

## TOPIC 2 - BREACH OF CONFIDENCE

Breach of confidence is a **doctrine developed by equity in its exclusive jurisdiction** that recognises and **protects certain rights of confidentiality**; it pertains to the **unauthorised use of confidential information**.

Other regimes for protecting such rights exist, such as contract, employment and intellectual property law, but this section is concerned with **purely equitable** claims – rights which equity enforces independently of the common law.

- From innovator's view: patent (monopoly) v breach of confidence route; if go for patent - it becomes public information
- Obligation of confidence effective in early stage before seeking patent (preliminary discussions, negotiations, engaging with manufacturers etc.)

P would be seeking to claim that D's (publication/disclosure/use) of (state what information is) constituted a breach of confidence (BoC). Equity enforces BoC independently of the common law, so this claim is unaffected by the fact that P and D have no contractual relationship. A successful claim to BoC requires the following four elements to be made out.

**Equity imposes an obligation of confidence where:**

- (1) The information is specific
- (2) The information has the necessary 'quality of confidence'
- (3) Circumstances import the duty; and
- (4) Unauthorised use

\*elements 2-4 derive from classic statement by Megarry J in *Coco v AN Clark (Engineers) Ltd 1968*; element 1 elaborated in more recent cases such as *O'Brien*

### ***Coco v A N Clark (Engineers) Ltd (1968)***

F: Coco designed a moped engine, and whilst negotiation with defendants for its manufacture, designs were disclosed. Negotiations broke down and defendants allegedly started to produce a moped based on Coco's design. Coco sought an injunction preventing its manufacture.

H: Coco was able to prove the circumstances under which the defendant received the information imposed an obligation of confidence, the court held that the information imparted was not confidential in nature, and the court did not find unauthorised use of the information.

Megarry J

- No K, therefore must consider "pure equitable obligation of confidence, **unaffected by contract**" (if K exists question of construing K and terms implied in it)

ELEMENT 2:

- However confidential the circumstances of communication, **there can be no breach of confidence in revealing to others something which is already common knowledge** – but this must not be taken too far (as per Lord Denning in *Seager*, when information used in partly public/partly private, it becomes more complicated - human ingenuity)

## ELEMENT 3:

- Information **must be communicated (and received) in a way importing obligation of confidence** i.e. if blurted out in public, there can be no binding obligation of confidence; **objective test** – reasonable man in shoes of recipient of information would have realised upon reasonable grounds the information was being given to him in confidence; commercial/industrial information given in business-like basis with some avowed common object in mind (joint venture/manufacture of articles by one party for another), the recipient carries a heavy burden to rebut contention that he was bound by obligation of confidence.

VALUE - **“I doubt whether equity would intervene unless the circumstances are of sufficient gravity; equity ought not to be invoked merely to protect trivial tittle-tattle, however confidential”**

## ELEMENT 4:

- “at first sight... detriment ought to be present if equity is to be induced to intervene”, however conceivably there exists circumstances when P may have substantial reason for seeking equitable intervention yet suffer no true detriment to themselves (may gravely injure some relative or friend).

**ELEMENT #1 – INFORMATION MUST BE SPECIFIC**

P must establish that the information claimed to be confidential can be defined with sufficient precision rather than merely in global terms (*O'Brien v Komesaroff* per Mason J). Burden rests on P to identify with some degree of concreteness what is the confidential information requiring protection. Serves as method of prima facie assessing the legitimacy of the action (Per Laddie J in *Ocular Sciences*)

***O'Brien v Komesaroff* (1982, HC)**

F: Solicitor who prepares unit trust scheme for avoiding withholding tax (cross border tax regime) and engages accountant. Accountant starts creating documents with similar clauses.

I: Was the information over which the obligation was claimed specific enough?

H: Whilst there may have been innovate nature to the way these clauses were structured, difficult to decipher where the confidential information, which departed from common knowledge, was within the document. Komesaroff could not specify the particular clauses within the document which constituted confidential information.

- “One needs to know not only what was the information conveyed but also what part of that information was not common knowledge.” – Mason J
- “...the problem is caused by **the generality of the description...** of ... the information which he seeks to protect.” – Mason J
- Importance of element: court order sought is often an injunction; court must be able to frame a clear, enforceable, precise order of restriction

\*IF RELEVANT: discuss **‘fork of O'Brien’**: catch 22 between 1<sup>st</sup> and 2<sup>nd</sup> element

- In satisfying the 1<sup>st</sup> element; he failed the 2<sup>nd</sup> because the information was public
- In satisfying the 2<sup>nd</sup> element he found himself describing the scheme generally which failed the 1<sup>st</sup> element test

***Ocular Sciences v Aspect Vision Care* (1997, UK patents court)**

F: Employees leaves business and subsequently establish rival business using the knowledge they acquired throughout previous employment. Business claimed the employees breached confidence in regard to the information about contact lenses, equipment, and software i.e. asserting almost everything about the optometry business was confidential

I: Whether 'more or less everything' about the optometry business constituted information capable of protection under BOC

H: Laddie J - The courts are careful to ensure that the plaintiff gives **full and proper particulars of all the confidential information** on which he intends to rely in the proceedings."

The defendant needs to know the case they have to meet; the plaintiff must carefully consider the scope of the claim.

**Factors to consider:**

- The burden on the plaintiff (but not given much weight)
- The link between the pleadings and the remedy
- The ability of the defendant to meet the case
- The potential for harassment and abuse of process

Cannot restrict former business partners more than someone off the street

## ELEMENT #2 – INFORMATION MUST HAVE THE NECESSARY QUALITY OF CONFIDENCE

In order to establish the information warrants equity's protection, P must establish the information is of a confidential nature i.e. has necessary quality of confidence.

- No restriction on the kind of information that can possess confidential quality
  - Commercial and non-commercial/personal; often a mix
- No restriction on the mode or medium through which the information may be conveyed (any form of information can be of confidential quality)
  - Any formula, pattern, design or compilation of information can be the substance of confidential information e.g. photograph, design of a product, list of customers or genetic structure of tree

### TWO KEY LIMBS: SECRECY AND VALUE

(a) Was the information sufficiently SECRET / not in the public domain?

- Greene MR in Saltman: 'not public property and public knowledge' (defined negatively)
- Lord Goff in Att-Gen v Guardian Newspapers: 'no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential.' (defined circularly)
- Lenah Game Meats: Must not have entered 'public domain' to be afforded equity's protection

The mere fact that information is not common knowledge, or is a record of events that