

| BREACH OF CONFIDENCE | |
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| Who are you acting for? | Other parties: |
| What do they want? | |
| Introduction: <i>The equitable obligation of confidence provides protection of information from unauthorised misuse or exploitation by others. The four elements of the obligation that must be demonstrated by [X] were comprehensively set out by Gummow J in Smith Kline & French Laboratories, and include specificity, necessary quality of confidentiality, circumstances importing the duty and misuse of the information.</i> | |
| <u>Look for:</u> protecting commercially valuable information; protection private information. | |
| Information must be specific or capable of being defined (O’Brien): <i>The information that is said to be confidential must be identified with specificity and not merely in global terms (O’Brien).</i> <ul style="list-style-type: none">- <i>O’Brien</i>: pro forma docs are too general – claim was about form of the doc rather than the content.<ul style="list-style-type: none">o Must be able to identify what information is conveyed and which part of the information is not common knowledge (Mason J in <i>O’Brien</i>).- <i>Ocular</i>: more or less everything is too general- For an injunction, the D must know what they can and cannot use (<i>Ocular Sciences</i>)<ul style="list-style-type: none">o Courts will not allow a BoC claim to be used as a form of harassment (<i>Ocular Sciences</i>)- <u>Look for:</u><ul style="list-style-type: none">o Commercial information i.e. <i>client lists, software, patents</i>o Technical (<i>Coco v AN Clark</i>)o Idea for TV show can be sufficiently specific (<i>Talbot</i>)o Personal information (<i>Giller</i>)o “Know how” of a business – need to determine if it is regarded as a separate part of an employee’s knowledge or whether it is property of the employer. | |
| Information must have a “quality of confidence” (Coco v AN Clark): <i>Start → Information must have the quality of confidence, so must not be public information or common knowledge (A-G v Guardian Newspapers) Whilst information remains confidential in nature then the obligation to not misuse it will continue.</i> <ul style="list-style-type: none">- <u>One:</u> Must be confidential (sufficiently secret):<ul style="list-style-type: none">o Cannot be in the public domain (<i>AFL v The Age</i>; <i>A-G v GN</i>), or common knowledge (<i>AG v GN</i>)<ul style="list-style-type: none">▪ Limited publication is not public domain (Kellam J in <i>AFL</i>) | <u>Look for:</u> <ul style="list-style-type: none">- Information being released for limited purpose (still retains confidential nature) (<i>Talbot</i>)- Design for an engine: no (<i>Coco</i>)- Idea for TV show: yes (<i>Talbot</i>) |

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| <ul style="list-style-type: none"> ○ Cannot be generally accessible (<i>Lenah</i>) ○ Useless information or trivia do not have the necessary quality of confidence ○ Limited publication does not determine loss of confidentiality (<i>AFL v The Age</i>) <ul style="list-style-type: none"> ▪ Speculation, even if correct, is not in the public domain (<i>AFL v The Age</i>) - Two: Must have the necessary quality of confidence: does it deserve equity protections? <ul style="list-style-type: none"> ○ Formulas, patterns and designs (<i>Coco</i>) ○ Plants (<i>Franklin</i>) ○ Does the information have commercial value? <ul style="list-style-type: none"> ▪ If yes more likely to have the necessary quality of confidence. ▪ If no can still have the necessary quality of confidence (<i>Foster v Mountford</i>) ○ If “<i>the maker has used his brain</i>”, likely to be confidential (McGarry J in <i>Coco</i>) <ul style="list-style-type: none"> ▪ Trade secrets ▪ Reverse engineering is ○ The more measures taken to protect the information, the more likely it is to be confidential (<i>Lenah</i>) ○ Originality is not generally covered by BoC and is instead covered by IP law. ○ Employee is taken to have ‘know-how’ when they leave, which amounts to the knowledge they acquired during their position of employment which they may reproduce later. This is not the same as taking documents or software (<i>Link2</i>). - Consider invasion of privacy issues: <ul style="list-style-type: none"> ○ <i>As opposed to NZ and America, Australian does not currently have a law which recognises a general right to privacy (Lenah). As such, [Plaintiff] will have to show that [information] has the necessary quality of confidence (Giller; Wilson).</i> <ul style="list-style-type: none"> ▪ <u>Test</u>: would disclosure of the information be highly offensive to a reasonable person of ordinary sensibilities (Gleeson CJ in <i>Lenah</i>). <ul style="list-style-type: none"> • Human dignity is protected by privacy, so cannot be applied to a corporation (Gleeson CJ in <i>Lenah</i>). ▪ Intimate photographs and videos taken in private shared between partners clearly has the necessary quality of confidence (<i>Wilson</i>). The images were not within the public domain and disclosing the images would be regarded as highly offensive to a reasonable person of ordinary sensibilities (<i>Lenah</i>). ▪ Video of people engaging in sexual activities is confidential even though the relationship is not (<i>Giller</i>). ▪ Aboriginal traditional male secrets (<i>Foster</i>) | <ul style="list-style-type: none"> - Manuals and software: yes (<i>Link2 v Ezystay</i>) |
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| <p>Recipient must know, or ought to have known the information was confidential (<i>Coco v AN Clark</i>): <i>A recipient must have knowledge of the confidentiality restriction (Coco). The obligation to observe confidentiality will arise where the recipient of the information knows, or ought to have known that the information could not be used without consent of the confider. The circumstances in which the information was acquired are critical and a detailed analysis of the facts is required to establish this element.</i></p> <ul style="list-style-type: none"> - Information must be given in confidence: - TEST: would a reasonable person in the recipient's shoes know, or ought to know, that the information was given in confidence? (Meagarry J in <i>Coco</i>) <ul style="list-style-type: none"> o Information surreptitiously, illegally or improperly obtained is presumed to have been received in confidence (<i>Franklin; Lenah</i>) <ul style="list-style-type: none"> ▪ Automatically imposes a duty of confidence (<i>Franklin; Wilson</i>) o 'So obvious that it goes without saying' (<i>Giller</i>) o Information received in capacity of D was not information free to be disclosed or used for any purpose other than the business (<i>Ezstay</i>). - For commercial scenarios look at: <ul style="list-style-type: none"> o Express claims of confidentiality; o Evidence as to the extent the information is known in the industry; o Measures taken to guard the secrecy; o Value of the information to its creator and competitors; o Amount of effort and capital invested in acquiring the information; o The ease that the other party were able to obtain the information - Third parties: same test applies from <i>Coco</i> | <p>Assess against each defendant Look at:</p> <ul style="list-style-type: none"> - How D came by information - The nature of the relationship - The mode and method of it being imparted <p>Accidental info: where obviously confidential document is 'wafted by an electric fan out of a window into a crowded street' and so the</p> |
| <p>Unauthorised use of information (<i>Coco v AN Clark</i>): <i>There must be an actual or intended unauthorised use of the information in order to breach the obligation of confidence (Coco). There is no element of mens rea required to establish misuse of confidential information. The defendant will still be liable even if the misuse was accidental or unintentional (Talbot).</i></p> <ul style="list-style-type: none"> - Actual or intended misuse of the information (<i>Coco</i>) - Stolen information – likely blanket prohibition on use (<i>Franklin</i>) <ul style="list-style-type: none"> o In <i>Wilson</i> the public disclosure constituted an actual misuse of the information. o Third party: where the confidant hasn't directly confided the information to the defendant (D obtained it accidentally or surreptitiously, or through a third party), it is more likely a blanket prohibition on use will be assumed as the plaintiff never considered passing the information to the defendant at all (<i>Franklin</i>). | <p>Look for:</p> <ul style="list-style-type: none"> - Using info outside of permitted purpose - Public exposure (<i>Wilson</i>) - Creating similar product as competitor |

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| <ul style="list-style-type: none"> - <u>Case examples:</u> <ul style="list-style-type: none"> o Using the information other than for the purpose than it was permitted amounts to misuse (<i>Castrol</i>) o Reverse engineering a product is not a breach of duty (<i>Coco</i>) o Using information obtained as a D for the benefit of the business, to start a competing business amounts to a breach (<i>Ezstay</i>). - <u>Explicit or implicit restrictions:</u> <ul style="list-style-type: none"> o Confider's intention is not conclusive (<i>Smith Kline</i>) o Did the D know, or ought to have known of the restrictions on use (<i>Castrol</i>) - <u>Detriment:</u> - <i>As equity 'intervenes to uphold an obligation', and the obligation in question is to respect the confidence, there is no need for a plaintiff to prove a detriment has occurred (Gummow J in Smith Kline).</i> <ul style="list-style-type: none"> o <u>Test:</u> whether the disclosure 'is of a substantial concern to the plaintiff' (<i>Moorgate Tobacco</i>). o 'Private concern of embarrassment is prima facie sufficient detriment to ground an injunction' (McHugh JA in <i>AG(UK) v Heinemann</i>). | <p><u>Reconciling <i>Smith</i> and <i>Castrol</i>:</u></p> <p>There were express statements of confidentiality in <i>Castrol</i> but not <i>Smith</i>. <i>Smith</i> was in regards to public health, whereas <i>Castrol</i> was about consumers – very different levels. DoH would not have been able to go their job without using the information in <i>Smith</i>.</p> |
| <p>Defences:</p> <p><i>Unless [defendant] can establish a valid defence then equity will work to restrain the unauthorised misuse of [information OTF].</i></p> <ul style="list-style-type: none"> - Public interest (not settled law): <ul style="list-style-type: none"> o <i>Demonstrating an overriding public interest in disclosure, has been accepted as a defence in the UK, but Australian courts have taken a more restricted approach and it remains unsettled law (Kellam J in AFL v Age). However, it was suggested in obiter in Lenah Game Meats that a public interest defence existed, and more recently in Kumar, the HCt appears to have endorsed a public interest defence to be wider than iniquity.</i> - Iniquity (established defence): <ul style="list-style-type: none"> o <u>Must show 3 things as set out by Kellam J in AFL v The Age:</u> <ul style="list-style-type: none"> ▪ Disclosure would reveal an iniquity that is a serious crime, civil wrong or serious misdeed (<i>A v Hayden</i>) ▪ Must affect the public as a whole or affect the public welfare; ▪ Person seeking to protect the confidence is trying to prevent persons with a real interest in redressing the crime from knowing it. | |

