

BREACH OF CONFIDENCE

[PL] will seek equity's protection concerning the confidentiality of [INFORMATION]

Elements of the duty

A. Specificity

The information claimed to be confidential must be capable of being identified with specificity and not merely in global or general terms (**O'Brien**)

- **Rationale:** commonly, the remedy for breach of confidence is an injunction, and the Court needs to ensure that the information is capable of forming the subject matter of an injunction (**Ocular Science**)
- Assessed at the time of pleadings

B. Necessary quality of confidence

Equity will only protect information which possesses the necessary quality of confidence (**Coco**)

1. Was the information sufficiently secret/not in the public domain?

- Information that has entered the public domain will have lost its quality of confidence and thereby its entitlement to equity's protection (**Lenah**)
- Speculation, gossip or assertions from unreliable sources does not render information public (**AFL**)

Case	Illustrative facts
AFL v Age	Gossip in online forums from anonymous sources was not sufficient for the information to have entered the public domain
Douglas v Hello	Elaborate security procedures were in place to prevent unauthorised photos, so the photos were sufficiently secret
ABC v Lenah Game Meats	Abattoir was private property, but public access was permitted and info re what happens in an abattoir = public knowledge

1.1. Limited disclosure

- Where the disclosure of information is limited, it will generally not be in the public domain (**Jane Doe**)

Case	Illustrative facts
Jane Doe v ABC	Confidential info was disclosed during closed court proceeding; this was a limited "circle of confidence"; secrecy preserved
Talbot v General Television Corp	Limited disclosure to Channel 9 executives did not stop that information being confidential

2. Did the information have the requisite value to warrant protection?

- Equity will not protect "useless information or trivia" (**Spycatcher**)
- The mere desire for something to remain unknown is not sufficient in itself to bring it within equity's protection (**Lenah**)

2.1. Commercial cases

Case	Illustrative facts
Talbot v General Television Corp	Effort expended designing TV pilot script = commercial value
Franklin v Giddins	Genetic code (contained in branch) = commercial value (trade secret)
Douglas v Hello	Photos were used to derive substantial profit; = commercial value

2.1.1. Compilation of non-confidential information

- A compilation of information of common knowledge may be protected even though the individual parts would not be considered sufficiently secret (**Link 2**)
- Protection will be granted where there is some evidence of “the maker using their brain” (**Saltman**)
 - This is a “relatively undemanding” test (**Link 2**)

Case	Illustrative facts
Link 2 v EzyStay	Business manuals contained information that was individually of minimal value; compiled manual was of commercial value
Saltman	Compilation of industrial drawings for tools to make a leather punch was of commercial value
Talbot v General Television Corp	Idea for TV show was banal and trivial, but creation of scripts, proposed episode structures etc = compilation of commercial value

2.2. Personal cases

- Australian/British courts have been willing to protect religious, cultural and intimate information

Case	Illustrative facts
Foster v Mountford	Info re sacred & secret Indigenous rituals = requisite value
Giller v Procopets	Videos of sexual activity = requisite value. Ct made a distinction bw knowing that someone is having sex (public) and seeing it (private)
Wilson v Ferguson	Intimate photos = requisite value
Jane Doe v ABC	Info regarding the victim of a sexual offence = requisite value
AFL v Age	Results of drug tests = requisite value
Campbell v Mirror (UK)	Info re seeking medical treatment = requisite value
Douglas v Hello	Photos of a wedding = requisite value
ABC v Lenah Game Meats	Info re health, personal relationships & finances = requisite value
Hosking v Runting (NZ)	Photos of children on street without some element that makes them “highly offensive to a RP” ≠ have requisite value to warrant protection

C. Circumstances importing a duty

Equity does not provide a carte-blanche protection for all secret and valuable information. The circumstances in which the information was imparted must import a duty of confidence (**Coco**)

1. Information given in confidence ('giving cases')

[DEF] will have a duty of confidence if a RP standing in their shoes would realise on reasonable grounds that the information was being imparted in confidence (**Coco per Megarry J**)

- No confidence will attach to information that was "blurted out in public" (**Coco**)
- Duty of confidence will be automatically established where:
 - There is a contractual express obligation of confidence; or
 - There is a fiduciary r/s

Factor	Explanation
Nature of the r/s b/w parties	Marital/de facto/sexual r/s = assumed confidential (Giller; Wilson)
Knowledge of info's secrecy	In Foster , DEF had gained community's trust over long period of time and had actual knowledge of the importance of secret rituals
Monetary value of information	In Douglas , magazine knew wedding photos were confidential due to strict measures preventing unauthorised photography
Inherently confidential info	In Spycatcher , info re <u>secret</u> MI5 ops was "obviously confidential"

2. Information improperly or surreptitiously obtained ('taking cases')

Equity automatically imports a duty of confidence where information is stolen or taken (**Franklin**)

- Duty is imposed by the act of taking; the defendant's viewpoint is not relevant

Case	Illustrative facts
ABC v Lenah Game Meats	Obtained videos at abattoir through trespass; confidence presumed
Franklin v Giddins	Obtained the special branch through trespass; hence, confidence presumed

3. Information accidentally obtained

[DEF] has a DOC re **[INFO]** that is "obviously confidential", even if accidentally obtained (**Spycatcher**)

- This principle stems from **Lord Goff's obiter in Spycatcher**, which provided illustrative examples:
 - Private diary; or
 - National security document
- Classic formulation = an obviously confidential document is "wafted by an electric fan out of a window into a crowded street" (**Spycatcher**)

4. Information passed to a third party

- In third-party cases, focus on the circumstances in which **[3P]** acquired the information
- **[3P]** will be under a duty if the transfer from **[DEF]** imparted a duty of confidence

D. Breach of duty/unauthorised use

[DEF] has breached the duty as [ACTION] is an actual or unauthorised use of [INFO] (Coco)

- If information is taken, any use of the information is automatically a breach (Franklin)
- If information is given, use of it will be a breach if the use falls outside the permitted scope

1. Was there a limited authorised use of the information?

- If there is disclosure for a limited purpose, the defendant's liability will depend on determining the scope of the limited purpose and whether use fell outside that (Smith Kline)
- Not enough that the giver simply asserts that it intended to give for a limited purpose (Smith Kline)

1.1. Was information given voluntarily or was it required?

- Information provided as part of a mandatory scheme will have a limited authorised use to be used for the purpose of the scheme (Smith Kline)

Case	Illustrative facts
Castrol v EmTech	Voluntary disclosure; wanted advice re purity of oil for advertising
Smith Kline v DCS	Mandatory disclosure; regulator assessing safety of drug for sale

1.2. Would restricting the use negatively impact a public body trying to perform its functions?

- If a public body's obligation of confidence is not inconsistent with their statutory function, then use contrary to what is authorised will breach their duty of confidence (Castrol)

Case	Illustrative facts
Castrol v EmTech	Consumer laws do not prevent the regulator from assuming an obligation of confidence wrt information given to it
Smith Kline v DCS	Restriction of use would limit the regulator's ability to conduct generic drug evaluations

2. Reverse-engineering vs copying

- Reverse engineering a product is not a breach of duty, but this does not authorise direct reliance on trade secrets (Saltman)

Case	Illustrative facts
Saltman	DEF used PLs actual designs for leather punch w/o authorisation
Coco v AN Clark	DEF made similar engine to PL; allowed as all engines will be similar

3. Detriment

- It is unclear whether it is necessary for P to show they have suffered detriment
 - The weight of authority seems to indicate it is not required
- In any case, it is a low threshold: "substantial subjective concern" in info remaining confidential was sufficient to satisfy the detriment requirement in Moorgate
- **Rationale:** per Gummow J in Smith Kline detriment is not a requirement as equity intervenes to uphold the obligation to respect confidence, not necessarily to prevent/recover loss