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TOPIC 2: BREACH OF CONFIDENCE

CHECKLIST:

1. Specificity
2. Quality of confidence
 - a. Secrecy
 - b. Value
 - i. Commercial/ human ingenuity
 - ii. Personal
3. Circumstances importing the duty
4. Actual or anticipated unauthorised use

Defences

1. Public Interest
2. Disclosure of iniquity

Remedies: Personal only!

INTRO:

P may sue D for Breach of Confidence for [FACTS: Publication/ Disclosure/ Use] of [FACTS: intimate images/trade secrets]. The court will consider four elements (Coco; O'Brien)

1. ELEMENT ONE: SPECIFICITY

The information claimed to be confidential must be defined with sufficient precision and not merely expressed in global or general terms so that D may adequately respond to the claim and the Court can provide appropriate relief (O'Brien; Ocular Sciences)

P will claim the information is [X], which is specific because [FACTS: discrete/ identifiable/ can be plead as X]

REASONING

1. Defendant entitled to know particulars of case to be answered to adequately defend themselves to the claim
2. For courts to identify and provide effective relief (frames the scope of injunction)

NOT SPECIFIC:

- "warehouses of information" (Ocular Sciences)
- "More or less everything" (Ocular Sciences)
- Business "know-how" eg. photocopying (Ocular Science)
- Extracts from textbooks, non-patented products (Ocular Sciences)
- Information which is a logical consequence of common knowledge (O'Brien)
- Information of an inherently public character (O'Brien)

2. ELEMENT TWO: NECESSARY QUALITY OF CONFIDENCE

Equity will only protect information with the necessary quality of confidence per 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)

- Is the information in the public domain?!

CONSIDER:

- Is it common knowledge amongst certain groups to whom it is relevant eg. certain professionals
- Is it protecting the identity of an informer (Kumar)

Degree of Accessibility

- If generally accessible then it is considered in the public domain and cannot be secret
- Jane Doe-
 - Information not easily accessible
 - Those who knew she was due to present evidence in court were within her 'circle of secrecy'
 - Those not present in the courtroom subject to a statutory regime intended to keep them uninformed
- AFL- subscribers to media information service (Foxtel) were notified BUT
 - Limited dissemination to a small group does not remove confidentiality
 - 'Circle of secrecy' by virtue of subscription/ membership

Authority of Disbursement

- Speculation, gossip or assertion from anonymous source is not sufficient for information to enter the public domain (AFL)
- Consider whether the information is seemingly reliable/ credible
- LOOK FOR: Anonymous source, intermediary papers/ publishers with equivocal reputation

Effectiveness of injunction

- Provides indication of secrecy if an injunction is ordered that would avoid relevant detriment (AFL)

Security of location

- Mere fact it is on private property was not enough to establish secrecy (Lenah Game Meats)
 - Possum caning process heavily regulated and subject to government inspections
 - Process was not exclusive or secret- commonly viewed by outsiders
- Consider to what lengths the person has gone to maintain confidentiality
- Measures taken to keep it secret then the more likely it is to have the necessary quality of confidence (Hello!)

Voluntary Disclosure

- Circle of secrecy per Jane Doe

(b) VALUE

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

Two broad categories have emerged in precedent (possible third in UK)- commercial and personal.

(i) COMMERCIAL VALUE/ HUMAN INGENUITY

CONSIDER:

- Equity will protect things that come from the ingenuity of the human brain (low threshold) (Tibot)
- Combining enough banal/ trivial things can create ingenuity output (Talbot; Ezystay)
- Common idea will not be public knowledge if it has been sufficiently developed to include new material (Talbot)
- Cleverness must be present; mere effort is not enough; Idea needs to be more than drudge, but does not have to be genius (Talbot)
- Can be a trade secret (and hence confidential) even though it wouldn't qualify for patent or copyright protection (Talbot)
- People have an interest to engage in commerce to make profits and Equity will deem it worth while protecting this interest (Franklin)
- Mere fact someone wants to buy something is not enough to establish commercial value (Lord Walker in Douglas v Hello!)

EXAMPLES:

- Talbot- millionaires and their success TV concept
- Franklin- nectarine
- Link 2

(ii) PERSONAL VALUE

Equity may also protect information of a personal or intimate nature

EXAMPLES:

- Foster- Secret indigenous ceremonies
- Wilson- Explicit images and text messages
- Giller- Videotape of sexual relations
 - Sexual activity is private and confidential affair worthy of equity's protection
 - Interest is of the P controlling or having authority or agency over the information and how it might become known to the wider world
- Jane Doe- ID of a complainant in a rape trial
- Douglas v Hello!- photos of a celebrity wedding

GLEESON CJ test (Lenah)- articulate the interest as worthy of protection when the information has:

- (i) Necessary quality of privacy; and
- (ii) Involves intrusion upon seclusion of information through publication that would be highly offensive to a reasonable person

NB: Shortcomings in a reliance on an objective measure of what amounts to a 'highly offensive intrusion' in application to an inherently subjective claim

(iii) COMBINATION/ MUTUAL EXCLUSIVITY?

MAJORITY:

- UK House of Lords in Douglas v Hello! Were open to the suggestion that the quality of confidence could be established through a combination of personal and commercial factors
- Departed from previous UK law

LORD WALKER:

- Information cannot be both
- The more commercial the information the less it can be intended to remain personal
- HCA have not expressed a willingness to make the same departure as the UK HoL
- This view favoured in Aus

3. ELEMENT THREE: CIRCUMSTANCES IMPORTING THE DUTY

D must have obtained the information in circumstances giving rise to an obligation of confidence per Smith Kline

Two main pathways:

- Given/imparted in confidence (GIVING)
- Surreptitiously obtained (TAKING)

(a) GIVING- Information is given

TEST: Would a reasonable person standing in the recipient's shoes have realised the information was given in confidence? (Coco per Megarry J)

CONSIDER:

- Strength of the QoC can import an obligation of confidence (Lord Goff in AG v Guardian)
 - Ie. obviously confidential then strongly indicates obligation of confidence
- Obviously confidential information blurted out will not lead to an obligation of confidence (Megarry J in Coco)
- Picture taken through a telephoto lens suggests an obligation of confidence (Lenah)

EXAMPLES:

- Coco
- Lord Ashburton v Pape
- Smith Kline
- Castrol

(b) TAKING- Information is taken

When information is taken or stolen (obtained surreptitiously) the court will import a duty of confidence (Franklin; Pape)

CONSIDER:

- Did they ask permission?
- Was P aware?

EXAMPLES:

- ABC v Lenah- Nothing protecting the secret, other people regularly went into the factory- NB: taken secretly but no obligation made out
- Franklin v Giddins
- Giller v Procopets
- Talbot
- Douglas v Hello!

(c) Accidentally obtained- blurring or wafting

Lord Goff in AG v Guardian

- Obviously confidential information that is wafted/ transmuted accidentally will lead to an obligation of confidence
 - Eg. obviously confidential document is wafted by an electric fan out of a window into a crowded street
 - Eg. Obviously confidential document such as a private diary is dropped in some public place and picked up by a passer-by
- TEST: Consider whether a reasonable person in D's shoes would have realised the information was confidential

Megarry J in Coco v Clark

- Obviously confidential information that is blurred out in public will not lead to a binding obligation of confidence

NB: THIRD PARTY DEFENDANTS

Eg. Obtained by another third party passed on to a defendant

- Element 3 must be established FOR EACH RECIPIENT in a chain of defendants for the action to be made out
- Eg. P to D1= Taking; D1 to D2= giving etc.
- ELEMENT MUST BE PROVEN FOR EACH STAGE THE INFO IS TRANSFERRED!
- Each person in chain of recipients must acquire information in circumstances importing a duty and be bound

EXAMPE:

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

NB: THIRD PARTY PLAINTIFFS:

- Not possible to have third party plaintiffs (Lord Walker in Douglas v Hello!).
- Equity protects a personal right which cannot be assigned to a third party

4. ELEMENT FOUR: ACTUAL OR ANTICIPATED UNAUTHORISED USE (BREACH)

Unauthorised use of information will breach the equitable obligation (Coco per Megarry J)