

SAMPLE ONLY

FULL VERSION MORE EXTENSIVE (MORE CASES, MORE ELABORATE, FURTHER STEPS PROVIDED, FURTHER DESCRIPTION, ETC)

Topic 2: Breach of Confidence

Breach of Confidence
Pertains to the unauthorised use of confidential information. Concerned with purely equitable claims – rights which equity enforces independently of the CL.
ELEMENTS
ELEMENT 1: INFORMATION MUST BE SPECIFIC
The information claimed to be confidential must be defined with sufficient precision.
<i>O’Brien v Komesaroff</i> (1982) 150 CLR 310
(Leading authority for first element) FACTS: Solicitor (K) provided set of docs (trust deed, articles of association) to a client/accountant (O) to be used as tax minimisation device. O then copied docs for his own clients. K sued O for infringement of copyright and breach of confidence. HELD: K failed to identify particular contents of the docs which he seeks to protect due to generality of the description . K regularly publishes info to the world at large (by advising clients) PRINCIPLES (Mason J): <ul style="list-style-type: none"> ○ Contents of docs were matters of common knowledge ○ Advice as to general legal effect of statutory provisions are not confidential ○ “One needs to know not only what was the info conveyed but also what part of that info was <u>not common knowledge</u>.”
<i>Ocular Sciences Ltd v Aspect Vision Care Ltd</i> [1997] RPC 289, 359-60 (OL)
FACTS: P claimed D used confidential info including contact lenses, equipment, software etc. Info specified was “more or less everything”. HELD: Element not made out. PRINCIPLE (Laddie J): The courts are careful to ensure that P gives full and proper particulars of all the confidential info on which he intends to rely in the proceedings. Factors to consider include: <ol style="list-style-type: none"> 1. Burden on P (not given much weight); 2. Link between the pleadings and remedy; 3. Ability of D to meet the case 4. Potential for BoC claims to be used for harassment and abuse of process
ELEMENT 2: INFORMATION MUST HAVE THE NECESSARY QUALITY OF CONFIDENCE (COCO)
The information must be <u>sufficiently ‘secret’</u> in its character. <ul style="list-style-type: none"> ○ The mere fact that info is not common knowledge or is a record of events that occurred on private property does not entail that it has the necessary quality of confidence ○ Info that is trivial cannot be protected through an action for BoC
Two critical features
<ol style="list-style-type: none"> 1. Secrecy vs Common Knowledge <ul style="list-style-type: none"> • Law may protect info that lots of people already know (AFL, Jane Doe) • Law may refuse to protect info that very few people already know (Lenah Game Meats) 2. Value or importance: merits equity’s protection <ul style="list-style-type: none"> • Trade secrets (Franklin v Giddins) • An idea (Talbot v GTC) • Cultural practices (Foster v Mountford) • Private sexual activity (Giller v Procopets, Wilson v Ferguson, Jane Doe v ABC) • Celebrity photos (Douglas v Hello!)
<i>Australian Broadcasting Corporation Ltd v Lenah Game Meats Pty Ltd</i> (2001) 208 CLR 199 (OL)
FACTS: Film of possum slaughtering process was obtained by trespassers through hidden cameras and sent anonymously to ABC. P sought an interlocutory injunction to restrain broadcasting of the film. HELD: Element not made out. Relevant info: what processing of possums looks and sounds like. L did not impose requirements of confidentiality on visitors. No special precautions taken to keep activities secret. Only basis was that it was carried out on private property, which was also not enough. PRINCIPLES:

<p>The requirement that disclosure or observation of info or conduct would be highly offensive to a RP of ordinary sensibilities is in many circs a useful practical test of what is private.</p> <p>Protection derives from a combination of the characteristics of the property, nature of the act and the disposition of the property owner. The fact that the footage was obtained improperly did not taint the use or broadcast of the footage by the respondent.</p>
<p><i>Australian Football League v Age Company Limited</i> [2006] VSC 308</p>
<p><u>FACTS</u>: AFL had agreements with players regarding 'illicit drugs policy'. First two positive tests treated confidentially – emphasis on education, counselling and treatment. Newspapers conceded they received info that they knew was confidential. Argued info was in public domain and not confidential, defence of iniquity, defence of public interest.</p> <p><u>HELD</u>: The info was secret. The info was being protected – workers & doctors were under disclosure agreements. The only unfettered dissemination was that on the internet, which HC held that it was rumour, not genuine transmission of info. Hence, the info remained sufficiently secret.</p> <p>PRINCIPLES:</p> <p>The leaking of info into an anonymous medium (chat rooms/message boards) does not bring the info into the public domain. For info to be publicly known, it has to rest on a knowledge requirement. The info has to rest on a sufficient evidentiary basis.</p> <ul style="list-style-type: none"> • Speculative gossip, innuendo, assertion by unknown persons...does not make confidential material lose its confidential nature
<p>Ingenuity of human brain</p>
<p>Any formula, pattern, design or compilation of info of any kind can be the substance of confidential info.</p> <ul style="list-style-type: none"> o No restriction on mode or medium through which confidential info may be conveyed o A quality of confidence in info which can be protected may appear from a photograph, design of a product, a list of customers or genetic structure of a tree
<p><i>Franklin v Giddins</i> [1978] Qd R 72 (OL)</p>
<p><u>FACTS</u>: Concerned info about a new breed of nectarine that the P had developed. Rival orchardist, G, who was a former employee snuck into F's property and took 4 twigs of budwood, and grafted the budwood to root stock. 6 years later, F investigated and reported to police.</p> <p>P argued the genetic history of the fruit as encoded in the fruit and tree itself. It was secret as it was only P who had that info and it was valuable because it was made by his ingenuity.</p> <p>F sued G and claimed a declaration and order for delivery up and destruction of G's trees. G said trees have become part of real property and laches.</p> <p><u>HELD</u>: Second element made out.</p> <p>F did guard budwood by exercising general surveillance over fruit-pickers and visitors and "bruiting" it abroad that it was theirs. No electric fence or dogs, but no matter.</p> <p>The information was the breeding history of the living thing encoded in the living thing.</p> <p>Orders were granted.</p>
<p>Non-commercial info</p>
<p><i>Foster v Mountford and Rigby Ltd</i> (1976) 14 ALR 71 (OL)</p>
<p><u>FACTS</u>: M visited aboriginal communities in around 1940. Was shown sacred sites and objects, paintings, rock engravings, myths, totemic geography. In 1975, M wanted to publish a book "Nomads of the Australian Desert". Revealed matters hitherto secret.</p> <p>Elders made urgent, ex parte application for interlocutory injunction prohibiting M from selling or distributing. Concerned that revelation of secrets to women, children and uninitiated men will undermine social & religious stability of their community.</p> <p><u>HELD</u>: Court accepted that this info about religious practices had the necessary quality of confidence. It was <u>secret</u> as it was not a public or open religion (closed religion), membership was primarily through familial connection, info was normally revealed through secret initiation practice etc.</p> <p>Only known to participants who were under obligation to one another not to reveal it to the outside.</p> <p>It was <u>valuable</u> as info about cultural and religious practices is understood to be valuable and worthwhile, not trivial and banal.</p> <p>M himself had recognised the secrecy in his acknowledgments: "the book should be used only after consultation with local male religious leaders".</p>
<p>Info that mixes both commercial and non-commercial characteristics</p>
<p><i>Douglas v Hello! Ltd</i> [2008] 1 AC 1 (OL)</p>
<p>Not good authority. Important point is Lord Walker's dissent: the mere fact that someone t</p>

FACTS: Ds were a celebrity couple who sold exclusive photography rights of their wedding to OK! Magazine. An unauthorised freelance photography gained access to the wedding and sold pictures to Hello! Magazine.

DISSENT: Lord Walker: Ds did not have property rights over their wedding. The photographs are benile, not analogous to the type of info in the other cases – it was a common place information. They lacked ingenuity to be protectable and they lacked any personal importance (they were sharing with their friends).

ELEMENT 3: CIRCS IMPORTING THE DUTY: KNOWLEDGE OF RESTRICTIONS

A court of equity will restrain the publication of confidential information **improperly or surreptitiously** obtained or of **info imparted in confidence** which ought not to be divulged.

An equitable duty to respect the confidentiality of confidential info arises where the recipient of the info **knows or ought to know of restrictions placed on the info's use**.

- Circs in which info was acquired are critical
- Protected info may be deliberately confided to a person under circs requiring its continued confidentiality
- Info may be acquired surreptitiously, or by chance

TYPE 1: Giving Cases

1. Circs must be such that any reasonable man standing in the shoes of the recipient of the info would have realised that the info was being given to him in confidence – *Coco*
2. Consider explicit/implicit conditions of the giving of the info – *Smith Kline*
3. Did D take appropriate steps to ensure D knew of the limitations as to the info's use? – *Smith Kline*

TYPE 2: Taking Cases

1. When the info is stolen or taken, the court will import a duty of confidence (*Franklin; Pape*). Little analysis is required beyond establishing the taking
2. Note tension between **wafting/blurting** cases:
 - However secret and confidential the info, there can be no binding obligation of confidence if that info is blurted out in public – *Coco*
 - BUT obviously confidential information that is 'wafted'/transmuted accidentally will lead to an obligation of confidence – *AG v Guardian*

Coco v AN Clark (Engineers) Ltd [1969] RPC 41 (SET, 12.2a)

FACTS: Concerned info being given to the D in the course of a commercial info. D used info in ways they were not allowed to do.

HELD:

Judge said: Equity cannot be invoked merely to protect trivial tittle tattle.

Coco v AN Clark – PRINCIPLE

If the circs are such that any **reasonable person** standing in the shoes of the recipient of the info would have realised under **reasonable grounds** that the info was being **given in confidence**, then this would impose upon that person the **obligation of confidence**.

Topic 3: Fiduciary Relationships

Main characteristic: The vulnerable party has assets or interests that another party can exploit or take advantage of. Detriment is NOT required.

STEP 1: Accepted Categories

1. Trustees and beneficiaries – trustee have legal capacity to sell/mortgage/lease;
2. Directors and companies – director/board of directors makes decisions for the company as an individual legal entity, may make decisions based on personal interests than company interests;
3. Agents and principals – agent has been authorised by principal to exercise private capacities on the principal’s part;
4. Employees and employers
5. Partners
6. Solicitors and clients
7. Bankruptcy trustees and creditors

If no accepted category...

STEP 2: Factual non-standard categories

1. *Hospital Products Ltd v United State Surgical Corporation:*

Factual fiduciary relationship TEST – Hospital Products

Mason J IN DISSENT:
 “The critical feature of these relationships is that the fiduciary **undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion** which will **affect the interests of that other person** in a legal or practical sense.
 The relo. between the parties is therefore one which gives the fiduciary special opportunity to exercise power or discretion to detriment of the other person who is accordingly **vulnerable to abuse by the fiduciary** of his position.
STEPS:

1. Representative character – fiduciary to represent interests of plaintiff
2. Exercise of power or discretion
3. Affect legal or practical interests

2. *Breen v Williams* – fiduciary obligations do not accommodate a duty for doctor to their patient for access to medical records. **Equity is concerned with what interests are at play, what powers** does the fiduciary enjoy and therefore what interests of the plaintiff have been **rendered vulnerable**
3. *United Dominions Corporations Ltd v Brian Pty Ltd* – A fiduciary relationship **can arise between parties who have not reached and may never reach, agreement** upon consensual terms which are to govern the arrangement between them

CASES

<i>Hospital Products Ltd v United States Surgical Corporation</i> (1984)
<p>FACTS: USSC manufactured surgical stapling products and disposable loading units. Engaged Blackman to become distributor. B obtained exclusive distribution rights in Australia and then established a competing company (Hospital Products Ltd). HP competed with USSC by repackaging USSC’s products, then sell these products as its own products, and also reverse engineered USSC’s products which allowed it to develop and produce further competing products. USSC sued B and HP for a breach of contract and FO.</p> <p>PRINCIPLE: “It is recognised by the decisions of the courts that there are other classes of persons who normally stand in fiduciary relationship to one another – e.g. partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed”.</p> <p>Mason J – in dissent but this statement is significant authority: ABOVE.</p>
Diagnosis, advice from doctor, good health are NON LEGAL/PRACTICAL INTERESTS
<i>Breen v Williams</i> (1996)
<p>FACTS: B underwent breast enhancement surgery, and subsequently endured severe pain. W did not remove the existing implants or insert new ones. It was found later that the left implant had leaked silicon. Asked medical records from W, he refused to provide records to her. B claimed qualified right to her own medical records.</p> <p>HELD: Under CL, a patient does not have a right of access to inspect and/or obtain his or her medical records.</p>

<p>PRINCIPLES: Maj judges: Health interests is not the type of interest that equity is concerned with in FO. Concepts of vulnerability/reliance or dependence on their own is not enough</p> <p>Brennan J: on the conduct in play – doctor meeting patient (not in scope), doctor advising the patient (not in scope, does not put private interests/assets/interest regarding those assets into play), doctor creating the records (not in scope either – that is not an exercise of control/power which renders the patient’s interests vulnerable).</p>
Joint venture cases
<i>United Dominions Corporations Ltd v Brian Pty Ltd (1985)</i>
<p>FACTS: UDC, Brian and SPL had been joint ventures in land development. UDC was main lender of money. Brian provided labour, SPL provided land. The developments realised substantial profit, but B did not receive from UDC repayment of its contributions or its share of profit.</p> <p>UDC claimed to retain all profits because of a ‘collateralisation clause’ in a mortgage given to it by SPL before the agreement was concluded. The clause, unknown to B, meant revenues would go out to UDC to discharge a prior debt SPL had to UDC independent of the joint venture.</p> <p>HELD: HC finds that there was a fiduciary duty. This was a single project partnership. Vulnerabilities in respect of legal/practical interests emerged – how B disposes labour, payment, revenues B is entitled to etc. These interests became vulnerable at the point the development work started – before the formal contract was executed.</p> <p>UDC acted to obtain advantage without knowledge of the other participants. Breached duty.</p> <p>PRINCIPLES – on joint venture cases, and scope: A fiduciary relationship may exist between prospective partners who have embarked upon the conduct of the partnership before the terms of the agreement have been settled</p>
Public Interest
<i>Habib v Cth (No 2) [2009]</i>
<p>FACTS: H was an Australian who was in Pakistan around Sep 11 2001. H was taken to Egypt to be tortured. He alleged that during this there were Australian intelligence officers were present. Questions were asked to him about his family which rested on info only the Aus officers could have. He was then sent to American naval base (Guantanamo bay), and eventually back to Aus without being charged.</p> <p>He commenced actions against Aus Gov – for tort (assault and battery/false imprisonment) and fiduciary actions arguing that the Aus Gov owed him duty as a citizen and have breached this duty in not working harder to get him out of American custody.</p> <p>HELD: There was no fiduciary duty.</p> <p>The fiduciary duty alleged seeks to have this Court hold that the executive branch should have conducted its relations with Pakistan, Egypt and US differently, more precisely, that instead of acting in the way that it did it should have acted on his behalf and for his benefits. Fiduciary law does not operate when the complaint is about the government in carrying out the public interest.</p>

STEP 3: Scope of fiduciary relationships

<i>Birtchnell v Equity Trustees, Executors and Agency Co Ltd (1929)</i>
<p>FACTS: Plaintiffs discovered that their deceased partner in a real estate business had been running a profitable land development business on the side with one of the partnership’s clients. They sued for an account of the deceased partner’s share of the profits in the business.</p> <p>HELD: Ps entitled to an account of profits. Deceased partner had made profits by using business connection of the partnership – one of its clients, in breach of his fiduciary duty to the partnership.</p> <p>Although K did not cover this type of business. (only helping to sell land not land development), a FD was owed as over the actual life of the partnership, the activities of the business have expanded and included such activities. The transactions of land development business also concerned partnership because it was involved in the same business as the land development enterprise, being the sub-division and sale of land.</p> <p>PRINCIPLE: Equity looks at the actual course of dealings, not only the contract.</p>
<p>Scope TEST – Birtchnell</p> <p>Scope is to be determined by ‘actual circs of the relationship’ (Dixon J).</p> <p>STEPS:</p> <ol style="list-style-type: none"> 1. Identify what fiduciary has done; then 2. Determine whether this falls within the scope of the FR by applying the test per <i>Birtchnell</i>
Factors to consider
<ol style="list-style-type: none"> 1. Terms of a contract between parties (<i>Hospital Products</i>) <ul style="list-style-type: none"> • FR can co-exist with contractual obligations (<i>Hospital Products</i>)

- If there is contract, consider saliency:
 - If **contract IS relationship** – contract is most salient
 - If parties have developed a **regular ‘course of dealings’**, that may be **contrary/different to the contract**, the contract might not be as salient (*Birtchnell*)
 - The contract pre-dated the contract e.g. *UDC* – relationship had its own life and fiduciary logic which must govern the powers the parties can exercise when they contract
- 2. The ‘character’ of the relationship (*Birtchnell*)
 - Look at partnership agreement
 - **Conduct** of the parties – if there is pattern in which they have demonstrated a course of conduct
 - **Course of dealings** will supersede contract if there is conflict
- 3. The course of dealings **ACTUALLY** pursued

Howard v Federal Commissioner of Taxation (2014)

French and Keane JJ: “The limits of duties were to be determined by the character of the venture for which the partnership existed, the express agreement of the parties and the course of dealings actually pursued by the firm.”
 “The scope of the fiduciary duty generally in relation to conflicts of interest **must accommodate itself to the particulars of the underlying relationship which give rise to the duty**”

Hayne and Crennan JJ: “Closer **attention must be given to the duties, interests**” that are in play.

Gageler H: “Must identify subject matter over which the fiduciary obligations extended, and for interest purposes, require identification of the relevant undertaking.”

STEP 4: What Constitutes BREACH of FD

Rule: F Fiduciaries must not enter into transactions that create conflicts or secret profits (*Chan*)

TYPE 1: The conflicts rule

Fiduciaries are not allowed to enter into transactions in which they have a personal interest conflicting, or which possibly may conflict, with the interest of those whom they are bound to protect.

DOES NOT REQUIRE:

1. Conscious fraud/malicious intention – *Nocton*;
2. Fiduciary got advantage;
3. Plaintiff’s interests were set back

REQUIRED: the relevant power or discretion was exercised in circumstances of conflict in respect of where duties were owed

Prohibited conduct

1. Use of information;
2. Use of property for personal gain;
3. Use of position and influence over the person who the fiduciary duties are owed to;
4. Acting as fiduciary for two people who themselves have competing interests

Trustee & beneficiary – *Boardman v Phipps* [1967]

FACTS: Solicitor (B) advising trustee, trustee owns a trust property. Trust assets include shares in textile enterprise (L&H). B and Tom Phipps suggested to Fox (trustee) that it would be desirable to acquire major shareholding, F disagreed. **With full knowledge of trustees, B and P purchased a major stake of shares themselves.** B and P **did not obtain fully informed consent** of all beneficiaries. Co made distribution of capital without reducing value of shares. Trust benefited 47,000 pounds, while B and P 75,000. John Phipps and other beneficiary sued for profits, alleging conflict of interest.

HELD: Breach of duties. There was disagreement in the House of Lords over the proper test for conflict and remoteness of such conflict. **Dissenting judgment of Lord Upjohn is good law in Australia:**

TEST – Lord Upjohn in *Boardman*:

“The conflicts rule is enlightened when a **reasonable man** looking at the relevant facts and circumstances of the particular case would think that there was a **real and sensible/substantial possibility of conflict**, NOT that you can imagine some situation arising which might, in some conceivable possibility, in events not contemplated as real sensible possibilities, result in a conflict”.

CONSIDERATION 1: ‘Duty-Interest’ Conflicts

Rule: P may allege that D’s FD to [...] conflicted with P’s personal interest in the transaction/matter.

1. Identify conflict precisely

2. Analogue

Nocton v Lord Ashburton [1914]

FACTS: Client sues solicitor on basis that solicitor also enjoyed a mortgage over same asset (second mortgage who gets subsequent priority of repayment). The **solicitor's mortgage was promoted** upwards and had improved benefit of the mortgage. This was argued not on fraud because harder to prove, and procedural reasons.

HELD: This was a breach of FD because solicitor gave advice (exercised relevant power or discretion) in circs conflict (when 2 parties have 1st and 2nd mortgage respectively on same asset, there is a flavour into conflict of interest).

No need to prove anything about the mental state of the solicitor, only need to prove the power and discretion was used in circs of conflict.

CONSIDERATION 2: 'Duty-duty' conflicts

Rule: Fiduciaries must avoid owing duties to persons who have conflicting interests.

Consider:

1. When the duty ends – *Bolkiah, Farrington, Chan*;
2. Being able to identify the conflict precisely – *Pilmer*

Farrington v Rowe, McBride & Partners [1985]

Gives example of duty-duty conflict

FACTS: Solicitors acted for P in personal injury claim. The P recovered damages and sought firm's advice on investment of damages. The firm had a major corporate client which was in financial difficulties and solicitor had a financial interest in the corp. Persuaded P to invest in the corp. 2 years later, the corp went into liq.

Lawyers tried to argue that the giving of investment advice was not on scope of any duties owed, because it was not a relevant power or discretion.

HELD:

On Scope: Court said it is **not relevant here as to what the express agreement would have entailed** (what's written in brochures/initial agreement with client). What is relevant here is the **actual relationship** – the actual question of **what interests the client has reposed into your custody so that you have powers and discretions for them.**

In this context, given that the lawyers have handled the litigation for them, and overseen the receipt of the payout, the **client was still reposing their interests in their custody** while they enquire about what to do with the payout.

PRINCIPLE: **FR can still exist even when the retainer ended**

Pilmer v Duke Group Ltd (2001)

HELD: Potential retainer for accountants in this case did not amount to conflict when they produced the report.

PRINCIPLE: Just because circs are questionable, does not mean that there is conflict.

MORE IN FULL VERSION

STEP 6: Third-Party Liability

RED FLAG: If a 3P is talked about. If a 3P is e.g. "told not to tell anyone about the opportunity", "attends a board meeting and worrying but not speaking", etc. OR a "coy remark" about the asset from the fiduciary. Is there a story that would enact whether something will put the 3P on notice/inquiry?

TPL: a means for equity to hold 3Ps to breach of FDs personally liable. TLP claim is **limited to personal remedies** only.

Baden scale of knowledge (affirmed in Farah)	Sufficient?
Actual Knowledge	Yes
1. Actual knowledge	
2. Wilfully shutting one's eyes to the obvious	
3. Wilfully and recklessly failing to make enquiries an honest and reasonable person would make	No
Constructive knowledge	
4. Knowledge of circs that would put honest and reasonable person on notice	
5. Knowledge of circs which would put honest and reasonable person on inquiry (constructive notice) → subjective	

Barnes v Addy (1874)

TEST per Barnes v Addy – Lord Chancellor

1st limb: A stranger to a trust who **receives** trust property becomes chargeable with it as constructive trustee (doesn't mean constructive trust that we usually mean, just means you are liable for property)

2nd limb: A stranger to a trust who, with **knowledge**, **assists** a trustee in **dishonest and fraudulent design**, is liable as a constructive trustee (means you are liable for personal remedies)

MORE IN FULL VERS.