

BREACH OF CONFIDENCE

Elements

Coco v AN Clark

- Requires: (restated in *Smith Kline*)
 - A quality of confidence
 - That the circumstances in which the information was conveyed imported a duty of confidence and
 - There was actual or threatened unauthorised use in breach of that duty

INFORMATION MUST BE SPECIFIC

O'Brien v Komesaroff

- Information must be specified to enable the court to draft an appropriate remedy

Ocular Sciences v Aspect Vision Care

- P must give 'full and proper particulars' of the information

INFORMATION MUST HAVE THE NECESSARY QUALITY OF CONFIDENCE

ABC v Lenah Game Meats

- Government regulation indicates the information was public knowledge
- Corporations cannot argue personal value/privacy in the same way as an individual
- Test for personal value- would disclosure be 'highly offensive to a reasonable person of ordinary sensibilities'
- cf. photo from camera at long distance- exposure to observation by others is "part of the price we pay"

AFL v Age Company

- Information disclosed to a circle of confidence will not have entered public domain
- Gossip and rumours from unverified sources do not amount to publication

Jane Doe v ABC

- Other interests must be balanced even if information is disclosed in a public process

Talbot v General Television

- Confidentiality may arise in how the information is compiled
- Obligation of confidence can exist outside a contractual relationship
- Two banal pieces of information could be viewed conjunctively to have a 'commercial twist'

Link 2 v EzyStay Systems

- Compilation of information of common knowledge may be protected even if individual parts would not be sufficiently confidential
- There must be a sufficient degree of skill and ingenuity- relatively undemanding test
- Consider- skill in compiling the information, time and cost in gathering information, restriction of access to the information

Franklin v Giddins

- Information can be in a number of forms
- Information must be shown to merit equity's protection through value or interest
- Consider time and effort in relation to developing the information

Foster v Mountford & Rigby

- Cultural significance can make information obviously/inherently confidential
- Need for trust/limited sharing indicates secrecy

Giller v Procopets

- Nature and method of recording information can render obvious secrecy
- Personal information concerning intimate lives is inherently confidential
- Concerns the protection of human dignity and personal autonomy

Wilson v Ferguson

- Nature of relationship between parties can indicate confidentiality (marital/de facto/sexual relationship)

Douglas v Hello!

- Monetary value of information is irrelevant- must be unique product of human brain
- Mere desire for something to remain unknown is insufficient

Ocular Sciences v Aspect Vision Care

- Non-selective list of publically available information is not confidential

Coco v AN Clark

- 'The maker must have used his brain'

Attorney-General v Guardian Newspapers

- Duty of confidence would not apply to trivial or useless information

O'Brien v Komesaroff

- Information with a public character, such as propositions of law, cannot be secret

KNOWLEDGE OF RESTRICTIONS

Coco v AN Clark

- Test is if a reasonable man in the position of the recipient would have realised it was given in confidence
- No binding obligation for information 'blurted out' in public

Lord Ashburton v Pape

- Equity will protect improperly or surreptitiously obtained confidential information

Franklin v Giddins

- Knowingly stealing a trade secret intending to use it in commercial competition

Attorney-General v Guardian Newspapers

- If an obviously confidential document is wafted out a window, the recipient bears a duty of secrecy (even if D has deliberately closed eyes to obvious confidentiality)
- Consider if the information was so generally accessible that it cannot be regarded as confidential in the circumstances

ABC v Lenah Game Meats

- Equity still protects information passed on to third parties

Douglas v Hello!

- Consider control exercised by plaintiff over information's dispersion

BREACH OF DUTY

Castrol Australia v EmTech Associates

- Permitted uses do not need to be spilled out
- Scope of use- Was the information given voluntarily or was it required? What are the consequences of extraneous use?

Smith Kline v Department of Community Services

- Equity upholds obligations rather than preventing loss- no detriment needed
- If D neither knew/ought to have known of limited purpose they will not be bound
- Limited restrictions will not bar other uses
- Public body tasked to protect the public- cannot be bound to opposing obligations through imposing a limited use

Moorgate Tobacco v Philip Morris

- No need for detriment upon breach- enough that secrecy is of 'substantial concern'

Defences

Smith Kline v Department of Community Services

- Public interest defence is more referable to judicial idiosyncrasy- overriding the obligation on an ad hoc basis based on the facts overall

ABC v Lenah Game Meats

- Public interest defence may exist in the context of constitutional IFPC

AFL v Age Company

- Public interest defence is not clear or settled in Australia
- Iniquity:
 - Existence or real likelihood of a crime, civil wrong, or serious misdeed of public importance
 - Affecting the community as a whole
 - Attempting to keep secret from person(s) with a real interest in redressing the iniquity

Minister for Immigration v Kumar

- HCA obiter endorsed a broader defence than iniquity such as a 'public interest' in issues of national security, serious health risks or administration of justice

Remedies