

EQUITY: EXAM NOTES

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Assignment of property rights

- Is there an assignable right?
 - Present property right
 - Future property right
 - Personal right
 - Cannot be assigned

Mere personal right

- Fails, a personal right (such as a right of access) cannot be assigned.

Present property right

- Has there been value/consideration given?
 - a. Peppercorn principle
 - b. If yes - assignment will be enforced, and assignor will hold property on CT for assignee.
 - c. If no - depends on the kind of property whether the right can be validly assigned
- Identify the kind of property dealing with
 - a. Voluntary assignment of equitable property
 - i. Partnership interest
 - ii. A beneficial interest under a fixed trust
 - iii. Part chose in action
 - b. Voluntary assignment of legal property
 - i. Real property
 - ii. Chattels
 - iii. Shares
 - iv. Intellectual property
 - v. Bills of exchange
 - vi. Debts or other legal choses in action
- Has the property been legally assigned?
 - a. **Torrens system land**
 - i. Complete statutory instrument of assignment
 - ii. Lodge with land titles office
 - iii. Registration
 - b. **Shares**
 - i. Lodgement
 - ii. Registration
 - c. **Choses in action (bank accounts, debts, bonds and rights to be paid)**
 - i. Absolute

BoFD claim checklist

- Introduction
 - Identify the parties; who is the alleged FD to the P?
 - Identify the contentious conduct and explain how fiduciary law might
- Is there a FR?
 - You can show there is a FR in three ways
 - Accepted categories
 - Mason J indicia
 - Case law
- What is the scope of the FR?
 - Understand each party will want a different expansion/restriction of the scope
 - Identify what the fiduciary has actually done
 - Is the act within the scope of this fiduciary relationship?
 - Analogue to case law
- Was there a breach?
 - Profits rule
 - Conflicts rule
 - Duty v duty
 - Duty v interest
- Do any defences apply?
 - Full disclosure
 - Genuine agreement to the breach
- Remedies against the FD (assess both)
 - Personal
 - Be selective
 - Proprietary
 - Prerequisites/pre-conditions to entitle P to proprietary remedies
 - Misappropriation of assets
 - Misappropriation of opportunity
 - Received a secret bribe/commission
 - Is the property still identifiable?
 - Apply tracing/following rules
 - Check that bona fide purchaser for value w/o notice exception's + volunteers

- ii. In writing
- iii. Signed by the transferor
- iv. Written notice given to the debtor or other party (bank)
- d. **Choses in possession**
 - i. Delivery
 - ii. Intention of transferring legal ownership
 - iii. Deed of assignment
- e. **Cheques**
 - i. Made out to a specific person.
 - ii. Endorsement (signed on the back)
 - iii. Delivery
- Can you actually effect the transfer by legal assignment?
 - a. Part chose cannot be assigned at law, must be done in equity
- If legal requirements have not been fulfilled
 - a. **Legal property**: Has the donor done everything required to be done by [him/her] to do alone such that it is beyond the transferors recall?
 - i. **Yes** – successful legal assignment
 - ii. **No** – The assignment fails
 - b. **Equitable property**: Has the donor shown a clear expression or manifestation of an immediate irrevocable intention to assign the property?
 - i. **Yes** – assignment recognised by equity
 - ii. **No** – assignment fails
- If yes to the relevant test;
 - a. Property in the asset has passed
 - i. If there is a completed **legal** assignment, the transferee takes title.
 - ii. If the assignment is completed in **equity**, the assignment will be enforced against the transferor in equity

Future property right

- Was value/consideration given?
 - a. No fails as it cannot be assigned
 - b. Yes, equity will enforce assignment if/when identifiable property comes into transferors' hands

Breach of Confidence

Step 1: Identify and introduce the cause of action

P may consider bringing an action of breach of confidence against D for disclosing (insert information) to Y and seek equitable relief as to the damage suffered

The equitable action of BOC protects valuable/personal information from misuse/exploitation by others. For equity to impose an obligation of confidence upon D, four elements must be established:

1. The information must be specific
2. It must have the necessary quality of confidence
3. Information must be imparted in circumstances that import an obligation of confidence
4. Its use must be unauthorised by the confider

Step 2: Evaluate the 1st element; specificity

Element 1: Information must be specific

P has the onus of establishing that the information claimed to be confidential can be defined with sufficient precision (O'Brien), not merely in global or general terms (Smith Kline), so that it can be particularised in pleadings (Ocular Sciences).

- P should distinguish from generality as seen in *Ocular Sciences* where it was held that 'warehouse information' was not specific
- D should argue the information is as vague and unidentifiable as the tax scheme Komesaroff alleged was disclosed without authorisation in *O'Brien* - see Mason J's explanation of the importance of specificity for the purposes of the defendant to predict what sorts of behaviour would constitute a BoC.
- If relevant discuss '*O'Brien* fork'; a *catch 22* between 1st and 2nd element.
 - When P tried to satisfy specificity he failed confidence because the information was public
 - When P tried to satisfy confidence he failed specificity because he was describing the scheme too generally

Element 2: Information must have the necessary quality of confidence

Rule: Per Megarry J in *Coco v Clark*, the information must have the necessary quality of confidence such that it can be protected by Equity. P must satisfy the additional requirements of secrecy and value, to prove that (insert information) has the necessary quality of confidence.

Secrecy Requirement

Rule: Per *ABC v Lenah Game Meats*, information must be sufficiently secret as opposed to being common or public knowledge. It is sufficiently secret where it is not 'public property and public knowledge' (per Greene MR in *Saltman*). It must not have entered the public domain (*Spycatcher*; *AFL v The Age*; *Jane Doe*).

D is likely to allege that [insert information] was not secret as it was known in the local community/broadcasted on television or to the public.

Is it a slip? Telling friends (circle of confidence) a secret and raise voice so someone else hears = slip that doesn't vitiate confidence. AFL; held that broadcast to select Foxtel audience = slip.

Consider the following factors:

- **Degree of accessibility:** if generally accessible then it is considered in the public domain
 - *Lenah*: the factory was relatively unsecured in the sense that nearly anyone could walk through it and no attempt made by the factory to conceal its operation, as such it was essentially public information
 - *Jane Doe*: only people who knew about the rape were those in her circle of confidence, or those in the court room at the time, who were subject to a statutory scheme, thus the information that pertains to her identity was not easily accessible to the public
 - *AFL*: despite the information being broadcasted, it was still considered secret due to the limited duration of the broadcast (too small segment of the public and only

Foxtel subscribers could watch) and the doctors and staff at the football club were brought into the circle of confidence

- **Circle of confidence:** telling select people of something that is secret, does not vitiate secrecy as they are brought into circle of confidence and trusted with that information
 - *Jane Doe*: friends were brought into the circle, statute brought journalists into the circle.
 - *AFL*: staff members who knew the players' identity were brought into the circle of confidence.
 - *Foster*: closed religion, had to be initiated into it cf. Christianity; more accessible
- **Authority of disbursement:** Speculation, gossip or assertion from an anonymous source is not sufficient information to enter the public domain (*AFL*)
 - *AFL*: footy message boards were not an authoritative disbursement
 - *Red flags*: anonymous source, intermediary papers/publishes with equivocal reputation
 - o Rational: without this would be too easy to circumvent of secrecy element
- **Security of location:** the more secure, the more likely to be secret (*Lenah*)
 - *Lenah*: Fact on private property not enough to establish secrecy, security low, regulators visited often, anyone could walk in, no attempt to control view. (Cf highly secure, guarded facility).
- **Effectiveness of injunction:** provides indication of secrecy if an injunction is ordered that would avoid relevant detriment, *AFL*.

Value Requirement

Rule: Equity does not protect banal or trivial information. To merit equity's protection, information must have some value. Note that equity has an objective theory of value that can be categorised as ingenuity or intimate information. In *Coco* 'equity ought not to be evoked merely to protect trivial tittle tattle'.

Generally there are three categories of cases, choose the appropriate category and cases based on facts:

(1) Commercial context

Rule: Equity will protect secrets developed from the 'ingenuity of the human brain' per *Coco v Clark*. Threshold not high: idea needs to be more than drudge but does not have

to be genius, *Talbot*. Spectrum: ingenuity ranges from *Franklin's* clear genius to *Talbot's* ok idea and extra effort. Things that on their own are not valuable can be combined to create something of value, *Talbot; Link 2*

Generic idea with application of some skill

- D should argue that the idea is common practice in the industry/business, or that it is logical/obvious for someone in D's shoes to do [X]
- P will want to argue that the idea had been further developed and that P had applied skill to it, albeit initially generic *Talbot*.

Compilation of information in the public domain

- D will argue that the information can be disseminated into separate parts and that those parts were already in the public domain
- P will likely argue that there is skill and value in compiling the information *Coco v Clark*. See *Link 2*

(2) Personal context

Rule: Equity will protect information of a personal and intimate nature, as too publicise the information would be to undermine the intimate and personal connection to the person affected.

Religion *Foster*

- See *Foster*; details of the secret religion was protected by equity.
- Consider whether P can analogise with *Foster* and refer to the similarities, namely that access to the information required initiation and conditions.

Intimate information (sex)

- P may cite *Giller* where the Court distinguished between knowledge that parties engaged in sexual relations, which may not be personal information, and what the parties engaged in the course of their sexual activities, which is private and warrants Equity's protection.
- Information about sexual activity is protected because it is **intimately personal**, not because it is shameful, *Giller* cf Gleeson in *Lenah*. The P should have control and agency over the information, *Giller*

- See *Wilson v Ferguson* if facts in problem q are more saliently similar

(3) Combination cases

The compilation may still be valuable even if its constituent parts are taken from the public domain. Novelty depends on the thing itself, not the quality of its constituent parts, *Coco*. Confidence (and injunction) only relate to the combination. D can use the banal constituent parts individually and re-create the compilation from scratch, *Link 2*

Mix between commercial and non-commercial (*Douglas v Hello!*)

See *Douglas v Hello!* - The fact someone is famous/obscure does not make banal information such as weddings, valuable and capable of equity's protection

Step 4: Evaluate the 3rd element; obligation of confidence

Element 3: Circumstances importing the duty: knowledge of restrictions

Rule: The information must be imparted in circumstances importing an obligation of confidence *Coco*. A "court of equity will restrain the publication of confidential information... that is improperly or surreptitiously obtained ... or information imparted in confidence which ought not to be divulged" (*Lord Ashburton v Pape*, affirmed by Mason J in *Cth v John Fairfax and Sons* and Gummow J in *Smith Kline*).

[P] must prove that a reasonable man in the recipient's shoes would infer that [information] was received in confidence *Coco*, thus importing a duty of confidence.

There are 4 broad categories of cases:

(1) Giving cases: Would a reasonable person, standing in the recipient's shoes, have realised that the information was given in confidence? *Coco* per Megarry J. Use common sense to answer (patients/doctors, firms/employees, sources/journalists).

- D may attempt to argue that the information was given by P, and thus there can be no obligation of confidence that was imparted. P may refute this and cite [insert case from below] ... and as such, the information was not for D to freely divulge.
- *Foster*: Indigenous community imparted information upon anthropologist, but there was no intention for him to divulge the information publicly

- *Wilson*: P sent D revealing and nude pictures with the intention of them remaining private
- *Talbot*: TV show was pitched in the context of negotiations for a business deal. The information was only divulged for that purpose and not so that the idea could be divulged anywhere else.
- *Saltman v Campbell*: obligation being imported onto third parties. The subcontractors knew that when they received the designs, the head contractor had given it to them in confidence as the only reason they received the design was for the purposes of making the products. The designs were placed in the subcontractor's possession for a limited purpose.

(2) Taking cases: when the information is stolen or taken, the court will import a duty of confidence (*Franklin; Pape*). Taking a picture with a telephoto lens creates an obligation of confidence, it is a species of taking, *Lenah* per Gleeson J

- P will argue that the information was improperly or surreptitiously obtained *Coco* by D, as [insert dodgy conduct] which is analogous to [insert case], such that there was an obligation to not divulge the information by way of the form of acquiring the information.
- *Franklin*: D unlawfully trespasses and takes the special nectarine tree branches without P's consent
- *Giller*: Most of the filming was without victim's consent

(3) Blurring cases: For want of no obligation of confidence, D may cite *Coco*, where it was held that in instances where information has been 'blurred', there will be no obligation of confidence. D will argue that [information] was blurred out by P in a public setting, and thus regardless of how secret or confidential [information] may be, P's careless announcement of the information in public vitiates the obligation of confidence that would otherwise bind D.

(4) Wafting cases: P will cite Lord Goff's judgment in *AG v Guardian Newspaper (Spycatcher)*, where it was proposed that there could be third category of category of cases that imported an obligation of confidence; where information was 'wafted'. This is characterised by an individual stumbling upon information where it has not been actively sought after. The relevant question to ask is whether a reasonable person in the

circumstances [of the defendant] would realise that the information is confidential, such that there is an obligation of confidence imported onto them.

Examples:

- Obviously confidential document wafted by a fan
- Obviously confidential diary dropped in a public place and picked up
- USB stick in public library computer

P may argue [information] has been wafted, in the sense that [insert scenario], a reasonable person would have realised the information is confidential as [insert reason], such that there is an obligation of confidence that is imported.

D may argue that the information was 'blurted' such that there is no obligation of confidence.

Step 5: Evaluate the 4th element; whether there has been a breach of the obligation

Element 4: Breach of duty

Rule: unauthorised use of information will breach the equitable obligation of confidence *Coco*. Unauthorised use depends on if the information was taken or given. There are two different ways in which the information can be used without authorisation:

Where there was no commission to use the information (i.e. the information was taken)

Rule: When the information has been taken in a surreptitious manner, ANY USE will be considered a breach (*Franklin*). P needs to explain how the information was improperly obtained and how it subsequently used.

Where there were restrictions on how the information should be used (i.e. given but outside the purpose)

Rule: Where the information is given, must analyse the purpose of the authorisation. When P gave D the information under certain circumstances, and D's use was beyond those conditions, D's use will be considered a breach (*Castrol*)

Exception: When D is a regulatory/government body and their use of the information was in prioritisation of their statutory duty that involves a public interest - see *Smith Kline*