given much weight); link between the pleadings and remedy; potential for BoC claims to be used for harassment and abuse of process
- Reasons for P's duty: D must be able to properly defend themselves and so that the court can provide effective relief (cf if the injunction has uncertain scope and is difficult to enforce)

2. Necessary quality of confidence (*Coco*):

- Equity will only protect information with the necessary quality of confidence – *Smith-Kline*.
- No restrictions on form, mode or medium of information
 - E.g. may be in the genetic structure of a tree (*Franklin*)
- 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 – what matters most is the quality of the information and not how it was obtained – Gleeson J in *Lenah Game Meats*.
- 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.
- Test: has the information entered the public domain so as to make issuing an injunction pointless?
 - Question of fact – *AFL v The Age*
 - Limited dissemination to a small group does not remove confidentiality – *AFL v Age*
 - Speculation, gossip or assertion from an anonymous source is not sufficient for information to enter the public domain – *AFL*

SECRECY	NO SECRECY
<ul style="list-style-type: none"> - Measures have been taken to ensure secrecy (counter <i>Lenah</i>) - Limited dissemination to small group of people where there is no authority of people leaking information – <i>AFL</i> - Information in public is of a speculative nature (even if accurate) rather than authoritative – <i>AFL</i> - Limited circle of people → imposes that duty onto them to – <i>Jane Doe</i>; <i>Talbot</i> - → but not here statute limited the broadcasting of the plaintiff's identity here, despite Courts usually being open to the public - If injunction would be effective to avoid relevant detriment, suggests secrecy – <i>AFL</i> - Identifying the name of footballers who've consumer illicit drugs – even if many journalists and other figures knew who – <i>AFL</i> 	<ul style="list-style-type: none"> - No measures taken to preserve secrecy – <i>Lenah</i> - Government authorities have licensed D and have the right to inspect them – <i>Lenah</i> - Private property/trespass insufficient for secrecy – <i>Lenah</i>

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

- **Facts:** film of possum slaughtering process was obtained by trespassers and sent anonymously to the ABC. P sought an interlocutory injunction to restrain broadcasting of the film

b. Value (objective):

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 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 – *Talbot*
 - Test for ingenuity isn't high. Doesn't need to be revolutionary – *Talbot*
- Remedy will go to the combination not the individual common place elements – *Link 2*

VALUABLE	NOT VALUABLE
<ul style="list-style-type: none">- Even if it lacks secrecy – provided there was skill, time and cost putting information together + restrictions on access to nonetheless ‘public’ info – <i>Link 2</i>- → Thus injunction would be over the manual as a whole- Information put together in a novel way (fairly undemanding test); protect the ‘ingenuity of the human brain’ – <i>Coco</i>- TV show idea put together with ingenuity and novelty, even if idea is commonplace, the <u>combination</u> is valuable – <i>Talbot</i>- Budwoods were the only way to recreate commercially successful, unique tree – <i>Franklin</i>	<ul style="list-style-type: none">- Banal; engages no serious human interest- Value per subjective desire (willingness to pay, fame for the plaintiff)- Merely has monetary value – <i>Coco</i>- Release of information just involves subjective preference of P to not have it shown, and subjective preferences of consumers to take consumption elsewhere - <i>Lenah</i>

○ Personal Information:

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

- Test: personal or intimate nature; to protect the personal autonomy of plaintiffs – *Gummow and Hayne JJ*
- Old test: highly offensive to a reasonable person of ordinary sensibilities – *Gleeson CJ in Lenah*

- Religious practices may be protected – *Foster v Mountford*
 - Secret Indigenous ceremonies protected – *Foster*
 - Value not because leaders don't want it let out. Value is connect to human social life, religion is a long stable part of our social system.
- Personal or Intimate information protected:
 - Sexual activity is a private and confidential affair worthy of equity's protection – *Giller*
 - Intimate images – *Wilson*
 - 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)

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:
 - Circumstances must be such that any reasonable man standing in the shoes of the recipient of the information would have realised that the information was being given to him in confidence – *Coco*
 - Consider explicit/implicit conditions of the giving of the information – *Smith Kline*
 - Did D take appropriate steps to ensure D knew of the limitations as to the information's use? – *Smith Kline*
- Taking Cases:
 - When the information is stolen or taken, the court will import a duty of confidence (*Franklin; Pape*). Little analysis is required beyond establishing the taking.
 - Note tension between waiving/blurting cases:
 - However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public – *Coco*
 - BUT Obviously confidential information that is 'wafted' / transmuted accidentally will lead to an obligation of confidence – *AG v Guardian*.
- Note: Third Party Defendants:

- Element 3 must be established for each recipient in a chain of defendants for the action to be made out. P to D1 = Taking, D1 to D2 = Giving etc.
 - 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.
- Note: 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: Actual or Anticipated:

Unauthorised use of information will breach the equitable obligation – *Coco*

- Taking Cases:
 - Where information is taken, any use will be unauthorised – *Franklin; Talbot*
 - Little analysis required. Use of taken information = breach.
- 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*.
- Note: 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*.
- Note: Is Detriment Required?
 - There is no need to show detriment per Gummow J in *Smith Kline* (cf. Deane J in *Moorgate*).
 - It is not a tortious action. Equity does not respond to harm, it is concerned with the conscience of the defendant.

5. Defences:

- Public Interest (UK law):
 - Only obiter support for this position in Australia (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.

- 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*:
 1. A genuine iniquity; crime or civil wrong or serious misdeed of public importance
 2. Information is of public importance – what is to be disclosed affects the community as a whole or affects the public welfare
 3. Disclosure is to a third party with an interest in redressing the alleged wrong
- Note: Cannot plead own iniquity to defeat someone else's duty of confidence – *Kumar*