

EQUITY EXAM NOTES

BREACH OF CONFIDENCE	3 – 15
Specificity of information	3
Information must have the necessary quality of confidence	4
Value	4
Secrecy	4
Right to privacy	8
Circumstances must import the duty	9
Giving	9
Taking	9
Unauthorised use	12
Detriment	13
Defences	14
Public interest	14
Iniquity	15
Remedies	15
BREACH OF FIDUCIARY DUTY	16 – 29
Establishing a fiduciary relationship	16
Accepted categories	16
Factual categories	16
Scope of fiduciary relationships	20
Method	20
Relevance of contract	21
Breach of fiduciary duty	23
Conflicts rule	24
Profits rule	25
Termination of fiduciary obligations	27
Defences	29
Fully informed consent	29
Contracting out	29
THIRD PARTY LIABILITY	30 – 35
Knowing receipt	31
Knowing assistance	32
Remedies against TP's	35

PERSONAL REMEDIES	36 – 55
Action based remedies	36
Specific performance	36
Injunctions and specific delivery	37
Declarations	38
Equitable rescission	40
Money based remedies	42
Election of remedies	42
Account of profits	43
Equitable compensation	46
LCAD damages	50
Common law principles and equitable remedies	51
Equitable defences	53
Laches	53
Acquiescence	53
Unclean hands	54
Undue hardship to D	55
Impact of order on TP's	55
PROPRIETARY REMEDIES	56 – 68
Advantages and disadvantages	56
Proprietary entitlement precondition	57
Equitable lien	60
Constructive trust	61
Tracing	62
Scenarios	62
Tracing into hands of volunteers	67
ASSIGNMENT OF PROPERTY RIGHTS	69 – 77
Legal property assigned at law	69
Legal choses in action	69
Legal choses in possession	70
Legal property that has failed assignment at law	71
Legal property not capable of being assigned at law	74
Equitable property	75
Assignments of future property	76

BREACH OF CONFIDENCE

- BOC is a doctrine that protects against the unauthorised use of confidential information
- “P may sue D for BOC for [facts], the court will consider 4 elements, element 1 **O’Brien**, element 2–4 **Coco**”
- Is connected to contract law as it is normally a contract that establishes an OOC, but may exist where there is no contractual relationship between the parties **Coco v AN Clark (Engineers) Ltd**

Coco v AN Clark (Engineers) Ltd

- P negotiated with D to manufacture engine for 4 months (no contract)
- No agreement was reached, D later manufactured own scooter
- P alleged D made use of his engine designs
- P was able to establish that the circumstances under which D received the information imposed an OOC, but was unable to show the information imparted was confidential in nature, or that unauthorised use was made of his information
- OOC may exist where there is no contractual relationship between the parties
 - Where there is a contract: construe the contract and any terms implied in it
 - Where there is no contract: determine what suffices to bring the OOC into being and what amounts to a breach of that OOC

Specificity of information

- The information claimed to be confidential must be identified with sufficient precision and not merely expressed in global terms **O’Brien**
 - P must define the confidential information with ‘sufficient specificity’ **Smith Kline** per Gummow J
 - It is not just enough to specify the document the information is in **O’Brien**
 - If P didn’t know what the information was, how was D meant to know, and how is D meant to defend?
 - If general information was subject to OOC, it would open up the floodgates
 - Court needs to be able to frame relief (injunctions) specifically, to avoid D being held in contempt
 - Ensures predictability in commercial behaviour (know what you can and can’t do)
- IN EXAM: analyse full range of information, then focus the question on what information is confidential (ie client list, or the idea to..., not the object which carries out the idea)

O’Brien v Komesaroff

- K was a solicitor who created and implemented tax minimisation schemes, O was an accountant
- K prepared a unit trust for avoiding tax, engaged O to assist
- O starts preparing similar unit trust deeds for his own clients based on K’s deed
- The deed consisted of public property and common knowledge
- HCA: P failed because he was unable to specify the information in the deed that was confidential in nature
- Although K’s skill and ingenuity went into producing the deed, it ought not to be regarded as containing confidential information, it is merely a unit trust deed
- There might have been innovative aspects and improvements to the documents, but K needed to specify which clauses contained confidential information, which he failed to do
- Mason J: one needs to know not only what was the information conveyed, but also what part of that information was not common knowledge
- The problem is caused by the generality of the description of the information which K seeks to protect

Ocular Sciences Ltd v Aspect Vision Care Ltd

- Employees started new business using employer’s designs, employer sued for BOC
- P claimed everything D’s learnt during employment was subject of OOC, but in fact, most specifications were publicly known as the glasses were on the market
- The court must be able to frame the remedy in precise terms, D must know the case they must meet
- Laddie J: the courts are careful to ensure that P gives full and proper particulars of all the confidential information on which he intends to rely in the proceedings (no ambit claim or abuse of process)
- ‘Warehouses of information’ isn’t specific
- Can’t restrict business partners more than you can restrict the general public

Information must have the necessary quality of confidence

Coco v AN Clark (Engineers) Ltd per Megarry J: the information must have the necessary quality of confidence

The information needs value

- There has to be value to the information to make it worth protecting, but not a high threshold *Coco v Clark*
 - Equity doesn't protect banal, trivial or anodyne information
- Form is irrelevant: can be oral, drawings, written documents, diagrams, codes, chemical formulae, film, audio, photographs, works of art, electronic documents, recordings and prototype inventions
- Equity has an objective theory of value (be careful with things such as self esteem and depression, this is subjective)

Commercial information

- Equity will protect secrets when they arise from the ingenuity of the human brain *Coco v Clark*
- Threshold not high – ingenuity ranges from clear genius to an idea that is more than drudge but not genius *Talbot v GCT, Franklin v Giddins*
- Things that on their own aren't valuable can be combined to create something of value *Talbot v GCT, Link 2 v EzyStay*
 - The compilation may still be valuable even if its constituent parts are taken from the public domain
 - Novelty depends upon the thing itself, not the quality of its constituent parts *Coco v Clark*
 - Confidence can only relate to the combination
 - Note a client list is commercially valuable, because that is how businesses make money
- Note in Australia it is still an objective test (same as *Douglas v Hello* per Lord Walker)
 - Just because people have paid money for it and it is subjectively important, doesn't necessarily mean it is objectively commercially valuable (cf UK *Douglas v Hello* majority)

Personal information

- Equity will protect information of a personal and intimate nature if it has the requisite value
- Certain information is connected to one's personality in an intimate way, to publicise such information is to undermine its intimate nature
- Religion: *Foster v Mountford*
 - Equity will protect secrets about religious practices (of an established religion with deep significance to adherents)
- Sexual activity: *Giller v Procopets, Wilson v Ferguson*
 - Protected because it is intimately personal *Giller*, not because it is shameful cf Gleeson CJ in *Lenah*
 - Note there is a difference between seeing the information (video/photo), and just hearing about it
 - P should have control and agency over the information *Giller*
- Identity *Jane Doe*
- Some cases are concerned with information that mixes commercial and non-commercial characteristics *Douglas v Hello*

The information needs to be secret

- Information must be sufficiently secret as opposed to being common or public knowledge *Lenah Game Meats*
- Something which is generally accessible and public knowledge won't have to be sufficiently secret
- Recipient of partly public partly private information must segregate it, can use the public information

Information that is public knowledge but has been modified as a result of skill and ingenuity:

- Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality if something new and confidential was brought into being by the application of skill and ingenuity of the human brain *Saltman v Campbell*
 - The compilation of information may involve a sufficient degree of skill and ingenuity to meet the fairly undemanding test to make the manuals confidential *Link 2 v Ezystay*
 - Look for skill and ingenuity in the compilation itself, not in the information it contains or its constituent parts *Link 2 v Ezystay*
- The idea doesn't have to be unique, will be confidential where there is a commercial twist or particular slant in P's idea which elevates it out of the realm of public knowledge (provides a qualitative difference from public domain) *Talbot v GCT*
 - Where P takes an idea out of general mass and crystallises it by putting in extra effort (very low threshold) *Talbot v GCT*

Information that isn't common knowledge:

- Confidential information is not 'public property and public knowledge' Greene MR in **Saltman**
 - The confidentiality can be inherent in the relationship between the parties **Ashburton v Pape**
 - Re sex cases: persons who produce such information need not explicitly state it is confidential, implied from conduct, so obvious it need not be expressed **Giller v Procopets**
 - The OOC stems from a relationship of mutual trust and confidence that the information isn't to be shared or divulged by either party **Giller v Procopets, Wilson v Ferguson**
 - The touchstone is whether the information would be highly offensive to any person of ordinary sensibilities **Wilson v Ferguson**
 - The confidentiality can be shown by steps taken by P to ensure the information isn't used
- Things that are private are generally confidential: Gleeson CJ **Lenah Game Meats**
 - Something will be private where the disclosure of the information or conduct would be highly offensive to a reasonable person of ordinary sensibilities
 - Manner of being obtained may indicate privacy:
 - If on private property, secure and caught by hidden camera it is likely inherently private information, therefore confidential (think bedroom) **Lenah Game Meats**
 - But if the information isn't inherently private, the tortious nature of obtaining it doesn't make it confidential **Lenah Game Meats**
 - If on private property but not obtained surreptitiously, it is not private and not confidential (think slaughterhouse open to the public, no attempt to control who enters) **Lenah Game**
 - Confidential information improperly or surreptitiously obtained is treated the same as information imparted in confidence which ought not to be divulged **Lord Ashburton v Pape**
 - This includes by eavesdropping or theft **Franklin v Giddins**
 - A slip (ie Foxtel broadcast in **AFL v Age**) doesn't vitiate confidence
- However the mere fact that information is not common knowledge, does not automatically mean it has the necessary quality of confidence
 - Location can't generate confidence: just because something happens on private property, doesn't make it confidential **Lenah Game Meats**
 - Impact can't generate confidence: just because the showing of the footage causes financial harm or sways public opinion more than a mere description, doesn't make the film confidential **Lenah Game**

Information that has already been publicised:

- Sometimes, if confidential information has been published, it will be considered public knowledge
- In certain circumstances, information may retain its quality of confidence despite publication:
 - Relative secrecy and degree of availability: **AFL v Age**
 - Claim of confidentiality can't be defeated by showing there are other people who know the facts besides D and those to whom D disclosed to, as long as relative secrecy remains
 - In determining whether the information is still confidential, the degree of accessibility depending on the particular case is an important factor (ie Foxtel broadcast isn't to the public)
 - Depends on nature of the information, the context in which it was disclosed, the number of people who know, who gave the information (including P) and how they treated it (ie whether they sought to restrict or control dissemination), and how most people who have the information treat it (ie whether they treat it as if it's secret)
 - Consider how many of the people who would be interested in the information already know, and how many people from whom P wants to keep the information confidential **Jane Doe**
 - Circle of confidence:
 - Telling a select group of people (friends, police, staff members, employees, those initiated into a religion, people in court) doesn't vitiate confidentiality, it brings those people into P's circle of confidence and an OOC is imposed on them **Jane Doe, AFL v Age, Foster**
 - Especially where they are bound by confidentiality agreements (ie employees, police)
 - P may still have a reasonable expectation that it would stay confidential **Jane Doe**
 - It isn't necessary for information to be secret for it to be private/confidential **Jane Doe**
 - Veracity and authority of disbursement: **AFL v Age**
 - Speculation, gossip or assertion from an anonymous source isn't sufficient to enter the public domain (OOC still remains) **AFL v Age**
 - Includes information merely speculated without being confirmed **AB v CD**, anonymous source, unverified, internet chatroom, doubtful reputation
 - The public have no expectation of veracity of anonymous information in chatrooms
 - Without this it would be too easy for new outlets to circumvent secrecy element
 - Authorised news outlets are accountable for the information they publish and are trusted by the public to report material accurately (OOC is lost)
 - Right to exclusivity: **Douglas v Hello**
 - Can protect the commercial value of the right to exclusivity through BOC
 - The protection extends beyond the information in photos to the exclusive right to publish them
 - The value of the exclusivity isn't exhausted after the first publication, it continues
 - There is still a commercial value in keeping unapproved photos out of other publications

Foster v Mountford and Rigby Ltd

- M was an author, R a publisher of book containing information on sacred indigenous ceremonies disclosed to M 35 years earlier which had never been published before, M knew they were secrets
- The secret if devolved to women and those not initiated would undermine the social and religious stability of the community (not necessarily commercial interests)
- F made urgent ex parte application to prevent publication of the book in NT, gave undertaking as to damages
- Court accepted information was disclosed in confidence (confidence had been respected for 35 years, book included a caveat saying it shouldn't be used in areas where traditional aboriginal culture is still significant)
- Treated the religious secrets like any other form of confidential information due to the cultural and religious significance of the information

Giller v Procopets

- D took videos of their sexual relations, some but not all with P's knowledge
- D attempted to show, and did show, the videos to members of P's family and her employer
- Police confiscated the videos and an order was granted preventing their future distribution (D can no longer use information, injunction is now futile)
- P claimed damages for mental distress and embarrassment caused by D's BOC in attempting to show the videos, including aggravated and exemplary damages
- VSCA: P was entitled to compensation for mental distress and embarrassment due to D's BOC, either as EC or LCAD (despite the BOC not relating to property rights or commercially valuable information)
- Persons who produce such information (through conduct) need not explicitly state it is confidential, it is implied from the conduct, it is so obvious it need not need to be expressed
- The OOC stems from a relationship of mutual trust and confidence that the information isn't to be shared or divulged by either party

Wilson v Ferguson

- D and P were both miners, D posts revenge porn on Facebook and nasty comments
- Could be seen, forwarded and shared by his 300 friends, many of whom are miners
- P asks D to take it down, he does after almost a day
- The images were provided on the mutual understanding they wouldn't be provided to third parties, they clearly have nature of confidence about them
- Highly offensive to any person of ordinary sensibilities
- Court granted injunction prohibiting further posting and EC for humiliation, anxiety and distress (application of **Giller**, although P didn't seek LCAD)

Douglas v Hello! Ltd (UK)

- The couple had a contract with Ok for \$1m, giving them the exclusive right to publish wedding photos (a mix of commercial and non-commercial interests)
- All guests asked not to bring cameras and know an OOC exists, there are ropes and barriers etc
- Freelance photographer got in and took photos, sold them to Hello
- Both magazines publish their photos, Ok publishes slightly earlier to beat Hello (not a straightforward BOC, as Ok had already published its photos)
- Hello's goal is to destroy the value of the exclusivity of Ok, so let other outlets publish their photos too
- Ok sued Hello for BOC, did Ok's publication destroy its action for BOC?
- Hoffman: can protect the commercial value of the right to exclusivity (paid for by Ok) through BOC (the protection extends beyond the information in the photos, to the exclusive right to publish them)
- The value of the exclusivity isn't exhausted after the first publication, it continues
- There is still a commercial value in keeping the unapproved photos out of other magazines eg market power, people won't pay for exclusive information that is freely available
- Ok had an entitlement to preserve the value of what it had paid for
- Brown: focussed on the individual nature of each photo, there may be further publications of other photos
- Nicholls: once the approved pictures had been published, the publishing of the unapproved pictures wasn't a BOC, the differences in expression cannot constitute confidential information for the purposes of BOC

Saltman v Campbell

- Design drawings of tools which weren't hugely novel, but were a bit different from other tools, were given to X to manufacture, but X gave to Y, a subcontractor (this wasn't a breach), only X was bound by OOC in writing
- When Y received the drawings, they knew the drawings had been given to X in confidence and for the purpose of producing the tools, therefore they know OOC applies to them
- The fact that the maker of the document has used his brain, and thus produced a result which can only be produced by someone who goes through the some process, makes this confidential
- Ingenuity of human brain is an important element
- Until someone reverse engineers the design (making the design in the public domain), it is confidential

Australian Broadcasting Corporation Ltd v Lenah Game Meats Pty Ltd

- Unidentified trespassers secretly filmed the stunning and killing of possums by P's employees
 - Film was given to ABC, P applied for an interlocutory injunction to restrain ABC from broadcasting
 - P conceded the fact of possum killing is public information, but argued the broadcasting of the footage would have a detrimental commercial effect on the possum slaughtering business
- Gleeson CJ: things that are private are generally confidential
 - Something will be private where the disclosure of the information or conduct would be highly offensive to a reasonable person of ordinary sensibilities
 - Focus on the nature of the information: is it private?
 - Location can't generate confidence: just because something happens on private property, doesn't make it confidential
 - Impact can't generate confidence: just because the showing of the footage causes financial harm or sways public opinion more than a mere description, doesn't make the film confidential
 - Manner of being obtained may indicate confidence: it caught by hidden camera it is likely inherently private information, therefore confidential (think bedroom)
 - But if the information isn't inherently private, the tortious nature of obtaining it doesn't make it confidential
 - If not obtained surreptitiously, it is not private and therefore not confidential (think slaughterhouse open to the public)

Link 2 Pty Ltd v Ezystay Systems Pty Ltd

- GR is former director of E, runs his own business, both compete in the market for student accommodation
 - GR took E's business manual (general information about how to run the business) and systems manual (process of engaging with customer, which any tenant will have learned of by engaging with the company)
 - Is the act of compiling it into a manual something that makes the use of the information inside it a BOC?
- The compilation of information involved a sufficient degree of skill and ingenuity to meet the fairly undemanding test to make the manuals confidential
 - Look for skill and ingenuity in the compilation itself, not necessarily in the information it contains

AB v CD

- Can DPP disclose Gobbo's identity to convicted criminals who might have their convictions overturned?
 - Police wanted to prevent the disclosure, DPP argued her identity was already in the public domain
- At this stage, it was speculated but hadn't been officially confirmed to be her, therefore OOC still attached

Talbot v General Television Corporation Pty Ltd

- P, a developer of TV program about millionaires relies on generic information such as: sample story (no scripts yet), structure (how they got to where they are, what effect has wealth had on them, what advice would they give), concept, program format (structured interviews)
 - P had meetings with Channel 9, copies of submissions kept by representatives, Channel 9 doesn't agree
 - Channel 9 then produced segment about millionaires: how they got to where they are, what effect has wealth had on them, what advice would they give
 - Channel 9 said the information was generic, any show about millionaires would involve that format anyway
- There are two ways information could be 'public': if it was confidential and has been disclosed, or if it was so general to begin with that it could never have been confidential (as Channel 9 argued here)
 - This idea was sufficiently developed to be attractive as a TV program and realised as an actuality (not a vague idea, it is practical and executable, a fully formed idea for a TV show)
 - There is a commercial twist or particular slant in P's idea which takes it out of the realm of public knowledge, as a program exactly like this hadn't been done before (qualitative difference from public domain)
 - The idea doesn't have to be unique, but it has to be formulated in a particular type of way to elevate itself out of the public domain ie where P takes an idea out of general mass and crystallises it (low threshold)

Jane Doe v Australian Broadcasting Corporation

- ABC report named the perpetrator of sexual assault, who was JD's husband, and mentioned JD's name
 - JD's identity was known to her family, close friends, perpetrator, police (14 people in total), she didn't explicitly tell them to keep it confidential
 - ABC identified JD by staying in court (open court, but they had a statutory obligation not to report JD's name)
- JD had a reasonable expectation, from the nature of the information and the context in which it was disclosed, that it would stay confidential, OOC remains
 - Not necessary for information to be secret for it to be private/confidential (this conflates privacy/confidentiality)
 - Depends on nature of the information, number of people, who gave it, reasonable expectation of privacy
 - Police and medical personnel are bound by confidentiality of their professions, there is a statutory prohibition on reporting of the name as disclosed in open court, JD told a small amount of people in her circle of confidence, didn't disclose the information to the ABC
 - There was a group of people from whom JD would want to keep this information who don't already know it

Australian Football League v Age Company Limited

- 3 strike policy for AFL players with recreational drugs because higher likelihood of employer finding out
- 3 AFL players returned 2nd positive tests, Age finds out the names of the players, knows it's confidential, proposed publishing their names, AFL sought a permanent injunction to prevent publication
- The information had spread past its original holders through instances of limited publication
- Age argued the information had lost any OOC it held by entering the public domain (oral discussion of the information within the AFL industry, anonymous phone caller named one player on Foxtel, localised but public internet chatroom speculations as to the identity of the players by anonymous people, SMH named the players in an article available to a media monitoring company then recalled it)
- Was this publication sufficient to destroy the confidentiality of the information?

- The information remained confidential notwithstanding the limited disclosure
- The fact The Age wants to publish a scoop may indicate the information hasn't yet reached a wide audience
- If the confidential information has entered the public domain, the information has lost any confidential quality it may have had previously and the court won't restrain the publication of matters which are well known by a large number of the public

Re relative secrecy and degree of accessibility:

- Claim of confidentiality can't be defeated by showing there are other people in the world who know the facts in question besides D and those to whom D disclosed to, as long as relative secrecy remains
- In determining whether the information is still confidential, the degree of accessibility depending on the particular case is an important factor
- Consider how many of the people who would be interested in the information already know, and how many of those would be people from whom P wants to keep the information confidential
- The publication of confidential information in widely-circulating print media would place information in the public domain

Re veracity and authority:

- There is a qualitative difference between unverified information in internet chatrooms (OOC still remains) and authorised news outlet (OOC is lost)
- Authorised sources are accountable for the information they publish and are trusted by the public to report material accurately
- The public have no expectation of authenticity or veracity of anonymous information posted on chatrooms
- Don't want news outlets to be able to destroy confidentiality anonymously and then publish it

Right to privacy

- UK has an established right to privacy **Douglas v Hello!**
 - BOC in the UK is influenced by this framework
- Australia doesn't have a strict right to privacy **ABC v Lenah Game Meats, Jane Doe, Giller v Procopets**
 - BOC has a greater role to play in keeping things secret
 - However Australia does have remedial flexibility, for personal information BOC can get:
 - Aggravated damages (EC or LCAD) **Giller v Procopets**
 - Compensation for mental distress and embarrassment **Giller v Procopets**
 - The continuing development of BOC in respect of personal information is occurring in a context of broader judicial consideration of the appropriate ways in which the law should protect individual privacy and personality from unwarranted interference and attack

Australian Broadcasting Corporation Ltd v Lenah Game Meats Pty Ltd (Aus)

- An action for BOC is suitable for protecting rights to privacy
- Australian law hasn't developed a standalone right to privacy tort, but we have mechanisms in our law that amount to the same thing (Gummow and Hayne JJ)
- Strengthened the protection afforded to privacy interests by existing causes of action (BOC), rather than tort of invasion of privacy

Jane Doe v Australian Broadcasting Corporation

- Here, the statutory prohibition on disclosure of information outside of court grounds her rights, rather than the information being a secret and never disclosed publicly (because it was disclosed in court)
- Repeated disclosure outside the court context is something that the right of privacy best deals with (rather than BOC, because it has already been aired publicly) (this is a way to distinguish this case)
- Right of privacy is a tort, enlivens CL remedies such as aggravated and exemplary damages