

*This preview only contains small extracts from a few topics. The full set of notes contains every topic in complete form.*

## (2A) Breach of Confidence

### (1) Introduction

**Operation of equity's exclusive jurisdiction:** Confidence is an equitable obligation of conscience arising from the circumstances in or through which the information was communicated or obtained (**Moorgate Tobacco, per Deane J**). A breach of confidence is an equitable cause of action.

**Operation of equity's auxiliary jurisdiction:** Equity can intervene to enforce a common law right (e.g. contractual agreement of confidentiality) through an equitable remedy (e.g. injunction).

### (2) Breach of confidence

A breach of confidence may arise when a party obtains 'confidential' knowledge for a particular purpose and misappropriates the information for another use.

### (3) Elements of a breach of confidence

The elements required to establish a breach of confidence in equity were developed by **Megarry J** in **Coco** and refined by the **FFC** in **Optus Networks**:

- (1) The information claimed to be confidential must be defined with sufficient precision
- (2) It must have the necessary quality of confidence
- (3) It must have been received in circumstances importing an obligation of confidence
- (4) There must be an actual or threatened misuse of the information without the discloser's consent

### (1) Can the information in question be identified with specificity?

The information claimed to be confidential must be defined with sufficient precision.

**O'Brien (HC):** In *O'Brien*, the plaintiff's claim of breach of confidence failed because his description of the information that he sought to protect (minutes, resolutions and provisions of a trust deed) was "too general" to allow the information to be identified as confidential.

- **Mason J:** "Simply saying that information is about effect and operation of discretionary trusts and private unit trusts schemes does not identify the information and enable the Court to formulate an order."
- **Mason J:** "Generality of description... of the information [which the plaintiff seeks to protect]" is problematic because:
  - The information must be defined with sufficient specificity/not be so general so that it would be impossible to evaluate other elements of the claim
  - If the plaintiff is seeking an injunction, the subject of the injunction must be defined sufficiently specifically so the defendant is aware of what they must comply with

### (2) Does the information have a necessary quality of confidence?

The information claimed to be confidential have a necessary quality of confidence.

#### (i) What types of information contain the necessary quality of confidence?

(i) *Personal information*

**Artwork relayed in private:**

- **Prince Albert v Strange (1849):** Artwork relayed in private contains the necessary quality of confidence. Prince Albert and Queen Victoria created etchings in their private time. The etchings were going to be published in a book. Prince Albert successfully sought an injunction to stop publication of the book.
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### (3) Remedial Equity

#### (A) Specific performance (to enforce a contract)

(1) Is there a contract under common law?

- No → cannot make an order for specific performance (look at an injunction or damages)
- Yes → go to step 2

(2) Is the contract supported by **valuable consideration**?

- To obtain specific performance, the contract must be supported by valuable consideration. A Court has no jurisdiction to grant an order for specific performance of a promise that is not supported by valuable consideration.
  - But note the Court does not have to consider that the consideration is adequate or not (i.e. valuable consideration can be as little as \$0.01) (whether consideration is inadequate may be relevant under discretionary factors).
- This may come into play when someone is a 'volunteer' and doesn't pay for something – they can't then demand the other person to do what they 'promised' to do.

(3) Are **damages under common law inadequate**?

- To obtain specific performance, damages under common law must be inadequate. A Court has no jurisdiction to grant an order for specific performance where an order of common law damages would be adequate.
- **Falcke v Gray**: Damages are presumed to be adequate unless it is an object of 'unusual beauty, rarity and distinction'
  - **(1) Agreement to sell land**
    - Historically all land has been considered rare enough to presume that damages are inadequate (therefore capable of an order of specific performance) – however this is perhaps less the case now e.g. consider large estates with similar houses and unit blocks.
  - **(2) Agreement to sell goods**
    - **Dougan v Ley (HC, Dixon J)**: Where the subject of the contract is something that is readily obtainable on the open market, typically common law damages are considered an adequate remedy and the court will not order specific performance.
      - In the case of goods or securities obtainable on the open market, damages at law place the disappointed buyer or seller in as good a position of delivery of the articles or receipt of the price
    - **Dougan v Ley (HC, Dixon J)**: However, where the subject of the contract is not a simple chattel, but a special right/privilege annexed to a chattel (transferable only with it, and numerically restricted), and such goods are not obtainable on the open market, damages are inadequate and specific performance is available.
      - A taxi sale contract was entitled to an order of specific performance because the good was rare enough – not the cab itself but because of the registration attached to it – its exclusivity and limited number of licenses.
      - Just because the plaintiff was able to secure another taxi before the proceeding is irrelevant to its rarity.
      - Note: Abnormal market conditions affect whether particular goods are readily obtainable on the open market

## (6) Fiduciary Obligations

### (1) Is there a fiduciary relationship?

**Hospital Products (Mason J):** A fiduciary obligation is embedded with the notion of undivided loyalty whereby a fiduciary is to act in the interests of another where their relationship and surrounding circumstances so call for.

### (A) Established categories of fiduciary relationships

*There is an established category of fiduciary relationship between A and B as [trustee] and [beneficiary].*

The law has recognised the following relationships as constituting a fiduciary relationship:

#### (1) Trustee and beneficiary

- Per Hospital Products and Keech, the trustee/beneficiary relationship is an archetypal fiduciary relationship.
- The terms of the trust may influence the scope of the fiduciary relationship.

#### (2) Director and company

#### (3) Solicitor and client

#### (4) Agent and principal

#### (5) Partner and partner

The law has not recognised the following relationships as constituting a fiduciary relationship (a fiduciary relationship will only be imputed on certain circumstances):

#### (1) Doctor and patient

#### (2) Guardian and ward

#### (3) The Crown and Indigenous peoples

- While a particular statutory scheme in Canada has resulted in the recognition by the courts that the Crown owes fiduciary duties to Indigenous peoples (**Guerin**), there is no similar statutory scheme in Australia. Therefore, the Crown and Indigenous peoples is not an established category of fiduciary relationship in Australia. However, it may be possible to impute a fact-based fiduciary relationship in certain circumstances (**Bodney, per Lehane J**).

### (B) Fact-based fiduciary relationships

#### (1) The Court may impute a fiduciary relationship

As observed by Dawson and Toohey JJ in **Breen v Williams**, the law is not limited to established categories and may impute a fiduciary relationship based on the circumstances of a case.

However, the High Court also noted in **Breen v Williams** that a relationship should not be expanded to a fiduciary relationship, merely because the plaintiff has no other remedy in contract, tort or statute.

#### (2) Key indicia of a fiduciary relationship

Per Mason J in **Hospital Products**, the 'critical feature' of a fiduciary relationship is **loyalty**: that the fiduciary undertakes to act in the interests of another person in the exercise of a power which will affect the interests of that person.

- **(1) Act on behalf:** the fiduciary has agreed to act on behalf of/in the interests of the principal
  - **(2) Opportunity/detriment:** the relationship gives rise to a special opportunity for the fiduciary to exercise power to the detriment of the principal
  - **(3) Vulnerability:** the principal is dependent on the advice of the fiduciary and is vulnerable to abuse by the fiduciary
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## (8) Constructive Trusts

A constructive trust may be imposed by the Court, in contradiction to the parties intentions, to benefit a party who has been wrongfully deprived of their rights.

### (A) A constructive trust imposed over the property of a delinquent fiduciary

(1) Where there has been a breach of a fiduciary duty owed by the defendant, the Court may hold that the defendant holds any property gained as a consequence of the breach on constructive trust for the plaintiff.

(2) Therefore, the beneficial interest of the property will be held by the principal who has been wronged.

- E.g. **A-G (Hong Kong) v Reid**: A senior prosecutor (Reid) took bribes and used this money to purchase property. As the Privy Council found that Reid had breached his fiduciary duty to his employer by accepting the bribes, the Privy Council ordered that the purchased property was to be held by Reid on constructive trust for his employer.

### (B) A constructive trust imposed over property belonging to a third party

As a third party is a stranger to the trust / fiduciary relationship, he is not liable to the beneficiary / principal for breach of trust / breach of fiduciary duty.

Per **Barnes v Addy**, a third party will only be held personally liable where:

(A) The third party has knowingly received some part of the trust property / property subject to the fiduciary relationship

(B) The third party has knowingly assisted in a dishonest or fraudulent breach of trust duty / fiduciary duty.

Note:

- This is not needed to get your property back if it can be traced; as long as you can show you are a beneficiary then you have a property claim to the property.
- But if you cannot trace the property, then liability in knowing receipt or knowing assistance gives rise to a personal claim against the party

### (A) Knowing receipt

A plaintiff may commence an action in 'knowing receipt' against a third party who holds their trust property / property subject to the fiduciary relationship to declare a constructive trust over that property.

Elements (**Barnes v Addy**; **Farah Constructions**):

#### (1) There has been a breach of trust / fiduciary duty by the trustee / fiduciary

- State the breach of trust or a breach of fiduciary duty

#### (2) The third party has received the trust property / property subject to the fiduciary relationship for his own personal benefit

- **Robb Evans (NSWSC)**: For a recipient to have 'knowingly received' property, the recipient must have received the property for its own use and benefit; not as a mere depository or channel.
    - A bank which merely collects money for a customer does not 'knowingly receive' such money. It is a mere depository or a channel.
    - C.f. if the bank has received money and used it to credit an overdraft; the bank has then used the money for its own benefit, and this is treated as receipt.
  - **Farah Constructions (HC)**: Information does not constitute property.
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## (9) Tracing

### (1) Tracing

(1) **Foskett v McKeown (per Millett LJ)**: Tracing is the process of identifying new assets in substitute for the old and allows the beneficiary to continue to hold a proprietary interest over the trust property despite it changing hands and form.

(2) The beneficiary will also have a personal claim against the trustee for breach of trust (or against fiduciary for breach of duty), but this provides a second option OR the only option where the wrongdoer is bankrupt/insolvent.

### (2) Who can a tracing claim be asserted against?

(1) A tracing claim can only be made against:

- (A) A delinquent trustee / fiduciary who holds misappropriated property,
- (B) A third party who holds misappropriated property as a result of knowing receipt;
- (C) A volunteer (has not provided consideration) who holds misappropriated property

(2) If an individual has provided consideration, they are a bona fide third-party purchaser without notice (BFTPPWN). A BFTPPWN then acquires the property free from prior equitable interests. He has legal title to the property, despite the claim of the beneficiary of the trust.

(3) Consequently, the beneficiary is limited to a personal claim against the trustee/fiduciary for breach of trust.

### (3) Tracing scenarios

#### (A) Delinquent trustee uses trust money to exclusively purchase an asset

(1) A trustee misappropriates trust money and uses it exclusively to purchase a car. The purchased object constitutes "traceable proceeds".

(2) Per Millett LJ in Foskett v McKeown, the beneficiary can elect to bring either:

- (A) A proprietary claim asserting beneficial ownership of the traceable proceeds
  - E.g. If \$10,000 of trust money was stolen to buy \$10,000 of shares, and those shares are now worth \$20,000, the beneficiary can elect to assert equitable ownership over all of the shares (because the beneficiary's money was used to purchase the shares).
- (B) A personal claim against the trustee for breach of trust, enforced by an equitable lien or charge over the purchased object so that the trust money can be restored
  - E.g. If \$10,000 of trust money was stolen to buy \$10,000 of shares, and those shares are now worth \$20,000, the beneficiary can elect to bring a personal claim against the trustee for breach of trust, enforced by an equitable lien or charge over the purchased object in the value of the misappropriated money so that the trust fund can be restored

#### (B) Mixing of trust money with the trustee's personal money (BO or charge)

##### (1) Mixed money sitting in an account

E.g. Trustee wrongly pays \$10,000 of trust money belonging to Blue Trust into the trustee's personal account, which has a credit balance of \$20,000.

(1) In this situation, it is possible to trace the trust money into the mixed fund.

(2) Per Millett LJ in Foskett v McKeown, the success of that tracing process will allow the beneficiary to bring either:

- (A) A proprietary claim asserting beneficial ownership of the traceable proceeds (equitable ownership over a proportionate share of the mixed fund)
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