

## BREACH OF CONFIDENCE

### GENERAL

#### *Elements*

- There are four elements to establish in an action for breach of confidence:
  1. Allegedly confidential information is identified with **specificity** (*O'Brien; Ocular Sciences*)
  2. Information has the **necessary quality of confidence** (*Coco v Clark*)
  3. Circumstances in which information was imparted were such to **import a duty of confidence** (*Coco v Clark*)
  4. There was a **breach** of that duty of confidence **actual or threatened unauthorised use** of the information (*Coco v Clark*)
- **NB:** The authority for all elements is *Coco* **EXCEPT** specificity where you **must** cite *O'Brien* or *Ocular*
- The defendant may claim **iniquity** as a **defence** – and potentially **public interest**

<i>Coco</i>
<p>FACTS:</p> <ul style="list-style-type: none"><li>• C designed a moped engine and negotiated with the defendant for its manufacturers. Designs were disclosed during negotiations. After negotiations broke down the defendant started production of a moped that C claimed to be based on their design.</li><li>• He sought an injunction preventing manufacture.</li></ul> <p>HELD:</p> <ul style="list-style-type: none"><li>• While C was able to establish that the circumstances under which the defendant received the information imposed an obligation of confidence, he was unable to show that the information imparted was confidential in nature, or that unauthorised use was made of his information, as opposed to information readily available from public sources.</li></ul>

### **SPECIFICITY**

- The information claimed to be confidential **must be identified with specificity** and not merely in global or general terms (*O'Brien v Komesaroff* (Mason J))

<i>O'Brien</i>
<p>FACTS:</p> <p>K was a solicitor whose practice included creating and implementing tax minimisation schemes. Ob was an accountant who believed K's schemes could be useful to his own clients. Ob obtained a set of necessary documents from K, and prepared unit trust deeds for his clients based on K's documents. K argued breach of copy right and breach of confidence.</p>

Was there enough precision or specificity?

HELD:

The HC said it was not a breach of confidence. The description of documents were just too general for the information to be classified confidential. If its public knowledge, it is not confidential. However where do we draw the line between public knowledge and manipulated confidential information. Court was reluctant to protect a scheme that bypasses tax.

As per Mason J

‘to simply say that the info is as to the effect and practical operation of the discretionary trusts and private unit trust schemes does not identify the info and enable the Court to make an order. One needs to know not only what was the info conveyed but also what part of that info was not common knowledge.

**On the issue of confidentiality –**

It was held that there was much that was public property and common knowledge, although the respondent’s skill and ingenuity went into producing them, the deeds ought not be regarded as containing confidential information capable of founding an action for breach of confidence

**On the issue of specificity –**

The full court held that the information, when read on its own, without proof of further material facts, none of which were pleaded, was not a sufficiently precise definition of what was the confidential information which was to be the foundation of an action for breach of confidence. The respondent was given every opportunity to define more specifically the information upon which he relied. The respondent could do no more than rely on the deed.

- Burden on plaintiff to identify with some degree of concreteness what is the confidential information that needs to be protected (*Ocular Sciences*).

#### *Ocular Sciences*

FACTS:

P claimed D used confidential information regarding contracts, equipment, software etc. P provided D with all information stating it was all confidential in nature.

The plaintiff companies and Ocular Sciences Ltd alleged that AVCL had breached obligations of confidence relating to the following items:

1. The design of the equipment used in the manufacture of the contact lenses;
2. Standard operating and testing procedures;
3. Lens designs and the dimensions of the various contact lenses; and
4. Computer software used in the calculation of the dimensions of the differently shaped lenses.

**HELD:**

Laddie J: 'The courts are careful to ensure that the P gives full and proper particulars of all the confidential information on which he intends to rely in the proceedings'

The information specified was 'more or less everything' – everything was confidential = not specific enough

If P does not give full particulars to the D, it is open to the Court to infer that litigation was really to harass the D competitor and constitutes an abuse of process

- Laddie J held that only the lens design computer software program and details as to the dimensions of the equipment used in the process of manufacture of the lenses were confidential. However, his Honour refused to order an injunction restraining the use of this information because such an injunction would be too onerous. It would deprive AVCL of the ability to carry on any business by effectively preventing the company from using any machinery at all.
- defendant for misuse of confidential information has a duty to ensure that the defendant knows what information is in issue. For at least two other reasons.
  - First, the plaintiff usually seeks an injunction to restrain the defendant from using its confidential information. Unless the confidential information is properly identified, an injunction in such terms is of uncertain scope and may be difficult to enforce:
  - Secondly, the defendant must know what he has to meet.

NB\* Distinguish between 'know how' and confidential information

- In *Ocular Sciences*, all that is required is that the information be part of an employee's own skill and knowledge for it to fall out of the realm of the doctrine of breach of confidence.